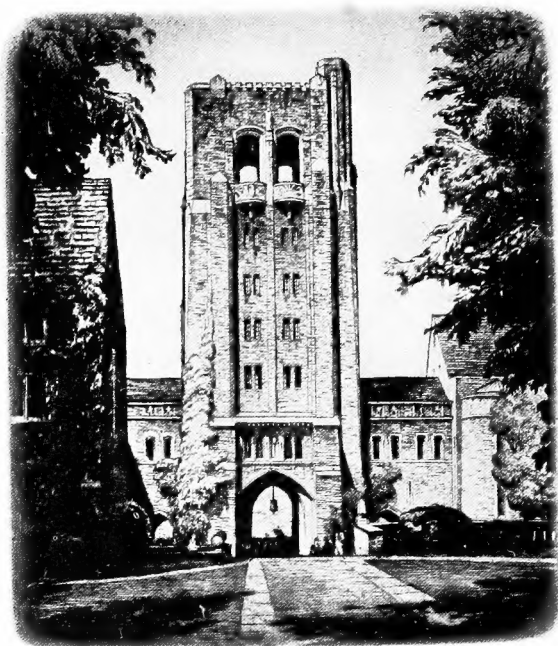


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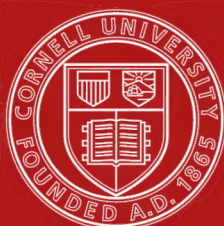
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SUPPLEMENT  
TO  
A TREATISE  
ON THE LAW OF  
MUNICIPAL CORPORATIONS

By EUGENE McQUILLIN, LL.D.

*Volume Seven of the Series*

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## PREFACE

The Supplement brings the whole body of Municipal Corporation Law down to date as such law exists and is applied daily in the administration of municipal government in this country. The original volumes (volumes 1 to 6) contain the principles of such law, with the reasons supporting them, and their judicial application as they had developed at the time of publication, while the Supplement (volumes 7 and 8) takes up these principles and their application by authoritative judicial decisions where the original left off, and brings them down to date.

The Supplement shows whether any principle set out in the original is still the law, whether it has been departed from, modified or extended, and, if so, the precise nature thereof.

The Supplement follows the classification and arrangement of the original. It is a section by section addition.

The law and its application to particular conditions is indicated in a Table of Contents preceding each chapter. The classification deals with both the principles and topics involved. In like manner the index, which is full and complete, leads directly to principle and fact.

Throughout the Supplemental volumes specific references are made to the original so that their proper use will bring the whole body of Municipal Corporation Law before the practitioner.

No department of law is undergoing more rapid and constant changes than Municipal Corporation Law. The growth of our cities and the increasing desire of our people to congregate in the crowded urban centers during the past decade is clearly shown by the last census.

At present nearly one-half of our entire population reside in places subject to Municipal Corporation Law. Constitutional and statutory provisions relating to cities and towns, new forms of municipal government, and new municipal charters are frequent, and hence modification and extension and new application of old principles are constantly taking place, and as a consequence lawyers and courts are busy investigating and determining these new phases and problems. Such investigation and decision can best be made in the light of authoritative judicial judgments correctly understood. The substance and result of these judicial judgments are interwoven in this work. For a full statement of the law on any point the Supplement must be used with the original.

As the Supplement follows the original section by section, the user may turn to any section therein and find it brings the law of the corresponding original section down to date, whether the law therein is merely followed and applied or extended in its application, or modified or disapproved, or whether new principles are added thereto.

The development of new principles and their practical application is shown mainly in the new sections incorporated in appropriate places in the Supplement.

New matter added includes developments in the extension of the commission form of municipal government; the right to exercise the power of the initiative and referendum in local legislation; the recall of municipal officers; the extensive and rapid growth of the necessary exercise of the police power in crowded urban centers; new applications concerning the relative rights in the use of public streets and ways by pedestrians and travelers in various modes, especially the use of automobiles in streets; the establishment, vacation, abandonment, control and management of streets; and legislative control of public utilities by the creation of state public service

commissions and the regulation of service and rates, and particularly discrimination of public utility companies.

The extensive use of the original by courts and lawyers appears from the numerous citations and quotations from it by courts of last resort in all the states.

EUGENE McQUILLIN.

St. Louis, January, 1921.



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# A TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS. SUPPLEMENT

## CHAPTER 2.

### THE NATURE AND KINDS OF MUNICIPAL CORPORATIONS.

- |   |   |
|---|---|
| <p>§ 106. Kinds of corporations—public and private.</p> <p>§ 107. Municipal corporation defined.</p> <p>§ 108. What is included in the term “municipal corporation.”</p> <p>§ 110. Corporations for “municipal purposes.”</p> <p>§ 111. Municipal corporations distinguished from quasi corporations.</p> | <p>§ 112. How municipal corporations differ from counties.</p> <p>§ 113. Municipal corporations distinguished from school districts.</p> <p>§ 114. School districts have statutory powers only.</p> <p>§ 116. People and place necessary to constitute a municipal corporation.</p> |
|---|---|

#### § 106. Kinds of corporations—public and private.<sup>1</sup>

A public corporation is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose—such is a municipal corporation.<sup>2</sup>

<sup>1</sup> *Forbes Pioneer Boat Line v. Board of Com'rs.* (Fla. 1919) 82 So. 346, 350.

<sup>2</sup> Civil Code of Ga. 1910, § 2190; *Hammond v. Clark*, 136 Ga. 313, 329, 330, 71 S. E. 479.

**Drainage Districts** as public corporations may be created.

“That the state, by the legislature, has the power to create corporations for the purpose of reclaiming or improving swamp and overflowed lands by ditches and drains and levees, in districts prescribed by it, or to be ascertained and fixed by such appropriate in-

### § 107. Municipal corporation defined.

In the absence of specific constitutional inhibition, late judicial decisions adhere to the well settled doctrine that the state by its legislature may create municipal and public corporations of any description. These corporations are bodies politic created to administer designated affairs of the areas incorporated. They exercise delegated powers of government, and are usually regarded as subordinate departments, or auxiliaries, or convenient instrumentalities of the state for the purpose of local or municipal rule. Their charters are granted for the better government of the particular areas or districts.<sup>3</sup>

instrumentalities as it may provide, is not longer a question in this state. Nor is it an open question that the instrumentality so created may be invested with all the necessary power and authority to construct and maintain whatever works may be necessary to accomplish such object, and to raise the funds to pay for the same by assessment on the lands to be benefited thereby. *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53; *Mound City Land & Stock Co. v. Miller*, 170 Mo. 240; *Squaw Creek Drainage District v. Turney*, 235 Mo. 80; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629; *State ex rel. v. Chariton Drainage District*, 192 Mo. 517, 90 S. W. 722; *State ex rel. v. Taylor*, 224 Mo. 393, 123 S. W. 892; *Little River Drainage District v. St. Louis & San Francisco R.*, 236 Mo. 94. These corporations, as is said in the most of the cases cited are, when formed, public subdivisions of the state exercising the powers granted them for the purpose of this creation, within their terri-

torial jurisdiction, as fully, and by the same authority as the municipal corporations of the state exercise the powers vested by their charters." *Houck v. Little River Drainage District*, 248 Mo. 373, 382, 383, 154 S. W. 739.

**Public Library.** "A corporation created under a general law, for the management of a public library supported by taxation, is in no sense a private corporation; it is a public corporation, existing at the will of the legislature." *Lambert v. Public Library Trustees*, 151 Ky. 725, 738, 152 S. W. 802.

<sup>3</sup>*Harris v. Wm. R. Compton Bond and M. Co.*, 244 Mo. 664, 689, 690, 149 S. W. 603; *Barnes v. Kirksville*, 266 Mo. 270, 180 S. W. 545; *MacMullen v. Middletown*, 187 N. Y. 37, 42, 79 N. E. 863; *Ex parte Rowe*, 4 Ala. App. 254, 59 So. 69; *Santa Monica v. Los Angeles County*, 15 Cal. App. 710 115 Pac. 945.

**Various Definitions.** *People ex inf. v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79, 91.

"Municipal Corporations are mere governmental bodies, having

In Wisconsin a municipal corporation is of the kind mentioned in the constitution. In that state the words now mean a body corporate consisting of the inhabitants of a designated area created by the legislature, with or without the consent of such inhabitants, for governmental purposes, possessing local legislative and administrative power, also power to exercise within such area

charge of and jurisdiction over particular subdivisions of the state." *Uvalde Asphalt Paving Co. v. New York*, 134 N. Y. S. 50, 149 App. Div. 491.

In this country "a city is only possible as an administrative agency of the state, having a measure of local legislative or ordinance power and a limited proprietary capacity." *State ex rel. v. Thompson*, 149 Wis. 488, 503, 139 N. W. 20.

"Municipalities are but mere departments or agencies of the state, charged with the performance of duties for and on its behalf, and subject always to its control." *Straw v. Harris*, 54 Or. 424, 437, 103 Pac. 777.

"The cities and towns of the commonwealth are public corporations established by the legislature for the convenient administration of government. In the furtherance of this end the extent and character of burdens which may be imposed on them within the bounds of reason rest in the sound judgment of the General Court and are determined by its conception of the requirements of the public good." *Re Boston*, 221 Mass. 468, 109 N. E. 389.

"A municipal corporation is a body corporate and politic, established by law to share in the civil

government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district incorporated." *Churchill v. Grants Pass*, 70 Or. 283, 141 Pac. 164, 166, quoting *Words and Phrases*, tit. "Municipal Corporations."

"Because of its autonomous character—its enjoyment of a large measure of organic independence—the municipal corporation is relieved to a considerable extent from officious, meddlesome legislation which seeks to interfere with its private or proprietary functions. The theory of local self-government for municipal corporations is firmly established in this state." *Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30, 32, setting out many definitions of municipal corporations.

"The city is a miniature state." *Paulsen v. Portland*, 149 U. S. 30, 38, 13 Sup. Ct. 750, 37 L. ed. 637.

A municipal corporation is a mere creature of the state, and has no powers except such as are granted by the state. *State Public Utilities Com. v. Quincy*, 290 Ill. 360, 125 N. E. 374.

"A municipal corporation, acting in its public or governmental capacity, is an agent of the state." *Patterson v. Ashland* (Or. 1920) 187 Pac. 593, 595.

so much of the administrative power of the state as may be delegated to it, and possessing limited capacity to own and hold property and to act in purveyance of public convenience.<sup>4</sup>

The municipal corporation must have both an incorporation and a charter. The very idea of incorporation, it has been held, includes the idea of a charter and the power to frame and adopt one.<sup>5</sup>

Municipal corporations proper have a two-fold capacity or character—one governmental, the other private.<sup>6</sup>

<sup>4</sup> *Sutter v. Milwaukee Board of Fire Underwriters*, 161 Wis. 615, 155 N. W. 127.

<sup>5</sup> *Gallup v. Saginaw*, 170 Mich. 195, 135 N. W. 1060, 1062, quoting from *Jackson Common Councils v. Harrington*, 160 Mich. 550, 125 N. W. 383.

<sup>6</sup> *Payette — Oregon Slope Irr. Dist. v. Peterson*, 76 Or. 630, 128 Pac. 837; *Asbury v. Albemarle*, 162 N. C. 247, 78 S. E. 146, 149.

**Public and Private Character.** Municipal corporations possess a two-fold character, the one public as regards the state at large in so far as they are agents in government; the other private in so far as they are to promote local necessities and conveniences for their own communities. The public and private functions may be blended (usually are). *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31.

"They exercise powers which are governmental and powers which are of a private or business character. In the one character a municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the state. In the other character it is a mere legal entity of juris-

tic person. In the latter character it stands for the community in the administration of local affairs wholly beyond the sphere of the public purposes for which its governmental powers are conferred." *Vilas v. Manila*, 220 U. S. 345, 356, 31 Sup. Ct. 416, 55 L. ed. 491; *South Carolina v. United States*, 199 U. S. 437, 461, 26 Sup. Ct. 110, 50 L. ed. 261, 4 Ann. Cas. 737.

"Cities and towns are territorial subdivisions of the state created as public corporations for convenience in the administration of government. They exercise only the powers which have been conferred by express enactment of the legislature or by necessary implication from undoubted prerogative vested in them. They have a two-fold character, the one governmental and the other private. In the one they execute the functions and possess the attributes of sovereignty, which have been delegated by the legislative department of government; in the other they are clothed with the capacities of a private corporation, and may claim its rights and immunities and are subject to its liabilities." *Higginson v. Slattery*, 212 Mass. 583, 99 N. E. 523, 524.

In New York it has been said that municipal corporations are independent corporate entities created by the state not only for governmental purposes but also with power to do acts not governmental in their scope, though they be for the common good of the inhabitants. When not acting in a purely governmental capacity, a municipal corporation is a separate entity acting for its own purposes, and not a subdivision of the state.<sup>7</sup>

**§ 108. What is included in the term "municipal corporation."**

Statutes distinguish "cities," "towns," and "villages," the distinction being usually based on population or method of incorporation;<sup>8</sup> however, other distinctions are also recognized.<sup>9</sup>

"In its governmental capacity it is the agent of the state, and assists in the government of the territory incorporated by making laws and regulations with respect to its local and internal concerns. In its proprietary capacity it represents those proprietary interests that appertain to it in common with other corporations. It makes contracts, employs men, owns property, and transacts business in the same way as individuals and private corporations. In this capacity it may sue and be sued, and is governed by the same laws and rules and subject to the same regulations and limitations that natural persons are, except so far as it may be exempt by express enactment." *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, 196.

<sup>7</sup> *Re Northern Bank of New York*, 148 N. Y. S. 85 Misc. Rep. 594.

<sup>8</sup> *Bledsoe v. Missouri*, Kansas

and Texas Ry. Co., 177 Mo. App. 153, 164 S. W. 183.

"City" may include an incorporated town. Size and population is the chief difference between a city and town in the popular sense. *People v. Grover*, 258 Ill. 124, 101 N. E. 216, Ann. Cas. 1914 B, 212.

"City," held to mean "town" in an improvement law. *Ransome-Crummey Co. v. Woodhams*, 29 Cal. App. 356, 156 Pac. 62.

An incorporated district with specified powers of local self-government, held neither a town or city within the meaning of the Kentucky Constitution as to powers. *Gleason v. Weber*, 155 Ky. 431, 159 S. W. 976.

<sup>9</sup> *Limited to Cities*. An enabling act authorizing "cities" to establish parks, held to have no application to villages, since by its express terms it was confined to cities. *Depue v. Banschback*, 273 Ill. 574, 113 N. E. 156, 159.

Under a statute forbidding a

**Town.** When the law does not define "town" courts will take the word in its ordinary signification—a collection of inhabited houses. The word "town" carries with it the idea of a considerable number of people living in close proximity, and as distinguishable from a rural settlement.<sup>10</sup> A town may exist without being incorporated.<sup>11</sup> Its incorporation adds nothing to this distinct characteristic.<sup>12</sup>

member of a "city government" from being interested, directly or indirectly, "in any contract entered into by such government while he is a member thereof," and declaring all such contracts void, it was said, "It should be noted that the statute here invoked and construed applies in its terms solely to cities, and the term 'municipality' or 'municipal' as here used, should be regarded as limited in its application to cities only." *Mangor v. Ridley* (Me. 1918), 104 Atl. 230, 232.

<sup>10</sup> *State v. Eidson*, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733.

**Town** implies and signifies an aggregation of inhabitants and a collection of occupied dwellings and other buildings. *Siskiyou Lumber M. Co. v. Rostel*, 121 Cal. 511, 513, 53 Pac. 1118; *Klauber v. Higgins*, 117 Cal. 451, 460, 49 Pac. 466.

"A town population is distinguished from a rural population which is understood to signify a people scattered over the country and engaged in agricultural pursuits or some similar association requiring a considerable area of territory for its support. A section of a country so inhabited cannot be called a town, nor treated as a part of a town, without doing

violence to the meaning ordinarily attached to that word." *Ralls v. Parrish*, 105 Tex. 253, 147 S. W. 564, 566, quoting with approval from *State v. Eidson*, 76 Tex. 302, 13 S. W. 263, 7 L. R. A. 733.

"A town may exist without being divided into lots; and on the other hand neither naked lots, whether with or without a map, constitute a town." *State v. Baird*, 79 Tex. 64, 15 S. W. 98.

<sup>11</sup> *Williams v. Willis*, 84 Tex. 398, 19 S. W. 683; *Hargadene v. Whitfield*, 71 Tex. 482, 9 S. W. 475.

<sup>12</sup> *Guadalupe county v. Poth* (Tex. Civ. App.), 163 S. W. 1050.

"City," held to mean "town," as to inoperation of a law until adopted by a majority vote of the electors. *Schwartz v. Wachlin*, 89 N. J. C. 39, 98 Atl. 252.

In an act relating to official oaths of officers "elected or appointed to office in the towns, townships, boroughs and other municipalities of this state," the words, "other municipalities," held to include cities. *Ludlam v. Dallas*, 82 N. J. L. 122, 81 Atl. 489.

A municipality possessed of the same characteristics as towns, etc. *Wright v. Campbell*, 74 N. J. L.



The constitution of Oregon employs the term "municipality" in a comprehensive sense so as to include (1) pure municipalities like cities and towns, and (2) all other municipalities including ports.<sup>13</sup>

**Drainage and levee districts** are sometimes said to be municipal in character; and it is true they resemble in their attributes townships and school districts.<sup>14</sup> By ex-

82, 64 Atl. 171, 74 N. J. L. 609, 67 Atl. 186.

**Townships.** Certain cities in Kansas constitute a part of the township in which situate. Under prescribed conditions existing a city may elect to become a separate township. *Ellis v. Jacobs*, 92 Kan. 452, 140 Pac. 856.

<sup>13</sup> *State ex rel. v. Bridges*, 97 Wash. 553, 166 Pac. 780.

"**The Constitution** is not confined in its operation to cities and towns, but the term 'municipality' signifies more, and consequently includes institutions other than cities and towns." *State ex rel. v. Port of Astoria*, 81 Or. 99, 154 Pac. 399, 403; *Schubel v. Olcott*, 60 Or. 503, 510, 120 Pac. 375; *Acme Dairy Co. v. Astoria*, 49 Or. 520, 524, 90 Pac. 153.

"**A municipal corporation** is not necessarily a county, city or town." *Cook v. Portland*, 20 Or. 580, 584, 27 Pac. 263, 13 L. R. A. 533.

**Ports.** In Oregon provision is made for incorporation under general law of ports in counties bordering upon bays or rivers navigable from the sea or containing bays or rivers navigable from the sea, and for defining the powers of ports so incorporated. When incorporated by petition, election, canvass of the votes and procla-

mation, the inhabitants in the district specified shall be a corporation, and as such shall have perpetual succession and by its name shall exercise the corporate powers granted. The powers are exercised by a board of five commissioners, the first board to be appointed by the governor for definite periods and thereafter their successors are elected by the qualified voters of the port. "The legislature has therefore viewed a port as a municipality; (a) by defining it to be a municipality; (b) by granting authority to exercise functions of government, to enact certain laws, and to provide fines, penalties and punishments for violations; and (c) by making provision for the operation of the initiative and referendum powers." *State ex rel. v. Astoria Port*, 81 Or. 99, 154 Pac. 399, 404.

A port is classed as a municipal corporation. *Mackay v. Port of Toledo*, 77 Or. 611, 152 Pac. 250, 252; *State ex rel. v. Port of Bay City*, 64 Or. 139, 143, 129 Pac. 496; *State ex rel. v. Swigert*, 59 Or. 132, 133, 116 Pac. 440; *Kiernan v. Portland*, 57 Or. 454, 466, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339; *Straw v. Harris*, 54 Or. 424, 430, 103 Pac. 777.

<sup>14</sup> *Wilson v. Kings Lake Drainage & Levee Dist.*, 237 Mo. 39,

press statute they are sometimes declared to be municipal corporations.<sup>15</sup> However, in the absence of such declaration, such bodies do not fall within the term municipal corporations.

As has been often declared by courts, a municipal corporation is created by government for political purposes, having subordinate and local powers of legislation. The word "municipal" applies strictly only to what belongs to a city or urban community, possessing rights of self-government. It does not, therefore, usually include such quasi corporations, as a sanitary district,<sup>16</sup> or a county.<sup>17</sup> But in Illinois counties are recognized by express language of the constitution as "municipal corporations."<sup>18</sup>

"Person or corporation," as used in statutes, is sometimes held not to include a municipal corporation.<sup>19</sup>

47, 139 S. W. 136, holding that such district is not a political subdivision of the state as to court jurisdiction, distinguishing *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629; *Wilson v. Kings Lake Drainage & Levee Dist.*, 176 Mo. App. 470, 493, 165 S. W. 734; *Winkelman v. Des Moines and Mississippi Levee Dist.*, 171 Mo. App. 49, 57, 153 S. W. 539; *Watts v. Levee Dist.*, 164 Mo. App. 263, 145 S. W. 129.

<sup>15</sup> *Buschling v. Ackley*, 270 Mo. 157, 192 S. W. 727; *State ex rel. v. Coles*, 167 Mo. App. 692, 151 S. W. 195.

<sup>16</sup> *People ex rel. v. Bergman*, 253 Ill. 469, 97 N. E. 695.

<sup>17</sup> *Municipal defined in Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30, quoting many definitions as to meaning of "municipal," concluding it pertains to a city, town or community, possessing rights of self-government, and excludes a county, as used in the constitution

of Montana relating to the election of officers.

<sup>18</sup> *People ex rel. v. Cook County Commissioners*, 260 Ill. 345, 103 N. E. 282, affirming 177 Ill. App. 58; *Jimison v. Adams County*, 130 Ill. 558, 22 N. E. 829; *Wulff v. Aldrich*, 124 Ill. 591, 16 N. E. 886.

In Oklahoma counties are organized into municipal townships, but no city or incorporated town of more than fifteen hundred inhabitants shall be included within the corporate limits of any township. Therefore, a town of the named population or less is a part of the municipal township within the corporate limits in which it is situated. *Byers v. Dunham*, 50 Okl. 266, 150 Pac. 1049.

<sup>19</sup> "A city or county being a governmental as well as a corporate entity is in its governmental capacity not a person or corporation within the meaning and intent of a statute forbidding free or reduced telephone

Finally, what is to be included in the term "municipal corporation" necessarily depends on the proper construction of the law wherein used, in the light of the course of legislation, general policy and judicial decision of the given state, which factors in time often change materially well settled definitions and descriptions.<sup>20</sup>

### § 110. Corporation for "municipal purposes."

In the absence of constitutional limitations the state legislature may create any kind of a corporation to aid in the administration of public affairs and endow such corporation and its officers with such powers and functions as it may deem necessary.<sup>21</sup> Thus, in Illinois the legislature may provide for the creation of forest preserve districts and endow such public corporations with power to acquire and hold lands containing one or more natural forests or parts thereof for the purpose of protecting and preserving the flora and fauna and scenic beauties within such districts, and to protect and preserve the lands as nearly as may be in their natural state, in order to promote the education, recreation and pleasure of the public.<sup>22</sup>

The Oregon constitution distinguishes between a corporation organized "for municipal purposes" and a pure municipality, like a city. In that state the test of a corporation for municipal purposes is the right or power to exercise some of the functions of government, for example, a port.<sup>23</sup>

charges," etc. *State v. Peninsular Tel. Co.* (Fla. 1917), 75 So. 201.

<sup>20</sup> "The meaning of words change with time. Archaic definitions, except when they relate to obsolete words or words from dead languages, which words are no longer in popular use, are of little value in arriving at the meaning of modern statutes, and such definitions may be very misleading." *Sutter v. Milwaukee B. of F. U.*,

161 Wis. 615, 616, 155 N. W. 127.

<sup>21</sup> *People v. Bowman*, 247 Ill. 276, 93 N. E. 244; *Harris v. Wm. R. Compton Bond and M. Co.*, 244 Mo. 664, 689, 149 S. W. 603; *Houck v. Little River Drainage Dist.*, 248 Mo. 373, 382, 383, 154 S. W. 739.

<sup>22</sup> *Perkins v. Cook County Commissioners*, 271 Ill. 449, 111 N. E. 580.

<sup>23</sup> *State ex rel. v. Astoria Port*, 81 Or. 99, 154 Pac. 399, 404; *Cook*

Corporations for "municipal purposes," vary somewhat in the several states.<sup>24</sup>

### § 111. Municipal corporations distinguished from quasi corporations.<sup>25</sup>

*Quasi* corporations, *quasi* municipal corporations, or public *quasi* corporations, as they are variously styled, usually include drainage districts,<sup>26</sup> levee dis-

v. Portland, 20 Or. 580, 586, 27 Pac. 263, 13 L. R. A. 533.

**24 Board of Fire Underwriters** incorporated under Wisconsin statutes, held not a municipal corporation, and therefore liable as a private corporation, for negligent acts of members of a fire patrol. *Sutter v. Milwaukee Board of Fire U.*, 161 Wis. 615, 155 N. W. 127.

**The board of water commissioners** of Detroit is a distinct corporate entity, the act establishing it not being embraced within the charter of Detroit. While it is a local corporation, created to serve municipal purposes, it is in no sense a municipal corporation within the legal meaning of that term. *Grobbs v. Detroit Water Commissioners*, 181 Mich. 364, 369, 149 N. W. 675, following *O'Leary v. Fire & Water Commissioners*, 79 Mich. 281, 44 N. W. 608, 7 L. R. A. 170, 19 Am. St. Rep. 169.

"**The District of Columbia** is undoubtedly a municipal corporation, though its organization is peculiar. There is no general organic law covering all the ordinary powers usually conferred in the creation of a municipal corporation—no formal municipal charter, so to speak. The commissioners are ministerial officers. Congress exer-

cises general control, sometimes enacting laws relating to municipal powers, duties and regulations; sometimes delegating to the commissioners the power to enact police regulations respecting specified subjects. The commissioners have no power to raise revenues for the support of the municipality, and the sums appropriated by Congress are directed to be applied to certain specified purposes, whether it be the improvement of streets, erection of public buildings, including public school houses and their repair." *District of Columbia v. Tyrrell*, 41 App. Cases D. C. 463, 472; *Brown v. District of Columbia*, 29 App. Cases D. C. 273, 282, 25 L. R. A. (N. S.) 98.

**25** Cities, towns and villages are distinguished from counties, townships, school districts, etc. While the latter are political or quasi corporations different principles usually apply to them touching their creation, powers and liabilities. *Honnold v. Carter County Com'rs.* (Okl. 1918), 177 Pac. 71, 75.

**26** *State ex rel. v. Blair*, 245 Mo. 680, 691, 151 S. W. 148.

State may create drainage districts and invest them with power to raise funds by assessment of lands benefited. *Houck v. Little*

tricts,<sup>27</sup> irrigation districts,<sup>28</sup> road districts,<sup>29</sup> special road districts,<sup>30</sup> school districts,<sup>31</sup> special school districts,<sup>32</sup> fire districts, etc.<sup>33</sup>

## § 112. How municipal corporations differ from counties.<sup>34</sup>

Counties are involuntary public or municipal corporations organized to aid in the proper administration of

River Drainage District, 239 U. S. 254, 36 Sup. Ct. 58, 60 L. ed. 266, affirming 248 Mo. 373, 154 S. W. 739.

<sup>27</sup> State ex rel. v. Taylor, 224 Mo. 393, 469, 123 S. W. 892, Campbell Lumber Co. v. Levee District, 186 Mo. App. 371, 378, 172 S. W. 64.

<sup>28</sup> "Quasi Municipal Corporation, such as road districts and school districts, are governmental and exercise their powers as auxiliaries of the state; and in that sense are public. Such a corporation is without legislative power, but all persons within the district or corporate boundaries are subject to its authority and burdened or benefited by its acts, and are entitled to a voice in the selection of the officer by whom they are to be governed."

In irrigation districts as only the land is benefited or burdened, the interest in the choice of its officers are confined to the land-owners, as they are the only persons concerned in their acts. "The management of the district affairs is solely of the irrigation project in the private interest of the land-owners." Payette-Oregon Slope Irrigation District v. Peterson, 76 Or. 630, 128 Pac. 837, 839, 840.

In Colorado an irrigation district is a public corporation.

Fisher v. Pioneer Construction Co., 62 Colo. 538, 163 Pac. 851, 854.

<sup>29</sup> In Kansas each incorporated city of the second and third class constitutes a separate road district. Ellis v. Jacobs, 92 Kan. 452, 140 Pac. 856.

<sup>30</sup> Harris v. Wm. R. Compton B. and M. Co., 244 Mo. 664, 149 S. W. 603; State ex inf. v. Hefferman, 243 Mo. 442, 447 et seq., 148 S. W. 90.

<sup>31</sup> School District v. Hodgins, 180 Mo. 70, 79 S. W. 148; Burnham v. Rogers, 167 Mo. 17, 66 S. W. 970.

<sup>32</sup> State ex rel. Smith v. St. Paul, 128 Minn. 82, 150 N. W. 389.

Public library, held a public corporation. Lambert v. Public Library Trustees, 151 Ky. 725, 738, 152 S. W. 802.

<sup>33</sup> "A fire district is a territorial subdivision of the state, bounded and organized under the authority of the legislature for the governmental purpose of providing protection against fire within its limits, maintaining street lights and other subsidiary matters. Although composed of a part of one or more towns, it is in substance a quasi-municipal corporation of definitely restricted powers." Williams College v. Williamstown, 219 Mass. 46, 106 N. E. 687.

<sup>34</sup> Honnold v. Carter County

state affairs, with such powers and functions as the law prescribes.<sup>35</sup>

### § 113. Municipal corporations distinguished from school districts.

School districts, while bodies politic and corporate under statutes, are in no proper sense municipal corporations with their diversified powers, but are *quasi* public corporations devoted to a single broad purpose, namely, education.<sup>36</sup> The title to the property employed for this purpose is vested in the school district as a public and not as a municipal corporation.<sup>37</sup> Frequently school districts are distinct corporations from and have no connection with municipalities or counties in which they perform their functions.<sup>38</sup>

Com'rs. (Okl. 1918), 177 Pac. 71, 74-76.

Hersey v. Neilson, 47 Mont. 132, 131 Pac. 30, 32, quotes many definitions of counties from text books and decisions, and contrasts them with municipal corporations proper, holding counties to be of a pure political character and subordinate divisions or agencies of the state for purpose of government only, and hence not "municipal corporations" relating to the election of officers as that term is used in the constitution of Montana.

<sup>35</sup> "Counties are purely of a political character and their functions are wholly of a public nature. They are organized as subordinate agencies of the state government for the purpose of exercising some of the functions of state government, and not exclusively for the common benefit of the citizens or property holders within their boundaries. In this respect they are distinguishable

from other municipal corporations which are usually voluntary corporations organized primarily for the purpose of endowing the inhabitants of a specified territory with powers of local self-government for the benefit of the citizens and property holders within their limits." Perkins v. Cook County Commissioners, 271 Ill. 449, 459, 111 N. E. 580.

<sup>36</sup> State ex rel. v. Gordon, 231 Mo. 547, 575, 133 S. W. 44; Burton Machinery Co. v. Ruth, 194 Mo. App. 194, 196, 186 S. W. 737.

<sup>37</sup> State ex rel. v. Henderson, 145 Mo. 329, 46 S. W. 1076.

<sup>38</sup> School District v. St. Joseph School Dist., 184 Mo. 140, 82 S. W. 1082; State ex rel. v. Gordon, 231 Mo. 547, 575, 133 S. W. 44; Thogmartin v. Nevada School Dist., 189 Mo. App. 10, 13, 176 S. W. 473; Wichita v. Wichita Board of Education, 92 Kan. 967, 142 Pac. 946.

See § 2433 et seq. post and § 2433 et seq. vol. 5, ante.

**§ 114. School districts have statutory powers only.**

Generally school boards have not governmental police powers.<sup>39</sup> However, it has been held that the board of education of the city of St. Louis is not subject to the ordinances and resolutions of the city as to the construction of sanitary regulations (water closets) in the public school buildings, in view of the applicable state statute specifically charging the board "with the care of the public school buildings and the responsibility for the ventilation and sanitary condition thereof." In the opinion of the court the statute renders the board's authority exclusive.<sup>40</sup>

**§ 116. People and place necessary to constitute a municipal corporation.**

As officers do not constitute one of the constituent elements a municipal corporation may exist without them.<sup>41</sup>

Municipal corporations embrace both territory and inhabitants.<sup>42</sup>

<sup>39</sup> *Kansas City v. Fee*, 174 Mo. App. 501, 504, 160 S. W. 537.

"School districts are quasi municipal corporations of the most limited powers known to the law. Their trustees have special powers and cannot exceed the limit." *Pasadena School District v. Pasadena*, 166 Cal. 7, 134 Pac. 985, 47 L. R. A. (N. S.) 892, Ann. Cas. 1915 B, 1039; *Denman v. Webster*, 139 Cal. 452, 73 Pac. 139.

<sup>40</sup> *Board of Education v. St. Louis*, 267 Mo. 356, 184 S. W. 975, distinguishing *Pasadena School District v. Pasadena*, 166 Cal. 7.

<sup>41</sup> *People v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79.

<sup>42</sup> *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, 196, 43 L. R. A. (N. S.) 954, Ann. Cas. 1913 E, 305.

## CHAPTER 3.

### CREATION AND CLASSIFICATION OF MUNICIPAL CORPORATIONS.

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| § 121. Power to create vested in state.   | § 128. Effect of general statutes on special charters.                        |
| § 124. Creation as delegation of legislative authority.                         | § 129. Special chartered cities and towns may incorporate under general laws. |
| § 124a. Same—optional city government laws.                                     | § 130a. Substituting new charter for old—effect.                              |
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| § 127. Creation under constitutional provisions.                                | § 132. Advancement and reduction in class or grade.                           |
| § 127a. Charter commission authorized by statute.                               |   |

#### ORGANIZING UNDER GENERAL LAWS.

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| § 133. Compliance with statutory provisions in general—irregularities. | § 147. Election on creation and change of boundaries.         |
| § 136. Incorporation by court.   | § 148. Same—official action thereon.                          |
| § 138. Separate bodies possessing concurrent jurisdiction.             | § 149. Void incorporation.                                    |
| § 140. Necessary steps to incorporate—statutory provisions—conditions. | § 150. Doctrine of implication.                               |
| § 141. The petition for incorporation—sufficiency.                     | § 151. De facto corporations.                                 |
| § 142. Same—qualification of signers.                                  | § 152. State recognition.                                     |
| § 144. Notice of pendency of proceedings to incorporate.               | § 153. Acceptance of charter.                                 |
| § 145. Hearing of application for incorporation.                       | § 154. Proof of corporate existence—judicial notice—pleading. |
| § 146. Court order of incorporation.                                   | § 157. Same—location of corporation.                          |
|  | § 158. Questioning creation—quo warranto—certiorari.          |
|  | § 161. Constitutional provisions—title to act—illustrations.  |

#### § 121. Power to create vested in state.

Unless restricted by the constitution, the power of the legislature either by general or special law, to create or



provide for the creation of public and municipal corporations of all kinds is absolute and unlimited. The creation and organization of these bodies, the determination of the form, the powers of government and the method of exercise thereof, and indeed, of everything appertaining to the fundamentals of municipal charters are, in the absence of limitation in the organic law, essentially legislative functions. The legislature may not only create and provide for the organization and classification of cities and towns, but may restrict their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit.<sup>1</sup>

<sup>1</sup>State ex rel. v. Thompson, 149 Wis. 488, 137 N. W. 20; Harris v. Wm. R. Compton Bond and Mortgage Co., 244 Mo. 664, 688, 149 S. W. 603.

Municipal corporation can only be created by the state. Ringling v. Hempstead, 193 Fed. 596, 113 C. C. A. 464; State ex rel. v. Dunson, 71 Tex. 65, 9 S. W. 103.

In Washington Port Districts may be incorporated by virtue of statute, although not mentioned in the constitution. Paine v. Seattle, 70 Wash. 294, 126 Pac. 628.

Idaho Constitution confers power on the legislature to provide for the incorporation, organization and classification of cities and towns and provides that cities and towns shall have such powers as laws give, and they shall have no more. Byrns v. Moscow, 21 Idaho 398, 403, 121 Pac. 1034.

Florida Constitution: "The legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time."

Tampa v. Prince, 63 Fla. 387, 58 So. 542.

Oregon Constitution, Amendment June 4, 1906, provides that "Corporations may be formed under general laws, but shall not be created by the legislative assembly by special laws. The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charters, subject to the constitution and criminal laws of the State of Oregon." Concerning this amendment the court said: "As this section now stands the people of the state are not prohibited from enacting, by initiative, general or special laws for the government of municipalities, but the legislative assembly is expressly prohibited from passing special laws creating either private or municipal corporations." The conclusion seems to be irresistible that the people by the adoption of said amendment intended to withdraw from the leg-

Apart from constitutional inhibition, in the exercise of its plenary power, the legislature may place one part of the state under one municipal organization and another part of the state under another organization of an entirely different character;<sup>2</sup> create new corporations, revise, amend or even repeal any or all of the existing charters, and impose new ones, within its discretion, with or without the consent of the community affected thereby;<sup>3</sup> divide counties and towns at its pleasure, and apportion the common property and the common burdens in such manner as to it may seem reasonable and equitable.<sup>4</sup>

In the exercise of the state's sovereignty over municipal corporation, unless the state constitution forbids, its legislative department may abolish municipal offices, although the terms of the incumbents thereof have not expired, by amendment of charter,<sup>5</sup> or change the plan of municipal organization, e. g., by providing a commission

islative assembly all power that it previously possessed to enact, amend or repeal charters or acts incorporating cities or towns, and to confer upon the legal voters of cities and towns all of said power, except the power to repeal charters." *Branch v. Albee*, 71 Or. 188, 142 Pac. 598, 600.

Legislative acts "incorporating towns and cities shall restrict their powers of taxation, borrowing money, contracting debts and loaning their credit." *Const. Oregon*, Article 11, Section 5; *Hunter v. Roseburg*, 80 Or. 588, 156 Pac. 267, 157 Pac. 1065.

<sup>2</sup> *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047.

<sup>3</sup> *Shaw v. Harris*, 54 Or. 424, 427, 103 Pac. 77; *Perrett v. Wegner* (Tex. Civ. App. 1911), 139 S. W.

984, 989; *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917 A, 1244.

Act may give electors of city right to vote for adoption or rejection of new charter and new form of municipal government. *Vollmer v. Wachlin*, 80 N. J. L. 440, 99 Atl. 394; *Cleveland v. Watertown*, 222 N. Y. 159, 118 N. E. 500, reversing 179 App. Div. 954, 165 N. Y. S. 305, 99 Misc. Rep. 66, 166 N. Y. S. 286.

See § 124a, post.

<sup>4</sup> Rule applied to severance of a school district. *Flemington Borough Board of Education v. State Board of Education*, 81 N. J. L. 211, 217, 81 Atl. 163, affirmed in *Glazer v. Flemington Borough*, 85 N. J. L. 384, 91 Atl. 1068.

<sup>5</sup> *Van Dyke v. Thompson*, 136 Tenn. 136, 150-152, 189 S. W. 62.

form of local government to be adopted by the electors of the municipality.<sup>6</sup>

## § 124. Creation as delegation of legislative authority.

In this country the rule has always obtained that power to enact local legislation may be delegated, but this of necessity, whether stated or not, is usually attempted to be restricted to matters consonant with and germane to the general purpose and object of the municipality to which such prerogatives may be granted;<sup>7</sup> that is, as it is

<sup>6</sup> Illinois, *People ex rel. v. Edmands*, 252 Ill. 108, 96 N. E. 914.

Iowa, *Eckerson v. Des Moines*, 137 Ia. 452, 115 N. W. 177.

Idaho, *Kessler v. Fritchman*, 21 Idaho 30, 119 Pac. 692; *Swain v. Fritchman*, 21 Idaho 783, 125 Pac. 319.

Kentucky, *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884.

Kansas, *Cole v. Door*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534.

Mississippi, *Jackson v. State*, 102 Miss. 663, 59 So. 873.

Texas, *Brown v. Galveston*, 97 Tex. 1, 75 S. W. 488.

Washington, *State ex rel. v. Taussick*, 64 Wash. 69, 116 Pac. 651, 35 L. R. A. (N. S.) 802.

“Municipalities are but political subdivisions of the state, created by the legislature for purposes of governmental convenience, deriving not only some, but all of their powers from the legislature. They are mere creatures of the legislature, exercising certain delegated governmental functions which the legislature may revoke at will. In fact, public policy forbids the irrevocable dedication of governmental powers.

The power to create implies the power to destroy. Furthermore, the legislature may incorporate a city even against the will of the inhabitants. Consent or acceptance is not required as formerly when charters were granted by the Crown. It may also without the consent of a city, change the form of government, determine the number and character of its officers, and define their powers and duties.” *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244, 1250.

**Commission form.** “While the commission form of government does not to the extent usual in city charters follow the tendency heretofore shown in the evolution of free popular government to avoid as far as possible the concentration of power in any one governmental officer, it is nevertheless a democratic form of government which rests at last upon the consent of a majority of the governed.” *Perrett v. Wegner* (Tex. Civ. App. 1911), 139 S. W. 984, 989.

<sup>7</sup> *Straw v. Harris*, 54 Or. 424, 103 Pac. 777.

variously expressed, to "municipal affairs," "municipal purposes," "local municipal functions." But it is true power is not always so limited. State concerns and municipal affairs have never been classified satisfactorily. The distinction between them is not clearly drawn in all cases.<sup>8</sup>

A law, it is held in New York, is not invalid because it delegates powers not strictly municipal, but such as in their essence are state functions, e. g., assessments, public safety, health, charity, education and plumbers' licenses. If the exercise of such powers are not committed or reserved by the state constitution solely to the legislature, they may be committed to a local government, in so far as its government is concerned.<sup>9</sup> However, it is held in Wisconsin that, inasmuch as the framing and granting of municipal charters is clearly reserved by the constitution to the legislature, a grant of power to any chartered city to alter or amend its existing charter, or adopt an entirely new one, and as subsidiary thereto to exercise all powers in relation to the form of government and conduct of municipal affairs not in conflict with the fundamental and general laws is a delegation of legislative power, and therefore unconstitutional.<sup>10</sup>

<sup>8</sup> Secs. 173 et seq. 195, 322 ante, vol. 1; sec. 876 ante, vol. 2.

<sup>9</sup> *Cleveland v. Watertown*, 222 N. Y. 159, 174, 176, 118 N. E. 500, reversing 179 App. Div. 954, 165 N. Y. S. 305, 99 Misc. Rep. 66, 166 N. Y. S. 286; *Genet v. Brooklyn*, 99 N. Y. 296, 307; *Terrel v. Wheeler*, 123 N. Y. 76; *Clarke v. Rochester*, 28 N. Y. 605; *People ex rel. v. Ham*, 166 N. Y. 477, 60 N. E. 191; *People ex rel. v. Coler*, 173 N. Y. 103, 65 N. E. 956; *People ex rel. v. Prendergast*, 206 N. Y. 405, 409.

"The legislature may delegate to a municipality the power to

tax for the expenses of the local government and the power to assess for the expenses of local improvements. All powers of local government are delegated." *Matter of Zborowski*, 68 N. Y. 88.

<sup>10</sup> The act provided: "Every city, in addition to the powers now possessed, is hereby given authority to alter or amend its charter, or to adopt a new charter by convention, in the manner provided in this act, and for that purpose is hereby granted and declared to have all powers in relation to the form of its government, and to the conduct of its municipal af-

The general doctrine, well established is that, in conferring upon municipalities appropriate *quasi* legislative powers for local governmental purposes, the legislature does not violate the implied principle of organic law that the legislature shall not delegate its general law making power. Accordingly by virtue of broad constitutional power to establish and abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers and to alter or amend the same at any time, the legislature may not delegate to a municipality its general law making power for the state, nor confer power that violates any other express provision of the organic law, nor confer power other than for municipal purposes, yet the legislature has a wide discretion in the local government it may provide and in the powers it may grant for this purpose, and also in the means and instrumentalities it may employ in constituting such local government, and defining its powers, within the limitations of the organic law.<sup>11</sup>

**§ 124a. Same—optional city government laws.**

The rule has been declared that the legislature may not delegate to the electors of a city, town or village the power to make a charter, but may itself enact a complete charter and permit the electors to determine whether they will adopt it, and if adopted such charter may become of like force and effect as though the legislature had, by formal act, created it for that particular municipality or for the class of municipalities to which it may have been legally assigned. Such legislative acts may contain one form or several forms of municipal

fairs not in contravention of or withheld by the constitution or laws, operative generally throughout the state." State ex rel. v. Thompson, 149 Wis. 488, 137 N. W. 20, Ann. Cas. 1913C, 774, 43 L. R. A. (N. S.) 339.

<sup>11</sup> Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, 773, citing

§ 124, vol. 1, ante; State v. Atlantic Coast Line Ry. Co., 55 Fla. 617, 634, 47 So. 969, 32 L. R. A. (N. S.) 639; State v. Westmoreland, 133 La. 1015, 63 So. 502.

Power given to city to adopt new charter or amend old. Note to Ann. Cas. 1913C, 788; note to 43 L. R. A. (N. S.) 339.

government, and any existing chartered city or town may be given the option to abolish its old form and adopt any one of the forms so prescribed by observing the legislative method provided for this purpose. Thus an act which allows a city to adopt its provisions and thereby change its present form of government to another form and then by ordinance to transfer and distribute the powers which the city officially now has to and among the officials of the new government necessary for the proper management of the city's affairs, was adjudged constitutional. Its adoption by the method laid down is, in effect, the surrender of the old form of government and the acceptance of a new charter which the city does not make. It merely substitutes another charter for the one it had; a new form of municipal government supplants an old, that is all.<sup>12</sup>

The doctrine is well supported by judicial judgments that the legislature may by an act complete in itself establish several models for the government of cities and towns, and provide that one or another of these may become operative in any city or town already chartered by the voters of the municipality at an election held in due form, without further legislative intervention. This method, as remarked by the Supreme Judicial Court of Massachusetts, is something of a reversion to the earlier freedom and flexibility of local self government which obtained when the town meeting was at its highest development.<sup>13</sup> Therefore, a legislative act which offered four different types of a city charter, leaving it optional with the city to select by its voters the best adapted to its needs, was adjudged valid and constitutional against the contention that making a law to take effect only when accepted by a community constituted a delegation of legislative power.<sup>14</sup>

<sup>12</sup> *Cleveland v. Watertown*, 222 N. Y. 159, 167, 118 N. E. 500, reversing 99 Misc. Rep. 66, 179 App. Div. 954, 165 N. Y. S. 305; *Vollmer v. Wachlin*, 80 N. J. L. 440, 99 Atl. 394.

<sup>13</sup> *Cunningham v. Cambridge*, 222 Mass. 574, 111 N. E. 409.

<sup>14</sup> *Cunningham v. Rockwood*, 222 Mass. 409, 111 N. E. 409.

A law conferring on designated cities the privilege of adopting any or all of its provisions may be treated as an option law, and such law must be a complete enactment in itself when it leaves the legislature. The feature of such law which gives it character as an option law is the right conferred to allow adoption of all or a part of it, and not an option in the administration of the law after adoption. Thus where a city adopts particular provisions it is bound thereby and cannot abrogate them or any part of them. When it exercises its option it exhausts its power.<sup>15</sup>

Agreeably to this doctrine the legislature may without delegating legislative power authorize any chartered city or town, to adopt by a vote of the electors the commission form of municipal government,<sup>16</sup> or to substitute a commission charter for a home rule or constitutional charter,<sup>17</sup> or a commission form for an alder-

<sup>15</sup> *Holt Lumber Co. v. Oconto*, 145 Wis. 500, 507, 130 N. W. 709; *Northern T. Co. v. Synder*, 113 Wis. 516, 89 N. W. 460.

<sup>16</sup> *Jackson v. State*, 102 Miss. 663, 59 So. 873; *Rankin County Comrs. v. Davis*, 102 Miss. 497, 59 So. 811; *Jones v. Cassidy*, 154 Ky. 748, 159 S. W. 562; *Swain v. Fritchman*, 21 Idaho 783, 125 Pac. 319.

Act applied to all second class cities to take effect when electors of any city adopt it, held constitutional; is not special legislation, although one city may adopt it and another not. *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884.

*State ex rel. v. Tausick*, 64 Wash. 69, 116 Pac. 651, holding that the act should be complete in itself, leaving to the municipality the choice to determine whether, and when, it shall go into effect as its new form of government.

Commission form does not make city a sovereignty. *Barnes v. Kirksville*, 266 Mo. 270, 180 S. W. 545.

<sup>17</sup> A general statute enacted pursuant to the constitutional mandate for legislative limitations as to the frame of the municipal charter, subject to the limitations in the act provided, may authorize any city or town falling within the class of municipal corporations embraced in the act, to provide for any scheme of municipal government not inconsistent with the constitution, and to provide for the establishment and administration of all departments of the city government and for the regulation of all local municipal functions, as full as the legislature might have done before the adoption of § 33, Art. 4, of the constitution, forbidding special legislation relating to local affairs. It may omit provisions in reference to any de-

manic form,<sup>18</sup> or an existing form for the city manager plan, or the Dayton plan of administration.<sup>19</sup>

## § 126. General incorporation laws required, and special acts usually forbidden.<sup>20</sup>

partment contained in special laws then operative in such city or village, and provide that such laws, or parts thereof as are specified shall continue in force therein.

The commission charter substituted a different administration of the public schools and the public library from that of the Home Rule Charter which it supplanted. Only male electors voted for the commission charters. It was adjudged valid. *State ex rel. Smith v. St. Paul*, 128 Minn. 82, 150 N. W. 389.

<sup>18</sup> *State ex rel. v. Nisbet*, 38 S. D. 347, 161 N. W. 351; *State ex rel. v. Lanier*, 197 Ala. 1, 72 So. 320.

<sup>19</sup> The law was applicable to all cities of the state, "An act relating to the government of all cities in Kansas, and to establish an optional form of government." *State ex rel. v. Bentley*, 98 Kan. 442, 164 Pac. 290.

<sup>20</sup> *State ex rel. v. Engel* (Wis. 1920), 177 N. W. 33.

Cannot be created by the legislative assembly by special laws in Oregon. *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594; *Branch v. Albee*, 71 Or. 188, 142 Pac. 598. But the people of the state may enact by the initiative, general or special laws for the governance of municipal corporations, at least where there is no constitutional inhibition. *Ibid.*

A port although not a city or

town, is a municipality, and cannot be created in Oregon by special law. *State ex rel. v. Astoria Port*, 79 Or. 1, 154 Pac. 399, 504; *Farrell v. Port of Columbia*, 50 Or. 169, 91 Pac. 546, 93 Pac. 254, but may be created by general law. *Straw v. Harris*, 54 Or. 424, 103 Pac. 777.

Municipal corporations created by special act may be incorporated and continued as municipal corporations by general laws. *Chicago, M. St. P. Ry. Co. v. Le Roy*, 124 Minn. 107, 109, 144 N. W. 464; *State ex rel. v. Cornwall*, 35 Minn. 176, 28 N. W. 144.

Only by general law, with certain exceptions, *Northfolk County supervisors v. Duke*, 113 Va. 94, 73 S. E. 456.

The Idaho constitution grants power to the legislature to provide by general law for the incorporation, organization and classification of cities and towns, in proportion to the population, and such laws may be amended or repealed by general law. Cities and towns incorporated prior to the adoption of the constitution may become organized under general law, whenever a majority of electors shall so determine under law of the legislature. *Kessler v. Fritchman*, 21 Idaho 30, 119 Pac. 692, 694.

Laws authorizing any city of a specified population to adopt the commission form of government by vote of its electors, is not special



**§ 127. Creation under constitutional provisions.<sup>21</sup>**

In **Arizona** the electors ratify the charter by a majority vote and the governor is to approve, and it then becomes the organic law of the city and supersedes the old charter and all ordinances inconsistent with its provisions.<sup>22</sup>

In **Michigan** by constitution the authority of the legislature is restricted to the passage of a general law for the incorporation of cities and villages which must limit their right of taxation for municipal purposes, restrict their powers of borrowing money and contracting debts.<sup>23</sup> And "under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and through its regularly constituted authority, pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of the state."<sup>24</sup>

The adoption of a home rule charter, it has been held

legislation, although it divides cities of certain classes, as established by law, and although the law is made applicable subject to local option. *State ex rel. v. Tausick*, 64 Wash. 69, 116 Pac. 651.

In **Kentucky** a taxing district incorporated by special act, and possessing many of the powers of a municipal corporation, cannot be assigned by the legislature to any of the classes of cities or towns. By the constitution of that state, the legislature is without power by special act to incorporate a city. Only incorporated cities and towns may by virtue of the constitution, be assigned to their proper classes. *Albershart v. Donaldson*, 149 Ky. 510, 149 S. W. 873.

*Hurley v. Motz*, 151 Ky. 451, 454, 152 S. W. 248, holding that "municipal governments are creatures of the law, and the warrant for their creation must be found in a valid statute, or they can have no legal existence."

<sup>21</sup> Legislature in **California** cannot amend a freeholders charter, but may only approve or reject. *Williams v. Vallejo* (Cal. App. 1918), 171 Pac. 834.

<sup>22</sup> *Schultz v. Phoenix*, 18 Ariz. 35, 156 Pac. 75.

<sup>23</sup> **Michigan** Const. Art. 8, § 20, *Compiled Laws Mich.*, 1915.

<sup>24</sup> **Michigan** Const. Art. 8, § 21; *Attorney-General v. Thompson*, 168 Mich. 511, 134 N. W. 722; *Attorney-General v. Detroit*, 168 Mich. 249, 133 N. W. 1090.

in **Minnesota**, is legislation. The authority it furnishes to city officers is legislative authority.<sup>25</sup>

The constitution of **Ohio**, as amended in 1912, grants to municipalities authority to frame and adopt or amend their charters for their government, and may, subject to the constitution, exercise thereunder "all the powers of local self-government."<sup>26</sup>

In **Oklahoma** cities containing a population of more than 2,000 inhabitants may frame and adopt charters for their own government. By virtue of this constitutional provision a city may adopt the commission form, and vest all municipal power in five commissioners to be elected by the city at large, since the requirements of general statutes that municipal powers of cities shall be vested in a mayor and a council, and all members of the council shall be elected by wards, are superseded by its adoption.<sup>27</sup>

The constitution of **Texas** authorizes cities having more than five thousand inhabitants, by a majority of the qualified voters of any such city, at an election held for that purpose to adopt and amend their charter subject to such limitations as may be prescribed by the legislature, and provides that no charter or no ordinance passed under such charter shall contain any provision inconsistent with the constitution of the state, or of the general laws enacted by the legislature of the state.<sup>28</sup>

### § 127a. Charter commission authorized by statute.

In **Michigan**, by legislative act, a charter commission may be elected by the qualified electors of a city, to frame

<sup>25</sup> *Park v. Duluth*, 134 Minn. 296, 159 N. W. 627.

<sup>26</sup> *State ex rel. Lentz v. Edwards*, 90 Ohio St. 305, 107 N. E. 768; *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N. E. 512; *State ex rel. v. Lynch*, 88 Ohio St. 71, 102 N. E. 670.

<sup>27</sup> *Lackey v. State*, 29 Okla. 255, 116 Pac. 913.

Computation of time as to submission for ratification or rejection. *State ex rel. Lowe v. Barlow*, 129 Minn. 181, 151 N. W. 970; *Lackey v. State*, 29 Okla. 255, 116 Pac. 913.

<sup>28</sup> *Texas*, 1912, Art. 11, § 5; *Legois v. State*, 80 Tex. Crim. App. 356, 190 S. W. 724.

and submit a municipal charter to the electors, or to amend a charter in existence, to be submitted to the electors for acceptance or rejection.<sup>29</sup>

### § 128. Effect of general statutes on special charters.

Some laws leave it optional with municipalities to elect to be governed by statutes providing uniform municipal codes.<sup>30</sup> In Oklahoma constitutional municipal

<sup>29</sup> "Until recent years the incorporation of cities in this state has been accomplished by special legislation or what have been known as 'Local Acts.' Without doubt one of the principal reasons for the legislation now under consideration was to harmonize municipal government in the different cities, and also apply the principles of local self-government which have always been favored in this state. The creation of charter commissions was to facilitate the preparation of charters to be submitted to the consideration of electors." *Eikhoff v. Detroit Charter Com.*, 176 Mich. 535, 142 N. W. 746.

The commissioners are local officers; they may fill vacancies in their body but have no power to oust one of their members; the commission is not a legislative body. When and how the commissioners are to be elected, when the commission is to convene after the election of its members and proceed with its duties, the time when the charter to be framed shall be completed, the method and time of submission for acceptance or rejection to the electors, and other details, constituting a complete scheme, are fixed by statute.—*Ibid.*

<sup>30</sup> Under a statute providing that from the time the chapter on municipalities becomes operative every municipality shall exercise the powers conferred on municipalities in accordance with the code provisions, but which leaves any existing municipality the right to decline to be governed by the code, if it signifies its purpose to continue to operate under its old charter by resolution of its corporate authorities, entered of record and certified to the secretary of state within twelve months after the law becomes operative that such existing municipality elected not to be controlled by the code laws, it was held that in the absence of a showing that the municipality declined to become subject to the code laws the court would presume that the town was controlled by the code. *Richards v. Magnolia*, 100 Miss. 249, 56 So. 386.

Law providing act shall remain inoperative in any city till adopted by a majority vote, held applicable to towns. "City" used in law, held to mean "town." *Schwartz v. Wachlin*, 89 N. J. L. 39, 98 Atl. 252.

charters supersede all conflicting state laws relating to purely municipal matters,<sup>31</sup> but not those of state concern, e. g., traffic in liquor, gambling, and prostitution.<sup>32</sup>

### § 129. Special chartered cities and towns may incorporate under general laws.

But under the Constitution of Idaho, it has been held, that a special charter can be amended only by special act; that general laws relating to the government of cities do not apply to cities operating under special charters without the consent of the electors of the city.<sup>33</sup>

### § 130a. Substituting new charter for old—effect.

When a new charter is adopted, materially changing the former municipal organization, usually the old charter provisions in whatever form existing become inapplicable to the new government, especially when they are inconsistent or out of harmony with the new organization.<sup>34</sup> Therefore, the general rule is that the adoption of a new charter abrogates or repeals the former one. However, obligations continue, but remedies may be affected without impairing the obligations of contracts.<sup>35</sup>

<sup>31</sup> *Oklahoma Ry. Co. v. Powell*, 33 Okl. 737, 127 Pac. 1080; *Mitchell v. Carter*, 31 Okl. 592, 122 Pac. 691; *Lackey v. Grant*, 29 Okl. 255, 116 Pac. 913; *Re Simmons*, 4 Okl. Cr. 662, 112 Pac. 951; *Owen v. Tulsa*, 27 Okl. 264, 111 Pac. 320.

<sup>32</sup> *Board of Education v. Best*, 26 Okl. 366, 109 Pac. 563.

In event of conflict the municipal laws give way. *State ex rel. v. Linn*, 49 Okl. 526, 153 Pac. 826.

<sup>33</sup> *Kessler v. Fritchman*, 21 Idaho 30, 119 Pac. 692, 696, 697.

<sup>34</sup> *Swain v. Fritchman*, 21 Idaho 783, 125 Pac. 319.

<sup>35</sup> *Standard Salt & Cement Co. v. National Surety Co.*, 134 Minn. 121, 156 N. W. 802.

Ordinance providing for submission of new charter was not published as provided by law, but notwithstanding on submission the new charter was adopted by the electors, held new charter did not go into effect, but old one remained in force. *Provoost v. Cone*, 83 Or. 522, 162 Pac. 1059.

In change to commission form, all obligations stand; remedies cannot be altered substantially. *Swain v. Fritchman*, 21 Idaho 783, 125 Pac. 319.

Constitution of Colorado creating the city and county of Denver of territory of the then present city of Denver with outlying territory added "to succeed to all

The Ohio Constitution continues in force the general laws of the state for the government of cities and villages until changed: (1) by the enactment of general laws for their amendment; or (2) by additional laws to be ratified by the electors of the municipality to be affected thereby; or (3) by the adoption of a charter by the electors of a municipality in the mode prescribed by the constitution.<sup>36</sup>

In Oklahoma whenever a freeholders' charter has been adopted under the provisions of the constitution, and conflicts with any law of the state relating to municipal matters of cities of the first class the provisions of such charter prevail.<sup>37</sup>

In Illinois, it is held that, a city organized under a special charter in adopting general laws applicable to cities, continues in force provisions of the special charter which are not in conflict with such general laws.<sup>38</sup>

The same ruling has been made in Missouri.<sup>39</sup> And in Wisconsin, a city with a special charter adopted part of the laws provided by a general statute applicable to municipal corporations, which were consistent with its charter, and it was held "they can stand together harmoni-

the rights and liabilities" of the present city of Denver, held, did not have effect of terminating street railway franchise where company had constructed and operated its lines. *Denver v. Mercantile Trust Co.*, 201 Fed. 790, 805-808, 120 C. C. A. 100, 161 Fed. 769.

<sup>36</sup> *State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 102 N. E. 670, approved in *State ex rel. Lentz v. Edwards*, 90 Ohio St. 305, 107 N. E. 768.

<sup>37</sup> *Adler v. Jenkins*, 33 Okl. 117, 124 Pac. 29; *Lackey v. State*, 29 Okl. 255, 116 Pac. 913.

See Oklahoma cases in § 128, ante.

<sup>38</sup> *Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, 352, 97 N. E. 672, affirming 164 Ill. App. 276.

<sup>39</sup> The adoption by a municipal corporation of the provisions of a general statute, held not to affect the provisions of a former special charter not inconsistent with or repugnant to the general law. The officers of the old corporation or reorganization, in absence of statutory provision relating thereto, hold their offices and exercise their powers until the officers of the new corporation are elected and qualified. *Menefee v. Taubman*, 159 Mo. App. 318, 322, 323, 140 S. W. 604.

ously and without hiatus. \* \* \* The city had powers to adopt the sections which it attempted to adopt and they are now a part of the charter, superseding such parts of the special charter as are in conflict with them."<sup>40</sup>

Changes in municipal charters ordinarily do not affect existing ordinances in harmony with the new provisions.<sup>41</sup> But whether the new supersede the old provisions is mainly a question of intention.<sup>42</sup> Inconsistency operates in favor of the new.<sup>43</sup> On the adoption of a new charter under a law providing that all ordinances and resolutions in existence, not inconsistent with the new charter, shall continue in force, a building code, for example, not inconsistent with the new municipal organization is not repealed.<sup>44</sup>

In the absence of a provision to the contrary, the superseding of the old charter by the new has the effect of abolishing the offices under the old charter. The general rule is that the repeal of a charter destroys all offices under it and puts an end to the functions of the incumbents.<sup>45</sup> Thus an ordinance providing for the em-

<sup>40</sup> *Smelker v. Campbell*, 165 Wis. 358, 361, 362, 162 N. W. 171.

<sup>41</sup> *Sloss-Sheffield Steel & Iron Co. v. Smith*, 175 Ala. 260, 57 So. 29; *Ventress v. Clayton*, 165 Ala. 349, 51 So. 763; *Ferrell v. Opelika*, 144 Ala. 135, 39 So. 249.

<sup>42</sup> *Hirsch v. Burk*, 83 N. J. L. 146, 83 Atl. 979.

Condition that former provisions of the charter relating to public improvements by local assessments should remain in force as ordinances, held effect was to repeal them as charter sections and reenact them as ordinances and they would stand valid although not based on a charter sanctioning such proceedings. *Robertson v. Portland*, 77 Or. 121, 149 Pac. 545, 548; *Portland v. Blue*, 77 Or. 131, 149

Pac. 548; *State ex rel. v. Portland*, 65 Or. 273, 285, 133 Pac. 62.

<sup>43</sup> *Salter v. Burk*, 83 N. J. L. 152, 83 Atl. 973.

<sup>44</sup> *Ninth Street Improvement Co. v. Ocean City*, 90 N. J. L. 106, 100 Atl. 568.

Adopting the commission form of government, held not to repeal certain ordinances regulating the construction and use of buildings. *Spokane v. Lemon*, 73 Wash. 248, 131 Pac. 853.

<sup>45</sup> *Adler v. Jenkins*, 33 Okl. 117, 124 Pac. 29; *People ex rel. v. Brown*, 83 Ill. 95; *Boyd v. Chambers*, 78 Ky. 140; *Watervliet v. Colonie*, 50 N. Y. S. 487, 27 App. Div. 394.

In adopting the commission form the provision was that all present

ployees of a department which has no existence under the new charter cannot be viewed as in force, although the new charter contains the usual provision that every ordinance in force at the time of its adoption not inconsistent with the charter shall continue in force until amended or repealed, and that employees within the scope thereof in office at the time of its adoption shall retain their positions.<sup>46</sup>

### § 131. Classification.

Although the constitution requires the classification of municipalities to be according to population,<sup>47</sup> it has been held, that a law authorizing any city of a specified population to adopt the commission form of government may create a new class and divide cities as already classified by law. After the legislature has classified cities as the constitution expressly requires it may create a class within such existing classes, so long as it does so by general law and according to population.<sup>48</sup>

A constitutional provision requiring the legislature to divide the cities and towns of the state into four classes, so that each class shall "possess the same powers and be subject to the same restrictions" is necessarily referable, it has been held, to the objects had in view, that is, the organization and division of cities and towns into four classes, and referred to the constituent agencies and governmental functions which compose the organization. It does not mean that the rate of taxation for municipal purposes must be the same in all cities of the class whether or not one city of the class might, because of its population, be entitled to become a city of the higher class.<sup>49</sup>

In Kentucky by the constitution the legislature assigns

city officers with two exceptions  
"shall be ipso facto abolished."  
Jones v. Cassidy, 154 Ky. 748, 159  
S. W. 562.

<sup>46</sup> State ex rel Rose v. Hindley,  
67 Wash. 240, 243, 121 Pac. 447.

<sup>47</sup> Kessler v. Fritchman, 21 Idaho  
30, 119 Pac. 692.

<sup>48</sup> State ex rel. v. Tausiek, 64  
Wash. 69, 116 Pac. 651.

<sup>49</sup> Calland v. Springfield, 264 Mo.  
296, 301, 304, 174 S. W. 396.

the cities and towns to the classes to which they respectively belong, and changes assignments made as the population of the city or town increases or decreases; but no city or town may be transferred from one class to another, except in pursuance of a law previously enacted and providing therefor.<sup>50</sup>

### § 132. Advancement and reduction in class or grade.<sup>51</sup>

Laws regulate the method of transition of municipal corporation from one class or grade to another. A constitutional section provided that "Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law." This provision was held not self-executing. "It indicates a basis of classification but the time and manner of transition of a municipal corporation from one class to the other is to be regulated by law."<sup>52</sup>

Unless restricted by the constitution the legislature may provide for advancement of a municipal corporation to a higher class or grade, e. g., in Pennsylvania, a borough into a city of the third class by popular vote.<sup>53</sup>

In the absence of legal regulation to that effect a city or town on attaining the population of a municipal corporation of a higher class or grade does not thereby *ipso facto* become a corporation of such class or grade. The necessary procedure to compass the advancement is usually prescribed in detail.<sup>54</sup> In Pennsylvania when a

<sup>50</sup> *Albershart v. Donaldson*, 149 Ky. 510, 512, 149 S. W. 873.

Power to classify vested in state legislature. *London v. Brown*, 183 Ky. 63, 208 S. W. 317.

<sup>51</sup> *Menefee v. Taubman*, 159 Mo. App. 318, 140 S. W. 604.

<sup>52</sup> *Murray v. State*, 91 Ohio St. 220, 230, 110 N. E. 471, distin-

guishing *People v. Hoge*, 55 Cal. 612.

The statute regulating the transition, of course, must not conflict with the constitution. *Ibid.*

<sup>53</sup> *Commonwealth v. South Bethlehem*, 248 Pa. 581, 94 Atl. 244.

<sup>54</sup> *State ex rel. v. Tausick*, 64 Wash. 69, 116 Pac. 651, 655.



borough of the specified population on taking the required steps receives letters patent as a city of the third class it is not at once created into a full fledged city of that class, but is only an embryonic city; its full development as such city does not occur until the new municipal officers chosen at a municipal election, shall enter upon their respective terms and organize the city government.<sup>55</sup>

#### ORGANIZING UNDER GENERAL LAWS.

### § 133. Compliance with statutory provisions in general—irregularities.

The existence of the specified statutory conditions in the area proposed to be incorporated are, of course, conditions precedent to incorporation. Substantial compliance with such prescribed conditions, and observance of the various steps outlined in detail will ordinarily be sufficient. Departures and irregularities relating to form will not affect the validity of the proceedings. However, failure to observe mandatory provisions of a fundamental and jurisdictional nature will render the attempted incorporation void.<sup>56</sup> For example, if the land

<sup>55</sup> *Commonwealth v. Langley*, 233 Pa. 222, 226, 82 Atl. 56.

<sup>56</sup> *People ex rel. v. Larkspur*, 16 Cal. App. 169, 116 Pac. 702; *State ex rel. v. Victoria*, 97 Kan. 638, 156 Pac. 705; *Re Village of Biron*, 146 Wis. 444, 131 N. W. 829.

Failure to provide registration for voters. *Johnson v. Luers*, 129 Md. 521, 99 Atl. 710.

Court issued order for the election under the wrong statute. After lapse of three years, court will not strike down the incorporation. *Commonwealth v. Pottsville*, 246 Pa. 468, 472, 92 Atl. 639.

Town was incorporated by legislative act, which remained unre-

pealed and the incorporation undisputed. Held, subsequent attempt to incorporate was void. *Pence v. Cobb* (Tex. Civ. App. 1913), 155 S. W. 608.

Errors in incorporating may be corrected by curative statutes. *Wilson v. Carter* (Tex. Civ. App. 1913), 161 S. W. 411.

The pendency of annexation proceedings, precludes organizing a municipal corporation including part of same territory to be annexed. *People v. Monterey Park* (Cal. App. 1919), 181 Pac. 825.

Election to organized, unorganized territory under Illinois Commission form of government act, to

in the territory sought to be incorporated, is not of such character as can form an incorporated town, within the terms of the statute, a court order organizing such territory into an incorporated town, clearly is void.<sup>57</sup>

The area to be incorporated should be described so that the boundaries thereof may be ascertained with reasonable certainty. Slight immaterial irregularities will be disregarded. Some statutes require the boundaries to be set out by metes and bounds.<sup>58</sup>

### § 136. Incorporation by court.

Vesting a court or other tribunal with power to ascertain and determine when the conditions of incorporation exist and the steps prescribed have been observed, as required by the legislature to justify incorporation, is not a delegation of legislative power.<sup>59</sup>

### § 138. Separate bodies possessing concurrent jurisdiction.

Where two separate bodies have concurrent jurisdiction to determine the question of incorporation, e. g., county commissioners, and a city council—the one having first acquired jurisdiction may retain it and proceed to

be held under general act. *People v. Campbell*, 285 Ill. 557, 121 N. E. 183.

<sup>57</sup> *Waldrop v. Kansas City Southern Ry. Co.*, 131 Ark. 453, 199 S. W. 369.

<sup>58</sup> *Foshee v. Kay* (Ala. 1916), 72 So. 391; *State ex rel. v. Victoria*, 97 Kan. 638, 642, 156 Pac. 705.

Territory and its location in organization of ports under Oregon statutes. *State ex rel. v. Port of Bay City*, 64 Or. 139, 129 Pac. 496.

Vagueness of description of territory incorporated. *State v. Bay City*, 65 Or. 124, 131 Pac. 1038.

Land was included which ought not to have been included, held

did not render void the incorporation. *State v. Blackwell*, 91 Wash. 81, 157 Pac. 223.

Defect of incorporating territory in excess of statutory limit cannot be cured by excluding the excess. *Wilson v. Carter* (Tex. Civ. App. 1913), 161 S. W. 411.

<sup>59</sup> "The legislation on the subject very wisely entrusts the determination of the advisability of the creation of a borough to the court of quarter sessions. Authority must be vested somewhere and it is well vested in a tribunal having knowledge of the vicinage and the people and occupying an important and disinterested atti-

a final hearing and disposition of the application as prescribed by law.<sup>60</sup>

### § 140. Necessary steps to incorporate—statutory provisions—conditions.

Statutes point out in most instances quite clearly the conditions required to exist to secure incorporation, namely, the area to be included, the nature of the territory, the character of the lands, and the uses to which put, whether farming or agricultural, and if so, whether used exclusively or in part for such purposes, the number of inhabitants, or taxable inhabitants or "resident population," and the density of the settlement, and sometimes the location of the district proposed to be incorporated with reference to cities, towns, township or other public corporations.<sup>61</sup>

tude with reference to the subject." *Re Millbourne Borough*, 46 Pa. Super. Ct. 19, 21, 22.

<sup>60</sup> *State ex rel. v. Clark*, 21 N. D. 517, 131 N. W. 715, 718.

<sup>61</sup> **Conditions justifying incorporation.** Area limited according to population, e. g., towns of from 2,000 to 5,000 inhabitants to superficial area of four square miles; further, no territory not intended to be for strictly town purposes, shall be included. *State ex rel. v. Polytechnic* (Tex. Civ. App. 1917), 194 S. W. 1136.

Organization of ports as municipal corporations; territory to be included: *State ex rel. v. Bay City Port*, 64 Or. 139, 129 Pac. 496; *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Hale v. Sengstacken*, 192 Fed. 641.

Borough in Pennsylvania may be carved out of a portion of a first-class township. *Re Millbourne*, 46 Pa. Super Ct. 19, 22.

Thickly settled community. *Northfolk v. Duke*, 113 Vt. 94, 73 S. E. 456.

**Resident population.** Law providing a named "resident population," as a prerequisite to incorporation, contemplates and requires that the necessary population should be actual residents in the territory, that is, those having a fixed abode therein, and excludes those temporarily sojourning therein, e. g., laborers employed at lumber camps. *State ex rel. v. Island Lake*, 130 Minn. 100, 102, 153 N. W. 257.

**Farming lands;** question whether lands alleged to be used exclusively for farming purposes should be included is one of fact for the court having control of the proceedings to determine. *Re Millbourne*, 46 Pa. Super Ct. 19, 24.

Farming lands, as such, should not be incorporated into cities or towns, but although used for farm-

### § 141. The petition for incorporation—sufficiency.

The petition, praying for incorporation, to be presented to the court, board, commission or tribunal empowered to act, is variously required to be signed by a named number of "legal voters" or "qualified voters" or electors, or "taxable inhabitants," or "owners of real property," or a "majority of the electors," or a "majority of the male inhabitants," all residing within the limits of the proposed municipality, or the "resident population," and by some statutes such petition is required to state "as near as may be" the number of inhabitants of the community sought to be incorporated; and also to recite the existence of the specified conditions authorizing incorporation.<sup>62</sup>

ing purposes solely they may be so surrounded and connected with lands used for town and city purposes, as to be and constitute a part thereof, so that the incorporation of the town or city would as a necessity, include within its natural boundaries such lands. Hence, the inclusion of small tracts of agricultural lands within the corporate limits of the incorporated town will not render the incorporation void. *State ex rel. v. Buerman*, 186 Mo. App. 691, 700, 172 S. W. 454; *State ex inf. v. Bellflower*, 129 Mo. App. 138, 108 S. W. 117; *State ex rel. v. Lichte*, 226 Mo. 273, 285, 126 S. W. 466.

Inclusion of excess of farming lands does not necessarily render the entire incorporation proceedings void. *State ex rel. v. Blackwell*, 91 Wash. 81, 157 Pac. 223.

<sup>62</sup> *Constitution v. Chestnut Hill Cemetery Ass'n*, 136 Ga. 778, 71 S. E. 1037; *Re Village of Holcomb*, 162 N. Y. S. 848, 97 Misc. Rep. 241.

Petition of 30 legal voters. *Peo-*

*ple v. Shaw*, 253 Ill. 597, 97 N. E. 1090.

Twenty electors. *Northfolk County Supervisors v. Duke*, 113 Va. 94, 73 S. E. 456.

Twenty-five qualified voters. *State ex rel. v. Phil Campbell*, 177 Ala. 204, 58 So. 905.

"Taxable inhabitants." *State ex inf. v. Woods*, 233 Mo. 357, 135 S. W. 932; *State v. Fleming*, 158 Mo. 558, 562, 59 S. W. 118.

Petition required to state "as near as may be the number of inhabitants of such town or village." *State ex rel. v. Victoria*, 97 Kan. 638, 641, 156 Pac. 705.

Requirement that the petition shall be signed by a majority of the electors, is observed where statement is that it was signed by the requisite number. *State ex rel. v. Victoria*, 97 Kan. 638, 156 Pac. 705.

The body authorized to entertain the application for incorporation, as county commissioners, usually may determine the sufficiency of the petition, e. g., whether it is

The petition should contain a description of the territory proposed to be incorporated. Some laws require the boundaries to be set forth therein by "metes and bounds."<sup>63</sup> The statute is observed if the descriptions are readily intelligible and entirely definite. It is not necessary that the description shall be literally by metes and bounds—that is, by describing its boundary line by course and distance.<sup>64</sup>

Accurate maps and plats of the territory are frequently required to be attached to or filed with the petition, and this requirement has been held to be jurisdictional.<sup>65</sup>

Under some statutes where there are "commons" (e. g., parks, public pleasure grounds or other public grounds coming fairly within the designation of commons) they are required to be set forth by metes and bounds in the petition. Under such statutes a petition which omitted all reference to the "commons," or "commons appertaining to such city or town," as required when such commons existed, was adjudged defective, because it did not contain what was regarded as a jurisdictional averment, that is, the inhabitants were to be incorporated

signed by a majority of the electors. *State ex rel. v. Holcomb*, 95 Kan. 660, 149 Pac. 684.

Petition appearing on its face to have been signed and verified by the required number of qualified electors constitutes prima facie evidence. *Hoffecker v. Los Angeles County Supervisors*, 23 Cal. App. 405, 138 Pac. 371.

The date of the filing of the petition, and not the date of the petition, confers jurisdiction. *State ex rel. v. Clark*, 21 N. D. 517, 131 N. W. 715.

<sup>63</sup> *State ex rel. v. Buerman*, 186 Mo. App. 691, 172 S. W. 454.

<sup>64</sup> *State ex rel. v. Victoria*, 97 Kan. 638, 642, 156 Pac. 705.

<sup>65</sup> *Foshee v. Kay* (Ala. 1916), 72 So. 391; *State ex rel. v. Phil Campbell*, 177 Ala. 204, 58 So. 905.

**Description in plat.** "A description of land by sections, without mentioning the township and range, and without other marks and calls to show what sections are meant, presents a patent ambiguity which cannot be aided by parol proof as to the intention of the parties or as to the property intended to be embraced." *State ex rel. v. Phil Campbell*, 177 Ala. 204, 58 So. 905, 907; *Brannan v. Henry*, 142 Ala. 698, 39 So. 92, 110 Am. St. Rep. 55; *Chambers v. Ringstaff*, 69 Ala. 140.

“for the preservation and regulation of any commons pertaining to said city or town.”<sup>66</sup> Of course, under such requirement the petition need not set forth the metes and bounds of commons if there are no commons. In such case the petition will be sufficient in this respect if it alleges that there are no commons.<sup>67</sup>

## § 142. Same—qualification of signer.<sup>68</sup>

## § 144. Notice of pendency of proceedings to incorporate.<sup>69</sup>

<sup>66</sup> In Missouri a petition to incorporate a town is defective where it omits all reference to the “commons appertaining to such city or town.” The statute authorizing the incorporation of cities or towns by the county court describes the character and scope of the petition to be presented and uses the word “commons” and the phrase “commons appertaining to such city or town.” The word “commons” as used in the statute was held not to mean the same thing as known in the days of French and Spanish rule in the Mississippi Valley, but that the word embraces parks and pleasure grounds, squares and other grounds set apart for municipal or public purposes in villages, towns or cities.

“Commons are of substance in urban life. Commons, pleasure grounds, breathing and beauty spots, parks, play grounds, ‘the village green,’ and public ‘squares,’ places dedicated to the common use of the whole community are not mere sentimental conceits. Neither the unlearned nor the learned, the dreamer nor the utilitarian, the courts nor the fireside, the child nor adult so regard them. With

one accord all agree that commons in some form are useful elements in wholesome municipal life, well worthy of the attention of laws and courts. Surely the matter has pith enough to be dealt with in incorporating a town.” State ex inf. v. Woods, 233 Mo. 357, 376, 378, 379, 135 S. W. 932.

<sup>67</sup> State ex rel. v. Buerman, 186 Mo. App. 691, 699, 172 S. W. 454.

<sup>68</sup> Under a statute requiring the consent to be signed by owners of “real property,” held not to include “special franchise.” Re Village of Oriskany, 150 N. Y. S. 724, 87 Misc. Rep. 357, 360.

**Proof of residence and qualifications of voters signing the petition** may be made by affidavit or otherwise as directed by the court. Foshee v. Kay (Ala. 1916), 72 So. 391; State ex rel. v. Phil Campbell, 177 Ala. 204, 58 So. 905.

<sup>69</sup> **Sufficiency of publication of petition.** Hoffecker v. Los Angeles County Supervisors, 23 Cal. App. 405, 138 Pac. 371.

**Sufficiency of notice of application to incorporate of thirty day publication.** Re Sinking Spring Borough, 52 Pa. Super. Ct. 481.

**Notice to be posted** “in five pub-

**§ 145. Hearing of application for incorporation.**

Hearings are uniformly provided.<sup>70</sup> Mere irregularities at the hearing will not invalidate the incorporation, e. g., hearing at a meeting to which no formal adjournment was made, or hearing at an adjourned session under a law requiring a hearing at a "regular session,"<sup>71</sup> or failure to ascertain the population prior to the order of publication of notice of election, as expressly enjoined by statute, or after granting the order of incorporation failure to file a copy of such order with the secretary of state, as required.<sup>72</sup>

Under some laws, the court grants incorporation on first being satisfied that the majority of the taxable inhabitants of the territory affected have signed the petition, setting out the conditions required, and praying for incorporation.<sup>73</sup> Under other laws, if the court is satis-

lic places in such town for at least fifteen days prior to the holding of the elections." Held, proof that notices were posted 15 days before the election is sufficient; it need not state that the notices remained posted during all that time. To construe the statute so would render the compliance therewith practically impossible. "To make the necessary proof that the notices remained posted continuously for at least fifteen days before the election in five public places would require a man on guard at each place of posting, night and day, for fifteen days. Such was not the intention of the legislature." *People v. Shaw*, 253 Ill. 597, 97 N. E. 1090.

Slight irregularities in the notice will be disregarded, e. g., that the petition for incorporation will be presented Tuesday, April 5, although April 5 fell on Wednesday. *Cole v. Orange County Supervisors*, 27 Cal. App. 528, 150 Pac. 784.

Some laws contemplate that the notice by publication of the time of the hearing of the petition for organization of a drainage district and the report of the viewers thereon shall not be issued until after the viewers have made their report. *State ex rel. v. Coles*, 167 Mo. App. 692, 151 S. W. 195.

<sup>70</sup> *People ex rel. v. Larkspur*, 16 Cal. App. 169, 116 Pac. 702.

<sup>71</sup> Law required action at a "regular session," held substantial compliance where action is had at an adjourned session of a regular meeting. *State ex rel v. Victoria*, 97 Kan. 638, 642, 643, 156 Pac. 705.

<sup>72</sup> *Cole v. Orange County Supervisors*, 27 Cal. App. 528, 150 Pac. 784.

<sup>73</sup> *State ex inf. v. Woods*, 233 Mo. 357, 370, 135 S. W. 932; *State ex rel. v. Fleming*, 158 Mo. 558, 562, 59 S. W. 118.

The incorporation of a town by a county court by authority of law,

fied that it will be to the best interest of the inhabitants of the town or community involved to be incorporated, that the request is reasonable, that the general good of the inhabitants will be promoted, and that the area is not excessive, but reasonable, the decree will be granted.<sup>74</sup>

The usual provision is that if the court after a hearing "is satisfied" that all the legal requisites, or conditions precedent for incorporation exist, and that all mandatory steps prescribed have been observed in substance, an order of incorporation shall be granted, but laws do not, expressly at least, suggest the instrumentalities requisite to create "the necessary status of judicial satisfaction." If all of the parties for and against the incorporation have had ample opportunity to present all relevant facts, and to be heard fully, it is clear that such is the hearing contemplated. Accordingly, on the hearing the petition and accompanying papers duly verified and complying with the law constitute a *prima facie* case, and justify an order of incorporation.<sup>75</sup>

### § 146. Court order of incorporation.<sup>76</sup>

Usually the court order of incorporation recites the facts or conclusions showing the existence of the conditions laid down in the statute, and those showing that all of the specified mandatory steps have been followed. Slight errors in these respects will be disregarded. Generally, the order is not open to attack for mere irregularity or mistake of fact.<sup>77</sup> An order reciting that the petition showed that it was signed by the requisite num-

is held a judicial act. *State ex rel. v. Center Creek Mining Co.*, 262 Mo. 490, 502, 171 S. W. 356.

<sup>74</sup> *Northfolk County Supervisions v. Duke*, 113 Va. 94, 73 S. E. 456.

<sup>75</sup> *Re Village of Biron*, 146 Wis. 444, 131 N. W. 829, following *Parsons v. Parsons*, 101 Wis. 76, 82, 77 N. W. 147.

Objection to inclusion of land should be presented to tribunal

passing on incorporation, and on appeal, if required. Usually it cannot be tested by *quo warranto*. *State v. Bay City*, 65 Or. 124, 131 Pac. 1038.

<sup>76</sup> *Sell v. Turner*, 138 Ga. 106, 74 S. E. 783.

<sup>77</sup> *State ex rel. v. Victoria*, 97 Kan. 638, 640, 156 Pac. 705; *State ex rel. v. Holcomb*, 95 Kan. 660, 149 Pac. 684.



ber of electors was held sufficient.<sup>78</sup> Failure of the order to recite that proof was made of the residence and qualifications of signers of the petition is not fatal.<sup>79</sup>

An order organizing the proposed territory into an incorporated town is void, if the land is not of such a character as could form an incorporated town.<sup>80</sup>

The area incorporated should be described or designated with reasonable precision in the order, at least so the boundaries thereof may be readily ascertained by the application of the usual rules of interpretation. Slight inconsistencies, obscurities and inaccuracies therein are not fatal.<sup>81</sup>

An order incorporating a town under the Missouri statute failing to describe the "commons" within the corporate boundaries or to recite that there are no commons is void.<sup>82</sup>

If all the conditions precedent to incorporation exist, and if all the steps specified have been taken, and the court so finds, and further finds that the territory has been legally organized and incorporated, and makes such record entry, thereupon, according to the majority of the judicial decisions, the order becomes conclusive of every fact required to constitute a valid incorporation.<sup>83</sup>

**Review.** Questions of fact bearing on the expediency of the proposed incorporation are usually committed by the law to the court or tribunal hearing the application, and ordinarily appellate courts have no authority to

<sup>78</sup> State ex rel. v. Victoria, 97 Kan. 638, 156 Pac. 705.

<sup>79</sup> Foshee v. Kay (Ala. 1916), 72 So. 391.

<sup>80</sup> Waldrop v. Kansas City Southern Ry. Co., 131 Ark. 453, 199 S. W. 369.

<sup>81</sup> State ex rel. v. Victoria, 97 Kan. 638, 156 Pac. 705.

Error in description; order nunc pro tunc. State v. Bay City, 65 Or. 124, 131 Pac. 1038.

<sup>82</sup> State ex rel. v. Gooch, 175 Mo. App. 270, 276, 157 S. W. 846; fol-

lowing State ex inf. v. Woods, 233 Mo. 357, 135 S. W. 932.

<sup>83</sup> State ex rel. v. Bay City Port, 64 Or. 139, 129 Pac. 496.

Court's finding of qualifications of signers of petition for incorporation, held conclusive and cannot be attacked by quo warranto. State ex rel. v. Phil Campbell, 177 Ala. 204, 58 So. 905.

Regularity of election cannot be questioned where court finds it regular and legal. Foshee v. Kay (Ala. 1916), 72 So. 391.

review the exercise of that discretion except where an abuse of discretion is distinctly charged and clearly established, or where there is some illegality in the proceedings disclosed by the record.<sup>84</sup>

### § 147. Election on creation and change of boundaries.

The necessary steps for holding and conducting the election in the creation of municipal corporations, as required in many instances,<sup>85</sup> must be taken in the manner specified by the law applicable. However, mere irregularities relating to form rather than to substance will not invalidate the election.<sup>86</sup> But a constitutional provision requiring submission of the question of incorporation at a general election was held violated by a statute authorizing incorporation or passing into a higher municipal grade, pursuant to a special election.<sup>87</sup>

### § 148. Same—official action thereon.<sup>88</sup>

<sup>84</sup> *Re Millbourne*, 46 Pa. Super. Ct. 19.

Review by appeal allowed. *State ex rel. v. Johnson*, 105 Wash. 93, 177 Pac. 699; *Re Incorporation of Uniondale v. Rugh* (Mo. App. 1918), 203 S. W. 508.

<sup>85</sup> *People ex rel. v. Larkspur*, 16 Cal. App. 169, 116 Pac. 702; *State ex rel. v. Troell* (Tex. Civ. App. 1918), 207 S. W. 610.

Provisions for submission of the question of organization of a forest preserve district to the legal voters of the proposed district, held valid. *Perkins v. Cook County Commissioners*, 271 Ill. 449, 111 N. E. 580.

<sup>86</sup> Petition for election, failure to accompany with map, held not fatal. *State ex rel. v. Montgomery* (Tex. Civ. App. 1911), 140 S. W. 385, following *State ex rel. v. Hoard*, 94 Tex. 527, 62 S. W. 1054.

Notice of election, sufficiency and

posting of. *State v. Johnson*, 76 Or. 85, 144 Pac. 1148, 147 Pac. 926 on rehearing.

Order for election; claimed was issued under wrong statute in proceedings instituted three years after election. Action denied. *Commonwealth v. Pottsville*, 246 Pa. 468, 92 Atl. 639.

Sufficiency of ballot for incorporation. *State ex rel. v. Heberlein*, 36 S. D. 60, 153 N. W. 897.

Form of ballot, held directory: mere irregularities will not vitiate the election. \**Attorney General v. Belleville*, 81 N. J. L. 200, 80 Atl. 116.

<sup>87</sup> *Commonwealth v. South Bethlehem*, 248 Pa. 581, 94 Atl. 244.

<sup>88</sup> Managers of the election certify the result to the court, and thereupon the court by order directs the clerk to issue a specified certificate of incorporation, etc.

§ 149. Void incorporation.<sup>89</sup>

§ 150. Doctrine of implication.<sup>90</sup>

§ 151. De facto corporations.

The law recognizes that, although a public or municipal corporation may not be a de jure corporation, it may exist de facto; <sup>91</sup> e. g., where there is a defect in the

*Constitution v. Chestnut Hill Cemetery Assn.*, 136 Ga. 778, 71 S. E. 1037.

After favorable election, certificate is to be filed with the secretary of state and thereupon the corporation becomes a public corporation. *Attorney-General v. Belleville*, 81 N. J. L. 200, 80 Atl. 116; *Campbell v. Wainwright*, 50 N. J. L. 555, 14 Atl. 603.

Requirement that the court within a specified time after receipt of the favorable election returns shall make a record of the fact, etc. As such fact may be established otherwise a record is not indispensable. Such record would only be prima facie evidence of fact of incorporation. *State ex rel. v. Montgomery* (Tex. Civ. App. 1911), 140 S. W. 385.

The entry is but record evidence of the fact of incorporation. Other proof is admissible, if record should never be made. *Ex parte Drake*, 55 Tex. Cr. Repts. 233, 116 S. W. 49.

After election adopting charter, it is submitted to governor for approval. *Mitchell v. Carter*, 31 Okl. 592, 122 Pac. 691.

In Louisiana, the governor is authorized to proclaim the incorporation of villages, after he is satisfied that the essential requirements of the law have been obeyed.

*State ex rel. v. Ehret*, 135 La. 643, 65 So. 871.

<sup>89</sup> Law validating incorporation of municipalities on account of failure to observe statutory requirements, held inapplicable to a void incorporation due to the existence of a prior corporation. *Pence v. Cobb* (Tex. Civ. App. 1913), 155 S. W. 608.

<sup>90</sup> Prior to the suit questioning the validity of the existence of the municipal corporation, the town had officers for a period of over two years, exercising the duties of their offices; and for more than twelve years the town had exercised the powers of a municipal corporation. By virtue of the statute the town "was conclusively presumed to be a regularly organized and legally incorporated municipality." The statute provided that if not questioned within one year from the date of organization the municipality would be deemed to be legally incorporated. *Lavelle v. Julesburg*, 49 Colo. 290, 112 Pac. 774, 777, following *People v. Curley*, 5 Colo. 412.

<sup>91</sup> A court order incorporating a drainage district, not void on its face, creates a de facto corporation. *Wilson v. Kings Lake Drainage & Levee Dist.*, 176 Mo. App. 470, 158 S. W. 931.

De facto corporation as to an-

proceedings of incorporation.<sup>92</sup> But where there cannot lawfully be a corporation *de jure* there cannot be one *de facto*. Municipal governments are creatures of the law, and the warrant of their creation, apart from creation by virtue of constitutional provisions, must be found in a valid legislative act, or they can have no legal existence. There can be no *de facto* corporation where there is no law authorizing a *de jure* corporation.<sup>93</sup> Accordingly, it was held in Kentucky that a taxing district, although possessing many of the attributes of a municipal corporation, cannot be converted or created into a municipal corporation by legislative act assigning it to the class of municipal corporations agreeable to its population, under a constitutional provision empowering the legislature to assign cities and towns to the class to which they respectively belong. The legislative act being unconstitutional, it was affirmed, did not constitute

nexed territory. *Coe v. Los Angeles* (Cal. App. 1919), 183 Pac. 822.

<sup>92</sup> Where all provisions of law were duly observed, except as to time of the filing of the petition for incorporation. *Vanover v. Dunlap*, 172 Ky. 679, 189 S. W. 915.

Where an irrigation district had made a bona fide effort to incorporate as a public corporation, although its incorporation was not legal, its acts as such corporation are valid as a *de facto* corporation until questioned by *quo warranto*. *Fisher v. Pioneer Construction Co.*, 62 Colo. 538, 163 Pac. 851, 885.

Incorporation defective because it contained territory in excess of the statutory limit which proceeds in good faith, elects officers and incurs debts is a corporation *de facto*. *Wilson v. Carter* (Tex. Civ. App. 1913), 161 S. W. 411.

<sup>93</sup> *Winneconne v. Winneconne*,

111 Wis. 10, 12, 86 N. W. 589, attempted to organize under an unconstitutional law. *Re North Milwaukee*, 93 Wis. 616, 67 N. W. 1033, followed.

"The authorities are a unit in deciding that there can be no *de facto* corporation where there is no possibility of the existence of a corporation. In such cases, corporate existence claimed can always be questioned in any proceeding." *Wilmington v. Addicks*, 8 Del. Ch. 310, 43 Atl. 297.

An unconstitutional law gives no warrant for the creation of a *de facto* corporation. *Levee District. Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562.

**Contra.** A *de facto* municipal corporation may exist under an unconstitutional charter. *Albuquerque Water Supply Co.*, 24 New Mex. 368, 174 Pac. 217, 223 to 229.

the taxing district even a municipal corporation de facto.<sup>94</sup>

The decisions support the proposition that where the existence of a corporation of a given kind is forbidden by law, or where there is no valid constitutional law authorizing the creation of such a corporation, it cannot exist even as a corporation de facto. The proposition is also supported that an organization assuming to be a corporation de jure but for sufficient reasons not so in fact may be a corporation de facto when it is of such a character that it could, under existing laws, have full and complete corporate being and power.<sup>95</sup> Thus when

<sup>94</sup> Hurley v. Motz, 151 Ky. 451, 152 S. W. 248; Albershart v. Donaldson, 149 Ky. 510, 149 S. W. 873.

Corporation created under an unconstitutional statute, held not a de facto corporation. Clark v. American, etc., Coal Co., 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217. Same ruling in Marion Trust Co. v. Bennett, 169 Ind. 346, 82 N. E. 782, 124 Am. St. Rep. 228; Eaton v. Walker, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102; Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

Court will inquire into the existence of a de facto railroad corporation when it seeks to exercise the right of eminent domain. Sisters of Charity v. Morris R. Co., 84 N. J. L. 310, 86 Atl. 954, 50 L. R. A. (N. S.) 236. The same doctrine was applied in Etowah Light & Power Co. v. Yancey (C. C. A.), 197 Fed. 845.

<sup>95</sup> Thus although there was a general law for the incorporation of railroad companies, the company in question was incorporated under a special charter which was at-

tacked on the ground that the act of incorporation was unconstitutional, but it was ruled that notwithstanding the company was a de facto corporation. Georgia S. & F. R. Co. v. Mercantile Trust & D. Co., 94 Ga. 306, 316, 32 L. R. A. 208, 47 Am. St. Rep. 153, quoting with approval from Snider's Sons Co. v. Troy, 91 Ala. 224; Stout v. Zulick, 48 N. J. L. 599, 7 Atl. 362, and Hudson v. Green Hill Seminary, 113 Ill. 618.

Act of de facto officers of a municipality created under unconstitutional law, held valid. Wendt v. Berry, 154 Ky. 586, 596, 157 S. W. 1115, 45 L. R. A. (N. S.) 1101; Ann. Cas. 1915C, 493; Albuquerque v. Water Supply Co. (24 N. Mex. 368), 174 Pac. 217; Young v. Colorado (Tex. Civ. App. 1915), 174 S. W. 986, 994, holding city cannot raise question in an action against it for debt that it was not incorporated constitutionally.

"An unconstitutional and void law may yet be color of authority to support as against any body but the state, a public or private corporation de facto, where such cor-

a municipal body has assumed, under color of authority, and exercised for a considerable period of time, with the consent of the state, the powers of a public corporation of the kind recognized by the organic law, neither the corporation nor any private person can, in private litigation, question the legality of its existence.<sup>96</sup>

### § 152. State recognition.

The receipt by the state of a portion of saloon license fees paid by a *de facto* village corporation will not preclude the state from questioning the validity of the incorporation.<sup>97</sup>

poration is of a kind which is recognized by law and its existence is consistent with the paramount law, and the general system of law in the state." *Ashley v. Presque Co. Board*, 60 Fed. 55, 8 C. C. A. 455.

<sup>96</sup> *Fisher v. Pioneer Construction Co.*, 62 Colo. 538, 163 Pac. 851, 855; *Constitution v. Chestnut Hill Cemetery Ass'n*, 136 Ga. 778, 71 S. E. 1037.

In an action for debt against a city which was organized pursuant to law and which was proceeding to conduct the local civil government, the city cannot set up the defense that it was not legally incorporated because the statute was unconstitutional and therefore had no existence as a city, etc. *Young v. Colorado* (Tex. Civ. App. 1915), 174 S. W. 986, 994.

Where commissioners have been elected under law and have taken office, private citizens cannot question the existence of the municipal commission form of government created by state statute on the ground the statute violates the constitution, because in any event a *de facto* municipal government

exists. *Devlin v. Wilson*, 88 N. J. L. 180, 96 Atl. 42, following *Atty. Gen. v. Dover*, 62 N. J. L. 138, 140, 41 Atl. 98; *Lang v. Bayonne*, 74 N. J. L. 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 122 Am. St. Rep. 391, 12 Ann. Cas. 961.

<sup>97</sup> Incorporated as village in 1905, suit 1915. After the incorporation many saloon licenses were issued and of the saloon license fees paid into the village treasury \$90 were paid to the state as and for the two per cent inebriate asylum tax. Held, state not estopped to question legality of incorporation. "The case of *State v. Harris*, 102 Minn. 340, 113 N. W. 887, 13 L. R. A. (N. S.) 533, 12 Ann. Cas. 260, is not in point. The license tax was paid to the state auditor and he was wholly without authority to refuse it, nor could he determine the legality of the organization proceedings had the facts been presented to him. No recognition of the village has been made by legislation, or by taxation by the state authorities, and no evidence was presented showing that with knowledge of

### § 153. Acceptance of charter.

In the creation of municipal corporations, unless restricted by organic law, as the power of the legislature is plenary, consent or acceptance by the inhabitants of the area incorporated of the charter is not a condition precedent, nor is it essential, to validate the incorporation.<sup>98</sup>

### § 154. Proof of corporate existence—judicial notice—pleading.

Courts will take judicial notice of the class of municipal corporations in the state and therefore of their population and powers, and of the laws applicable thereto.<sup>99</sup> Statutes usually so provide.<sup>1</sup> In the absence of proof that a city is operating under a special charter, it has been held that it will be presumed that it is subject to the general statutes relating to cities and towns.<sup>2</sup>

the facts either executive or legislative department of the state has dealt with the village as such. No other facts are shown to justify an application of the rule applied in the Harris case." State ex rel. v. Island Lake, 130 Minn. 100, 102, 153 N. W. 257.

<sup>98</sup> People v. California Fish Co., 166 Cal. 576, 606, 607, 138 Pac. 79, citing Section 153, vol. 1 ante; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, 989, L. R. A. 1917A, 1244, 1250; Section 121 ante.

"Prior to the adoption of the present constitution, the legislature was not only competent to create a corporation for municipal purposes by a special law, but could compel a community of persons to accept a charter so created." Thomason v. Ashworth, 73 Cal. 73, 14 Pac. 615.

"In the absence of constitu-

tional restriction it would be competent for the legislature to create such public corporations (irrigation districts) even against the will of the inhabitants." Re Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 27 Am. St. Rep. 106, 14 L. R. A. 755.

<sup>99</sup> Ferry v. Sawyer, 198 Mo. App. 30, 33, 195 S. W. 574; Shackelford v. Jefferson City, 167 Mo. App. 59, 62, 150 S. W. 1123; State v. Doe, 150 Mo. App. 185, 129 S. W. 713.

<sup>1</sup> Catlin v. Tilton, 281 Ill. 601, 117 N. E. 999.

In a specific case an appellate court declined to take judicial notice that a ward of a city of a particular class constitutes an election district. McGowan v. Gardner, 186 Mo. App. 484, 491, 172 S. W. 408.

<sup>2</sup> Haskell v. Webb (Tex. Civ. App.), 140 S. W. 127.

### § 157. Same—location of corporation.

Court will notice judicially what and where the boundaries of a particular county are as defined by public law;<sup>3</sup> of the location of municipal corporations of the state, e. g., that a named city or town is in a particular county;<sup>4</sup> that a specified town is in a certain county which adjoins a certain county, which joins a certain city;<sup>5</sup> of the distance of a named town from another named town on a particular railroad line;<sup>6</sup> of the location of all cities which are commercial centers and of the states where situate.<sup>7</sup>

Courts may know judicially the geographical positions of places of well known public notoriety, whether within or without the state,<sup>8</sup> since these are facts of common knowledge, what the public generally knows.<sup>9</sup>

<sup>3</sup> *Keaton v. Hamilton*, 264 Mo. 564, 175 S. W. 967; *Commonwealth v. Desmond*, 103 Mass. 445; *Smitha v. Flournoy*, 47 Ala. 345.

Judicial notice taken of county boundaries in fact claimed by the state. *State v. Dunwell*, 3 R. I. 127.

<sup>4</sup> *McCormick v. Higgins*, 190 Ill. App. 241; *State v. Pennington*, 124 Mo. 388, 391, 392, 27 S. W. 1106; *Comfort v. Ballingal*, 134 Mo. 281, 291, 35 S. W. 609; *Johnson v. Hutchinson*, 81 Mo. App. 299, 304.

<sup>5</sup> *Sikes v. St. Louis & S. F. R. Co.*, 190 Mo. App. 181, 186, 176 S. W. 255.

<sup>6</sup> *United States v. Atlantic Coast Line Co.*, 224 Fed. (U. S. D. C.) 160.

<sup>7</sup> *Parks v. Jacob Dold Packing Co.*, 6 N. Y. Misc. 570, 574.

Thus judicial notice will be taken that by the word "Louisville" in a form sheet, exhibited in evidence, reciting that a horse race was to take place at Louisville, was meant Louisville in the State of Ken-

tucky. *State v. Cummings*, 248 Mo. 509, 521, 154 S. W. 725, disapproving *Ober v. Pratte*, 1 Mo. 8, and *Riggin v. Collier*, 6 Mo. 568, 572.

<sup>8</sup> *United States v. La Vengeance*, 3 Dall. (U. S.) 297; *Peyroux v. Howard*, 7 Pet. (U. S.) 324.

<sup>9</sup> "Courts will not pretend to be more ignorant than the rest of mankind." *Munn v. Burch*, 25 Ill. 35; *State v. Missouri Pacific Ry. Co.*, 212 Mo. 658, 676, 111 S. W. 500; *Kansas City v. Scarritt*, 169 Mo. 471, 485, 69 S. W. 283; *Brotherhood of Locomotive Firemen and Enginemen v. St. Louis & S. F. R. Co.*, 2 Mo. P. S. C. 560, 563, P. U. R. 1915F, 489, 491; *Phelps v. St. Louis, I. M. & S. R. Co.*, 2 Mo. P. S. C. 560.

New York courts will "take judicial notice of the location, size and commercial importance of the city of Buffalo." *People ex rel. Simon v. Bradley*, 207 N. Y. 592, 609, 101 N. E. 766, 155 App. Div. 882.



Ordinarily courts will not take judicial notice of unincorporated towns, villages, hamlets or pueblos,<sup>10</sup> nor of their boundaries. When a town is duly incorporated it is embraced within definite metes and bounds, and without respect to an aggregation of inhabited houses, but when it is unincorporated its area is defined to be and to embrace the aggregation of inhabitants and the collection of occupied dwellings and other buildings constituting such town.<sup>11</sup>

### § 158. Questioning creation—quo warranto—certiorari.

With a few exceptions,<sup>12</sup> late decisions uniformly support the well settled general rule that a private person cannot either directly or indirectly question the existence of a municipal corporation,<sup>13</sup> but that this may be done

<sup>10</sup> *Hihn Co. v. Santa Cruz*, 170 Cal. 436, 150 Pac. 62.

<sup>11</sup> "The situs of an unincorporated town will not be controlled by the platted area of such town without reference to the collection of inhabited houses, which together with the area appurtenant to the same in the ordinary signification of the meaning of the word constitute the town." *Ralls v. Parrish*, 105 Tex. 253, 147 S. W. 564, 566.

<sup>12</sup> Taxing district attempted to be created into a municipal corporation which act was void and as a municipal corporation it never had any existence, may be questioned by citizens of the district. *Albershart v. Donaldson*, 149 Ky. 510, 149 S. W. 873.

Citizens and taxpayers of the district have the right more than two years after the city was organized to bring a suit attacking its creation as being in violation of the constitution. "A municipal government that never had any

legal existence cannot be continued when its authority is questioned merely because the persons who raise the issue did not act as soon as they might have acted." *Hurley v. Motz*, 151 Ky. 451, 454, 152 S. W. 248, distinguishing *Ferguson v. Landram*, 5 Bush (Ky.) 230, and *Hoertz v. Jefferson Southern Pond D. Co.*, 119 Ky. 824.

Collateral attack allowed in proceeding to enjoin collection of taxes, with dissenting opinion, stating that the decision "overturns the settled policy of this court with respect to the relation between a de facto corporation and a taxpayer and gives the latter the right to attack collaterally the legal status of the former in order to defeat the collection of taxes—a right that has never been recognized by this court before." *Wal-drop v. Kansas City Southern Ry. Co.*, 131 Ark. 453, 199 S. W. 369, 373.

<sup>13</sup> *Prankard v. Cooley*, 132 N. Y. S. 289, 147 App. Div. 145, 147, hold-

only in an action in the name of the state by some officer or person authorized to represent the interest of the public,<sup>14</sup> as the attorney-general,<sup>15</sup> or the county or prose-

ing injunction to restrain officers from acting will not lie, distinguished from action by taxpayers.

"A private person cannot use the name of the state in an action to annul the charter of an incorporated city on the ground that it contravenes the constitution. Such an action must be brought in the name of the state by some officer authorized to represent the interest of the public as the attorney general." *State ex rel. v. Butterfield*, 92 Ohio 428, 111 N. E. 279.

After electors adopt a freeholder's charter, and it is approved by the governor, mandamus by officer elected under new charter against old officer to recover property of officers, will not lie, to test validity of charter. *Mitchell v. Carter*, 31 Okl. 592, 122 Pac. 691; *Adler v. Jenkins*, 33 Okl. 117, 124 Pac. 29.

Where the municipal government consists of commissioners chosen at an election pursuant to statute such commissioners constitute, if not the de jure, certainly the de facto governing body of the city, "and the attorney-general alone, acting as the representative of the state, can call into question the legality of its existence. A private relator will not be permitted to do so, either by a direct proceeding, or in the guise of an attack upon the legality of the title of an incumbent of a municipal office." *Morris v. Fagan*, 85 N. J. L. 617, 90 Atl. 267; *State ex rel. v. Vickers*, 51 N. J. L. 180, 17 Atl. 153, 14 Am. St. Rep. 675; *Dugan v. Farrier*,

47 N. J. L. 383, 1 Atl. 751; *Bownes v. Meehan*, 45 N. J. L. 189; *Mitchell v. Tolan*, 33 N. J. L. 195.

In denying the defense in an action on bonds issued by a precinct that the precinct was illegally constituted, it was said: "When a municipal body or a political subdivision of the state or county has, or its officers have, assumed, under color of authority and have exercised for a considerable period of time, with the consent of the state and its citizens, powers of a kind recognized by the organic law, neither the corporation, subdivision, nor any private party can, in private litigation, question the legality of the existence of the corporation or subdivision." *Clapp v. Otoe County*, 104 Fed. 473, 45 C. C. A. 579.

<sup>14</sup> Legal existence can be questioned only by state. *Wright v. Kelley*, 4 Idaho 624, 43 Pac. 565; *Hammar v. Narverud*, 142 Minn. 199, 171 N. W. 770, citing section 158, vol. 1, ante; *Albuquerque v. Water Supply Co.*, 24 N. Mex. 368, 174 Pac. 217, 223 to 229.

<sup>15</sup> *Attorney-General v. Belleville*, 81 N. J. L. 200, 80 Atl. 116.

In New Jersey, the attorney general alone may question the legality of a commission form, e. g., that the vote prescribed to adopt was not obtained. A private person cannot by quo warranto question the title to office of one in possession thereof. *Morris v. Fagan*, 85 N. J. L. 617, 90 Atl. 267.

Law required the petition to be signed by not less than a ma-

cuting attorney,<sup>16</sup> or in event of refusal (by statute) by any person upon leave of court;<sup>17</sup> and moreover, by direct action only, as distinguished from collateral attack,<sup>18</sup> e. g., as a defense to a proceeding to levy and collect taxes,<sup>19</sup> or an action to enjoin the collection of

majority of the resident qualified electors, but made no provision for the determination of such fact by the county commissioners who were empowered to proceed, etc. Action may at any time be shown to have been without jurisdiction by establishing the fact the petition was not signed as law required. *State ex rel. v. Porter*, 203 N. Mex. 508, 169 Pac. 471, distinguishing *State v. Holcomb*, 95 Kan. 660, 149 Pac. 684.

<sup>16</sup> *Mandamus* to compel a prosecuting attorney to bring quo warranto to determine the validity of incorporation. Plain case must be made out. *State ex rel. v. Blackwell*, 91 Wash. 81, 157 Pac. 223.

<sup>17</sup> Attorney General or county attorney may institute quo warranto, or in case of refusal, any person, upon leave of court under Arizona Statute. *Faulkner v. Gila County Supervisors*, 17 Ariz. 139, 145, 149 Pac. 382, quoting with approval part of section 158, vol. 1 ante.

<sup>18</sup> *Vanover v. Dunlap*, 172 Ky. 679, 189 S. W. 915; *Barnes v. Missouri Valley Const. Co.*, 257 Mo. 175, 165 S. W. 723, 726; *Campbell Lumber Co. v. Levee District*, 186 Mo. App. 371, 378, 172 S. W. 64; *Catlin v. Tilton*, 281 Ill. 601, 117 N. E. 999; *Barnes v. Kirksville*, 266 Mo. 270, 180 S. W. 545; *Burkhard v. Pennsylvania Water Co.*, 234 Pa. 41, 82 Atl. 1120.

<sup>19</sup> *State ex rel. v. Center Creek Mining Co.*, 262 Mo. 490, 503-505,

176 S. W. 356; *Wright v. Phelps*, 89 Vt. 107, 110, 94 Atl. 294; *Readsboro v. Woodford*, 76 Vt. 376, 57 Atl. 962.

Collateral attack, as by way of defense, to action on special tax bill, or to collect drainage taxes, denied. *State ex rel. v. Coles*, 167 Mo. App. 692, 698, 151 S. W. 195; *State ex rel. v. Wilson*, 216 Mo. 215, 277, 115 S. W. 549; *Buschling v. Ackley*, 270 Mo. 157, 192 S. W. 727; *State ex rel. v. Blair*, 245 Mo. 680, 687, 151 S. W. 148.

A drainage district is a public corporation and the legality of its organization, and the sufficiency of its corporate existence cannot be inquired into in a collateral action. *Campbell Lumber Co. v. Levee District*, 186 Mo. App. 371, 377, 378, 174 S. W. 64.

A school district is a public corporation and its existence cannot be questioned in a suit for school taxes. "Confusion amounting to chaos would result if the life of every municipal or other public corporation in the state could be assailed in this manner." *Burnham v. Rogers*, 167 Mo. 17, 21, 66 S. W. 970.

"The existence of a corporation organized under a law afterwards declared unconstitutional cannot in a proceeding by it for the collection of a tax be questioned by the taxpayer. For reasons of public policy it will be permitted to do those things for which it was

municipal taxes,<sup>20</sup> or to enjoin the enforcement of an ordinance,<sup>21</sup> or as a defense in a suit for personal injuries that the place of the injury was not within the municipal area.<sup>22</sup>

Quo warranto or information in the nature of quo warranto is the usual remedy available,<sup>23</sup> and not cer-

created until the creator by proper direct proceedings challenges its right to exist." *Bartlett v. MacDonald*, 17 Ariz. 194, 149 Pac. 752, citing sections 158, 159, vol. 1, ante.

Does not invalidate incorporation by inclusion improperly of small bit of land. Of the small portion improperly included "the quantity is so negligible compared with the whole area of the proposed port that its inclusion could have had no appreciable effect on the election, and does not infringe upon the taxable property in any other port. It may well be that if the owners of property so included should refuse to pay taxes to the port, or themselves raise the question as to their improper inclusion within the port, the court would afford them relief, not by declaring the whole proceedings void, but by declaring such property to be outside the limits beyond which the port could be legitimately extended." *State v. Johnson*, 76 Oregon 85, 147 Pac. 926.

<sup>20</sup> Incorporation cannot be questioned collaterally, e. g., attacking constitutionality of law under which the municipal corporation was created in suit to enjoin collection of municipal taxes. *Morgan's La. & T. R. R. & S. S. Co. v. White*, 136 La. 1074, 68 So. 130.

<sup>21</sup> To enjoin enforcement of an ordinance. *Constitution v. Chest-*

*nut Hill Cemetery Assn.*, 136 Ga. 778, 71 S. E. 1037.

To validate bonds issued or to be issued. *Merrell v. St. Petersburg* (Fla. 1917), 76 So. 699.

Action to enforce an ordinance. *People v. Ellis*, 253 Ill. 369, 375, 97 N. E. 697.

<sup>22</sup> In a suit for personal injuries due to collapse of a bridge, where the defense was that the bridge was not in the city limits, and the proof showed that upon extending the municipal limits, not adjacent to the bridge, the bridge by ordinance, altering and defining the city area, had been placed beyond the corporate boundaries, it was ruled that a collateral attack upon the corporate organization could not be made by urging invalidity of the ordinance. *Horner v. Atchison*, 93 Kan. 557, 560, 144 Pac. 1010.

<sup>23</sup> *State ex inf. v. Gooch*, 175 Mo. App. 270, 157 S. W. 846; *School Dist. v. Yates*, 161 Mo. App. 107, 117, 142 S. W. 791; *School Dist. v. Pace*, 113 Mo. App. 134, 87 S. W. 580.

Where a city as to annexed territory is a de facto corporation any attack upon its exercise of the franchise must be by quo warranto at the instance of the state. *Coe v. Los Angeles* (Cal. App. 1919), 183 Pac. 822.

"The suit should take such form

tiorari.<sup>24</sup> As the granting of relief in a quo warranto proceedings is largely discretionary with the court, this remedy may be denied on the ground of delay in instituting the action,<sup>25</sup> the conclusiveness of the findings of the incorporating court or tribunal,<sup>26</sup> or the existence of other remedies.<sup>27</sup> It has been held that fraud is a subject of

as to allow the incorporation to appear in court and defend." *Faulkner v. Gila County Supervisors*, 17 Ariz. 139, 149 Pac. 382; *Velasquez v. Zimmerman*, 30 Colo. 355, 70 Pac. 419.

<sup>24</sup> After a township becomes incorporated and files the certificate required by law with the Secretary of State, its existence as a municipal corporation can be questioned by quo warranto by the state, certiorari will not lie. *Attorney General v. Belleville*, 81 N. J. L. 200, 80 Atl. 116.

Certiorari will not lie to review action of board of supervisors in incorporating a town, because such action is not judicial but an exercise of legislative or ministerial functions. *Faulkner v. Gila County Supervisors*, 17 Ariz. 139, 149 Pac. 382.

<sup>25</sup> Action denied brought three years after holding election favorable to incorporation based on claim that order to hold election was issued on wrong statute. *Commonwealth v. Pottsville*, 246 Pa. 468, 92 Atl. 639.

The granting relief is largely within the court's discretion and after a lapse of considerable time a judgment of ouster may be refused on the ground of laches, to avoid the impairment of public and private interests. *State ex rel. v. Carterville* (Mo. App. 1916), 183 S. W. 1093, approving *State ex rel.*

*v. Mansfield*, 99 Mo. App. 146, 72 S. W. 471.

<sup>26</sup> Conclusiveness of court's finding in incorporation proceedings. *State v. Port of Bay City*, 64 Or. 139, 129 Pac. 496.

Finding of court conclusive, and contest by quo warranto denied. *State v. Bay City*, 65 Or. 124, 131 Pac. 1038.

Quo warranto denied, as court held that act of the incorporating court was judicial. *State ex rel. v. Phil. Campbell*, 177 Ala. 204, 58 So. 905, distinguishing *West End v. State*, 138 Ala. 295, 36 So. 423, decided under a different statute, and approving *People v. Loyaltan*, 147 Cal. 774, 82 Pac. 620; *People v. Los Angeles*, 133 Cal. 338, 65 Pac. 749, holding that in quo warranto the finding as to the number of inhabitants residing within the area incorporated by the board was conclusive.

In Louisiana where by statute the governor is authorized to proclaim the incorporation of a village after he is satisfied that all essential steps prescribed by law have been observed, it is held that after such proclamation is issued an action to set aside the incorporation at the relation of the attorney general will not lie. *State ex rel. v. Ehret*, 135 La. 643, 65 So. 871.

<sup>27</sup> Quo warranto denied; remedy, objections at hearing to incorpo-

inquiry in quo warranto to test the validity of a judgment of a county court incorporating a town.<sup>28</sup>

### § 161. Constitutional provisions—title to act—illustrations.<sup>29</sup>

The constitutional provision requires only that the title shall be a "fair forecast of the contents of the bill,"

rate and review or appeal. *State v. Bay City*, 65 Or. 124, 131 Pac. 1038.

<sup>28</sup>*State ex inf. v. Woods*, 233 Mo. 357, 380, where it is said that it is elementary that fraud is cognizable in law as in equity. It is a head of jurisdiction in both.

<sup>29</sup>*Jackson v. Harrington*, 160 Mich. 550, 125 N. W. 383.

Title to act, amending charter. *Weil v. Newbern*, 126 Tenn. 223, 148 S. W. 680.

Title relating to the classification of township, and authorizing contracts for repairs of highways and bridges. *McKeown's Petition*, 237 Pa. 626, 632, 85 Atl. 1085.

Act relating to incorporation and organization of cities and towns and to legalize attempted incorporations now exercising corporate functions. *Grants Pass v. Rogue River Public Service Corporation*, 87 Or. 637, 171 Pac. 400.

Act providing that cities with commission form of government might abandon such form and return to the aldermanic form, held constitutional. *State ex rel. v. Lanier*, 197 Ala. 1, 72 So. 320.

"An act relating to the government of all cities of Kansas, and to establish an optional form of government," providing for the city manager plan, held constitutional. *State ex rel. v. Bentley*, 98 Kan. 442, 164 Pac. 290.

Title held constitutional of act providing for the removal of unfaithful public officers, including municipal, and to prescribe procedure therefor. *State ex rel. v. Crump*, 134 Tenn. 121, 183 S. W. 505, L. R. A. 1916D, 951.

"An act for a general law for the incorporation of cities and towns," held insufficient to embrace sections limiting or repealing existing powers of such corporations. *Albany v. McGoldrick*, 79 Or. 462, 155 Pac. 717.

"An act to amend Section — of the Revised Political Code of 1903, of — relating to organization of cities," held constitutional since the subject of the act is single as only one subject is expressed in the title. *State ex rel. v. Nisbet*, 38 S. D. 347, 161 N. W. 351; *Wilson v. Western Security Co.*, 31 S. D. 175, 140 N. W. 263; *State ex rel. v. Erickson*, 125 Minn. 238, 146 N. W. 364.

"An act to amend, consolidate and supersede the several acts incorporating the city of C— to create a new character and municipal government for said corporation; to declare the rights and powers of the same; to provide for the creation of a board of commissioners for administering all the affairs of said city," providing for the initiative and referendum, the recall and for other purposes, held

and its subject so as not to mislead the law-makers or the people; and where the subsequent provisions of the bill are within the radius of that subject, it does not violate the constitution.<sup>30</sup> This organic provision is mandatory though it is generally liberally construed.<sup>31</sup> "So long as the generality of the title is not made a cover for legislation incongruous in itself, and which by no fair intendment can be considered as having necessary or proper connection between its parts, there is no cause of objection."<sup>32</sup> An act to create a commission form of government and provide for a board of public safety, first to be elected by the state senate, and thereafter to be appointed by the governor, and giving control of police, fire, etc., to the governor, was held to contain a constitutional title.<sup>33</sup>

constitutional (1) as sufficiently describing the law to be amended. *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487, following *Shippen Lumber Co. v. Elliott*, 134 Ga. 699, 68 S. E. 509; *Bagwell v. Lawrenceville*, 94 Ga. 654, 21 S. E. 903; and (2) as not containing a plurality of subject-matters, approving *Americus v. Perry*, 114 Ga. 871, 40 S. E. 1004, 57 L. R. A. 230.

Act to reclassify municipal corporations. *Loudon v. Brown*, 183 Ky. 63, 208 S. W. 317.

<sup>30</sup> *Barnes v. Kirksville*, 266 Mo. 270, 280, 180 S. W. 545.

<sup>31</sup> "It will not annul an act where all its provisions radiate from the 'single subject' of the bill and are within its just scope and reasonable application, and where that subject is pointed out by a title which is not designed to mislead either the members of the legislature or the people, but which contains a fair forecast of the contents of the bill." *State ex rel. v. Revelle*, 257 Mo. 529, 538.

The principle to be extracted from judicial rulings is that the constitutional provision "must be wisely and liberally interpreted and should not be applied so as to thwart the efficiency of intelligent and salutary legislation, and that it does not forbid the inclusion in one bill under one general title of any subject naturally connected or reasonably related to each other." *Burge v. Wabash Railroad Co.*, 244 Mo. 76, 91, 148 S. W. 925.

<sup>32</sup> *State ex rel v. Thompson*, 193 Ala. 561, 69 So. 461; *State v. Street*, 117 Ala. 203, 23 So. 807.

<sup>33</sup> Court was unable "to find any authoritative, hard and fast definition of the commission form of government that descends into the details of the plan, nor do we believe that any such definition exists in the popular mind. The general idea suggested by the phrase is that of a concentration of all the powers of municipal government in a few persons; of government by a committee chosen

from the community at large rather than by a mayor and the old familiar board of aldermen." The plan thus far developed usually, though not universally, incorporates popular elections, the referendum and the recall. It has hardly reached the stage of a scientific formula. In its brief history it has undergone many modifications; numerous varieties of it are now extant in

the several states. *State ex rel. v. Thompson*, 193 Ala. 561, 69 So. 461, 463, 464.

Title to amend an act creating a commission form of government and to regulate the selection of commissioners, and prescribing qualifications, held constitutional. *State ex rel. v. Teasley*, 194 Ala. 574, 69 So. 723.



## CHAPTER 4.

### LEGISLATIVE CONTROL OF MUNICIPAL CORPORATIONS.

- I. IN GENERAL—RESTRICTIONS CONSIDERED AND ILLUSTRATED.
- II. CONSTITUTIONAL PROVISIONS.
- III. SAME—CLASSIFICATION OF MUNICIPAL CORPORATIONS—GENERAL AND SPECIAL OR LOCAL LAWS.
- IV. LEGISLATIVE CONTROL OF CORPORATE PROPERTY.
- V. LEGISLATIVE CONTROL OF STREETS AND HIGHWAYS.
- Va. LEGISLATIVE CONTROL OF PUBLIC UTILITIES OWNED AND OPERATED BY THE MUNICIPALITY OR OPERATED WITHIN ITS LIMITS.
- VI. LEGISLATIVE CONTROL OF FUNDS AND REVENUES.
- VII. POWER OF LEGISLATURE TO IMPOSE OBLIGATIONS, CONTROL MUNICIPAL CONTRACTS, PUBLIC IMPROVEMENTS AND LIABILITIES.
- VIII. CONCLUSIONS RELATING TO LEGISLATIVE CONTROL.

#### I. IN GENERAL—RESTRICTIONS CONSIDERED AND ILLUSTRATED.

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| § 164. Importance of the subject.   | § 174. Same—illustrations of state and municipal affairs.        |
| § 165. General legal doctrine stated.   | § 174a. Same—California.   |
| § 166. Legislature may exercise compulsory authority in state affairs.                            | § 176. Right of municipal corporations to select local officers. |
| § 167. Limitations of legislative control.  | § 177. State may regulate the selection of municipal officers.   |
| § 170. The limit of legislative control is to be determined, if at all, by the adjudicated cases. | § 178. Municipal officers distinguished from state officers.     |
| § 171. Local self-government is recognized, and sought to be perpetuated by state constitutions.  | § 180. Same—illustrative cases of state and municipal officers.  |
| § 173. Municipal affairs defined and distinguished from state functions.                          | § 181. Police recognized as agency of state.                     |
|   | § 182. Legislative control of officers and their functions.      |

## II. CONSTITUTIONAL PROVISIONS.

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| <p>§ 185. General constitutional limitations of legislative power relating to municipal corporations.</p> <p>§ 187. Special and local laws relating to municipal corporations where a general law can be made applicable.</p> <p>§ 188. The legislature shall not regulate the business or internal affairs of municipal corporations.</p> | <p>§ 189. Same—by commissions.</p> <p>§ 191. Uniform system of local government is usually required.</p> <p>§ 194. Legislative control of cities with constitutional or freeholders' charters.</p> <p>§ 195. Special constitutional provisions forbidding legislative control.</p> |
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## III. SAME—CLASSIFICATION OF MUNICIPAL CORPORATIONS, GENERAL AND SPECIAL OR LOCAL LAWS.

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| <p>§ 197. Classification of municipal corporations authorized and described.</p> <p>§ 198. "General law," "public law," "special law," and "local law" defined and distinguished.</p> <p>§ 199. Same—difference between governmental and private power as to classification.</p> <p>§ 200. Tests to distinguish general or special from local law.</p> <p>§ 204. Population as a basis of classification.</p> | <p>§ 205. Act applicable to one city or object only.</p> <p>§ 211. The legislature cannot divide or add classes.</p> <p>§ 212. Special or local laws to take effect on event of future contingency or within limited time.</p> <p>§ 216. Indirect or legislative amendment of municipal charters.</p> |
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## IV. LEGISLATIVE CONTROL OF CORPORATE PROPERTY.

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| <p>§ 219. Legislative control of corporate property—general consideration.</p> <p>§ 220. Same—waterworks.</p> | <p>§ 221. Same—parks.</p> <p>§ 222. Same—wharves.</p> <p>§ 225. Same—transfer to another class of public officers.</p> |
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## V. LEGISLATIVE CONTROL OF STREETS AND HIGHWAYS.

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| <p>§ 227. Legislative control of streets is paramount.</p> | <p>§ 228. Power delegated to municipal corporations to regulate streets.</p> |
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VI. LEGISLATIVE CONTROL OF PUBLIC UTILITIES OWNED AND OPERATED BY THE MUNICIPALITY OR OPERATED WITHIN ITS LIMITS.

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| § 229a. General consideration.  | § 229d. Same—withdrawing municipal jurisdictions. |
| § 229b. Municipal jurisdiction—constitutional or freeholders charter. | § 229e. Same—charter power.                       |
| § 229c. Same—rates.   | § 229f. Same—railroad and street crossings.       |

VI. LEGISLATIVE CONTROL OF FUNDS AND REVENUES.

- § 230. Legislative control of funds and revenues.

VII. POWER OF LEGISLATURE TO IMPOSE OBLIGATIONS, CONTROL MUNICIPAL CONTRACTS, PUBLIC IMPROVEMENTS AND LIABILITIES.

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| § 234. Power of legislature to impose obligations. | § 239. Legislative control of municipal contracts.       |
| § 237. Compelling payment of claims.               | § 240. Same subject—hours of labor—validating contracts. |

VIII. CONCLUSIONS RELATING TO LEGISLATIVE CONTROL.

- § 246. Right of local self-government exists without express constitutional provision.

I. IN GENERAL—RESTRICTIONS CONSIDERED AND ILLUSTRATED.

§ 164. Importance of subject.<sup>1</sup>

§ 165. General legal doctrine stated.

Municipal corporations of all kinds, including incorporated cities, towns, villages, hamlets and boroughs, are

<sup>1</sup> Entire Section 164, vol. 1, ante, quoted with approval in concurring opinion of Monroe, J., in *State v. Lafayette Fire Ins. Co.* (Sup. Ct. La.), 63 So. 630, 635, 636.

“The question of local self-gov-

ernment is one which has engaged the attention of courts since the formation of the Union.” *State ex rel. v. Burr*, 65 Wash. 524, 526, 118 Pac. 639.

regarded (as variously expressed) as creatures, agencies, instrumentalities, departments, auxiliaries, or political subordinate sub-divisions of the state in government,<sup>2</sup>

"There is great wisdom in permitting those of the same community to manage their own affairs. They grow in sympathy and mutual kindness. They observe the precept 'Bear ye one another's burdens,' and they naturally resent interference from outsiders. It is sure to do more harm than good." *State ex rel. v. Frazier* (N. D. 1918), 167 N. W. 510, 520, Robinson, J., dissenting.

<sup>2</sup>*Baltimore v. Keeley Institute*, 81 Md. 106, 31 Atl. 437, 27 L. R. A. 646; *Revell v. Annapolis*, 81 Md. 10, 31 Atl. 695; *Frederick v. Groshon*, 30 Md. 436, 96 Am. Dec. 591; *Barnes v. District of Columbia*, 91 U. S. 540, 23 L. ed. 440; *Churchill v. Grants Pass*, 70 Or. 283, 141 Pac. 164; *Patterson v. Ashland* (Or. 1920), 187 Pac. 593.

**Municipal corporation as a state agency.** "The municipality of the City of New York is a state agency." *Goldschmidt v. Hardy*, 163 N. Y. S. 305, 306, 177 App. Div. 547.

"A municipal corporation is a state agency and creature over which that legislature has general power save as limited by the provisions of the state constitution." *People ex rel. v. Prendergast*, 128 N. Y. S. 1082, 1085.

"That municipal corporations are simply agencies of the state for conducting the affairs of government, and as such, are subject to the control of the legislature, is fully borne out by the Maryland decisions." *Sweeten v. State*, 122

Md. 634, 90 Atl. 180, 183; *Elkan v. State*, 122 Md. 642, 90 Atl. 183.

Political sub-divisions of the state, created for governmental convenience, deriving all their powers from the state. They are mere creatures of the state, exercising delegated governmental functions which the legislature may revoke at will. 'Public policy forbids the irrevocable dedication of governmental powers. The power to create implies the power to destroy.' *Booten v. Pinson*, 77 W. Va. 41, 89 S. E. 985, 989, L. R. A. 1917A, 1244.

"Instrumentalities of the government acting under delegated powers, subject to the control of the legislature, except so far as may be otherwise expressly provided by the Constitution." *Burch v. Hardwicke*, 30 Gratt. (Va.) 24, 32 Am. Rep. 640.

"Cities are mere instrumentalities of the state for the convenient administration of government, and their powers may be qualified, enlarged or withdrawn at the pleasure of the legislature." *Reno v. Stoddard*, 40 Nev. 537, 167 Pac. 317.

"Legislative powers are not measured by grants, but by limitations. The legislature represents the sovereign power of the people, and is therefore limited in the exercise of supreme authority only by the inhibition of the constitution. The legislature has a large discretion with reference to its control of municipalities. Munic-

and in their creation whatever form is given them, unless restrained by the constitution, in conferring powers and imposing obligations upon them the legislature may within its discretion designate limitations thereon;<sup>3</sup>

ipal corporations are but instruments of government created for political purposes and subject to legislative control." *Bayville v. Boothbay Harbor*, 110 Me. 46, 85 Atl. 300, 302.

"The legislature of Alabama has the same power that belongs to the British Parliament except so far as its powers are abridged by the Constitution of the United States and the constitution of the state"; it "possesses all the legislative power which under the federal constitution resides in its state, except where that power has been expressly or impliedly taken from it by the constitution of the state"; "the constitution of Alabama is a limitation upon the exercise of power." *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31; *Miller v. Marx*, 55 Ala. 322.

"The British Parliament has supreme uncontrolled power, and may change the constitution of England, and repeal even Magna Charta which is itself only an act of Parliament." *Re Whitcomb*, 120 Mass. 118, 21 Am. Rep. 502.

"There seems to be no distinction in the power of the state over municipalities whether counties, towns or cities." *State ex rel. v. Burr*, 65 Wash. 524, 527, 118 Pac. 639.

"While in respect to cities and towns it is said that the power of the legislature to control them in the exercise of their municipal powers is somewhat more restricted

than in the case of counties, yet both are but instrumentalities of the state for the administration of local government, and their authority as such may be enlarged, abridged or withdrawn entirely at the will or pleasure of the legislature." *Murphy v. Webb & Co.*, 156 N. C. 402, 72 S. E. 460.

"Municipalities in the exercise of their governmental functions are subject to almost unlimited legislative control, except when restricted by constitutional provision." *State v. Prevo*, 178 N. C. 740, 101 S. E. 370.

**3 Restricting municipal powers.**  
"The general rule is that the state in conferring powers and imposing obligations on municipalities may limit the powers and the obligations as it sees fit." *Board Co. v. State*, 219 Fed. 827, 135 C. C. A. 497, affirming 213 Fed. 51; *MacMullen v. Middletown*, 187 N. Y. 37, 79 N. E. 863, 11 L. R. A. (N. S.) 391; *Goddard v. Lincoln*, 69 Neb. 594, 96 N. W. 273.

It is "a legislative function to determine what powers shall be granted; what withheld, and what restriction shall be imposed in the exercise of the powers granted." *Denver v. Hallett*, 34 Colo. 393, 83 Pac. 1066.

A "town is a creature of the legislature, and the legislature may (within the limits of the constitution) define the powers of a town." *Paris Mountain Water Co. v.*

from time to time enlarge or restrict their powers and obligations, or their boundaries, by charter amendment directly or indirectly, within the limitations of the organic law; <sup>4</sup> abolish them and withdraw their powers in

Greenville (S. C. 1918), 96 S. E. 545, 549.

"A city of this state is a creature of statute. Independently of legislation it cannot exist—cannot exercise any function whatever. In the absence of constitutional limitation, the legislature would be free to prescribe for a city such powers and privileges as it deemed best." *McClintock v. Great Falls*, 53 Mont. 221, 163 Pac. 99.

By constitution the legislature has plenary control over the taxing powers of cities and towns. *State ex rel. v. Wetz* (N. D. 1918), 168 N. W. 835.

<sup>4</sup>By virtue of the constitution the legislature may create and abolish, alter or amend and prescribe their powers at any time. *Tampa v. Prince*, 63 Fla. 387, 58 So. 542.

Constitution giving voters of city powers of initiative and referendum as to all local, special and municipal legislation, and also power to amend their charters, subject to the constitution and criminal laws of the state, held state may control them by general laws, and amend their charter. "The delegation of rights as to local self-government does not alter the relation of municipal corporations to the state, but leaves them as they were before, mere agencies of the state, which may by general law control all its municipalities even to the extent of amending their charters." *Churchill v.*

*Grants Pass*, 70 Or. 283, 141 Pac. 164.

Power in the legislature to abolish a municipal charter, includes the lesser power to amend it. "Political powers conferred by the legislature upon a municipality cannot become a vested right as against its creator. \* \* \* Municipal grants of franchises are always subject to the control of the legislative power for the purpose of amendment, modification or entire revocation." *Smiddy v. Memphis* (Tenn. 1918), 203 S. W. 512.

Municipal corporations are subject to legislative control. "Their charters may be changed, modified, enlarged, restrained or abolished to suit the exigencies of the case." *People ex rel. v. Crawley*, 274 Ill. 139, 145, 113 N. E. 119. However, by the constitution of Illinois it shall not be done by local or special law. *Ibid.*

"The legislature has ample power to alter or amend the charter powers of municipal corporations in this state by general law, and to repeal by general or local law the charter of any such corporation." *State ex rel. v. Thompson*, 193 Ala. 561, 69 So. 461; *Ensley v. Simpson*, 166 Ala. 366, 377, 52 So. 61.

Extending limits is exclusively with the legislature, if the constitution does not forbid, with or without a referendum. *McGraw v. Merryman* (Md. 1918), 104 Atl.

whole or in part and resume them in whole or in part,<sup>5</sup>

540; McCormick v. St. Louis I. M. and S. Ry. Co., 20 Mo. App. 640.

5 Arizona. Blount v. MacDonald, 18 Ariz. 1, 155 Pac. 736.

Illinois. People v. Grover, 258 Ill. 124, 101 N. E. 216; Chicago v. Walden W. Shaw Livery Co., 258 Ill. 409, 101 N. E. 588.

Louisiana. New Orleans Board v. New Orleans Ry. & L. Co. (La. 1919), 82 So. 280.

New Jersey. Flemington Borough Board of Education v. State Board of Education, 81 N. J. L. 211, 81 Atl. 163.

New York. People ex rel. Simon v. Bradley, 207 N. Y. 592, 101 N. E. 766, 155 App. Div. 882; Cleveland v. Watertown, 222 N. Y. 159, 118 N. E. 500.

Rhode Island. Re Opinion of the Justices, 34 R. I. 191, 83 Atl. 3, 8.

South Dakota. State ex rel. v. Summers, 33 S. D. 40, 144 N. W. 730.

Washington. Meehan v. Shields, 57 Wash. 617, 107 Pac. 835; State ex rel. v. Burr, 65 Wash. 524, 118 Pac. 639.

West Virginia. Hornbrook v. Elm Grove, 40 W. Va. 543, 549, 21 S. E. 853, 28 L. R. A. 416.

United States. Pawhuska v. Pawhuska Oil & Gas Co. (U. S. 1919), 39 Sup. Ct. 526.

"Except as limited by the federal or state constitution the legislative authority over municipal corporations is supreme or plenary." Londoner v. Denver, 52 Colo. 15, 119 Pac. 156, 159; Kraus v. Philadelphia (Pa. 1919), 109 Atl. 226.

A majority of the states hold that "municipal corporations have

only such powers as are conferred upon them by the legislature, and that the legislature in the absence of constitutional inhibition, controls such municipalities absolutely." State ex rel. v. Burr, 65 Wash. 524, 118 Pac. 639.

"Manifestly the legislature has supreme authority over these agents of it, save only as it is restrained by the state constitution." Windfall City School Town v. Somerville, 181 Ind. 463, 104 N. E. 859, 862 State ex rel. v. Ogan, 159 Ind. 119, 63 N. E. 227.

"Municipal corporations are purely the creatures of the legislative will and subject to its control, and may be created or annulled at the pleasure of the body creating them and their property turned over to some other municipal corporation and their powers and duties conferred upon such body." Rylands v. Clark, 278 Ill. 39, 44, 45, 115 N. E. 829, 831.

"The legislature is vested with the whole power of the state in the absence of some constitutional limitation; and may establish any public or municipal corporation it deems necessary or expedient in the public interest. It may also confer on such corporations such public power and authority as it may deem wise and best. Moreover, it may not only create such public corporations, but it may also change, divide and abolish them at pleasure." Harris v. Wm. R. Compton Bond and Mortgage Co., 244 Mo. 664, 688, 689, 149 S. W. 603.

Municipalities are subject always to control of the legislature

either directly or indirectly by the creation of a commission, for example, to regulate railroad crossings of highways, the separation of the grades thereof, and make an equitable division of costs for such work;<sup>6</sup> may change the form of local government, e. g., from the aldermanic to the commission form,<sup>7</sup> allow the inhabitants to make and adopt their own charters, under constitutional provisions,<sup>8</sup> or permit the local community to choose in the manner specified a form of government suitable to its needs, prescribed by the legislature;<sup>9</sup> or the legislature may create an entirely new corporation.<sup>10</sup>

of the state. "The state regardless of any declaration in its constitution to the contrary, may at any time revise, amend or even repeal any or all of the charters within it, subject, of course, to vested rights and limitations otherwise provided by our fundamental law." *Straw v. Harris*, 54 Or. 424, 437, 103 Pac. 777. "I think this is a correct statement of the law as it is and it must finally prevail. It can in no way be avoided so long as our present system of federal and state governments obtains and so long as these underlying forces operate which always tend to lodge ultimate sovereign power with him best able to exercise it and whose position makes him the final arbiter of his own claim to such power. This is the state, not the city. There can be no absolute autonomy in American cities no matter how limited the subject." *State ex rel. v. Thompson*, 149 Wis. 488, 505, 139 N. W. 20.

"To say that municipalities have inherent political rights and at the same time admit that all their powers are delegated by the legislature is a contradiction of terms. The principle seems both illogical

and paradoxical." *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, 990 L. R. A. 1917A, 1244.

Subject to unlimited legislative control except as restricted by the constitution. *State v. Prevo* (N. C. 1919), 101 S. C. 370.

<sup>6</sup>Section 229 F, post.

Legislative power is absolute unless restrained by the constitution. State may resume power delegated to localities and assume direct control of matters relating to local government, by a commission, e. g., railroad crossings. *People ex rel. v. Bradley*, 207 N. Y. 592, 610, 611, 101 N. E. 766, affirming 139 N. Y. S. 1139, 15 App. Div. 882.

All municipal powers are subject to addition or diminution by the state. *Walker v. Richmond*, 175 Ky. 26, 189 S. W. 1122.

<sup>7</sup>*Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244.

<sup>8</sup>Section 127, ante; section 127, vol. 1, ante.

<sup>9</sup>Section 124a, ante.

<sup>10</sup>"Every power which is possessed by a municipality is a power which is delegated to it by the state, and every power which it possesses can, unless there is some



**§ 166. Legislature may exercise compulsory authority in state affairs.**

By appropriate legislation, within the limitations of the constitution, the legislature may compel the levy and collection of taxes for police purposes, the maintenance of highways and bridges, and sometimes for street and other public improvements, e. g., drains and levees, and for the support of the state officers of the local community,<sup>11</sup> and it has been held the state may establish a bureau of inspection to secure a uniform system of accounts, with power to examine all accounts and records of county and city officers at the expense of the local community. As the purpose of the law in the opinion of the court was to secure a uniform system and supervision throughout the state it became a matter of public concern as distinguished from local, and therefore, did not impose a tax on counties, cities and towns within the meaning of the constitutional inhibition.<sup>12</sup>

The state may impose on local officers specific duties relating to the enforcement of state laws under penalty,

constitutional inhibition to the contrary, be taken from it by the state." \* \* \* "The legislature has plenary power to alter, amend, withdraw or repeal the charter of a city or town, and to create an entirely new one." *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31, 34.

The state power of regulation of its municipalities is very broad. "The power of creation and control may be exercised in many ways and may give rise to actual or asserted inequalities. It has been exercised to enlarge or contract the boundaries of municipal corporations; invest them with special powers, divide and apportion their property. *Kies v. Lowrey*, 199 U. S. 233; *Braxton County Court v. West Virginia*, 208 U. S.

192. It would be difficult to define the restrictions upon this power of control and keep it efficient." *Stewart v. Kansas City*, 239 U. S. 14, 16.

<sup>11</sup>Section 181, vol. 1, ante.

**Levy taxes to pay police.** *State ex rel. v. Mason*, 153 Mo. 23, 54 S. W. 524; *State ex rel. v. Jost*, 265 Mo. 51, 175 S. W. 591.

**Pension firemen.** *State ex rel. v. Love*, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. (N. S.) 607.

<sup>12</sup>"In matters which do not concern the inhabitants of the municipality alone, the municipalities are acting as agencies for the government, and they can be compelled to carry out the schemes of the state looking towards good government." *State ex rel. v. Burr*, 65 Wash. 524, 118 Pac. 639.

e. g., police powers directed against liquor, gambling and prostitution; officers of the city are in this relation state officers under legislative control.<sup>13</sup>

Usually local improvements not state or governmental in character cannot be compelled by the state.<sup>14</sup>

### § 167. Limitations of legislative control.<sup>15</sup>

<sup>13</sup> State ex rel. v. Linn., 49 Okl. 526, 153 Pac. 826.

"The efficient administration of the law, adopted for the welfare of the state at large, renders it imperative that the state, as guardian for the people as a whole, should possess and exercise this control." State v. Robinson, 101 Minn. 277, 112 N. W. 269, 208 L. R. A. (N. S.) 1127.

<sup>14</sup> In North Carolina it has been held, that the legislature cannot dictate to its municipal corporations the manner in which it may acquire its waterworks. "The principle of local self-government," remarked the court, "requires that this is of necessity and must be left to the sound discretion of the local authorities." Asbury v. Albemarle, 162 N. C. 247, 78 So. 146, 149, 150, following Helena Consolidated Water Co. v. Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.

<sup>15</sup> Entire § 167, vol. 1, ante, quoted with approval in concurring opinion of Monroe, J., in State v. Lafayette Fire Ins. Co. (Sup. Ct. La.), 63 So. 630, 636.

"Because of its antonomous character—its enjoyment of a large measure of organic independence—the municipal corporation is relieved to a considerable extent from officious, meddlesome legislation which seeks to inter-

fere with its private or proprietary functions." Hersey v. Neilson, 47 Mont. 132, 131 Pac. 30.

"The extent of legislative control over municipalities extends so far as is essential to accomplish a result in which the state has an interest in its governmental capacity, but this power does not extend to depriving the municipality of discretion in the means or methods of its accomplishment, or the expense it will incur for that purpose, where such minute or specific control in detail or means is not essential to the accomplishment of the result, and which interest in the result constitutes the basis of legislative right of control." Rule applied to water system. Kenton Water Co. v. Covington, 156 Ky. 569, 161 S. W. 988.

"In matters purely governmental in character it is conceded that the municipality is under the absolute control of legislative power; but as to its private or proprietary functions the legislature is under the same constitutional restraints that are placed upon it in respect to private corporations," e. g., local water system. Asbury v. Albemarle, 162 N. C. 247, 78 S. E. 146, 150; Helena Consolidated Water Co. v. Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412.

Contra. "A few states have

§ 170. The limit of legislative control is to be determined, if at all, by the adjudicated cases.<sup>16</sup>

§ 171. Local self-government is recognized and sought to be perpetuated by state constitutions.<sup>17</sup>

This appears in a variety of ways, and laws relating to municipal corporations are generally construed in

adopted the view that the municipalities have an inherent right to local self-government not dependent upon legislative authority, and that this right was brought to this country from the rule adopted in the Anglo-Saxon countries from which our law descended. This view is entertained by the courts of Indiana, Kentucky and Michigan, while practically all the rest of the jurisdictions hold that the municipal corporations have only such power as is conferred upon them by the legislature, and that the legislature in the absence of constitutional inhibition controls such municipalities absolutely." *State ex rel. v. Burr*, 65 Wash. 524, 526, 118 Pac. 639.

<sup>16</sup> Second paragraph of § 170, vol. 1, ante, quoted with approval in concurring opinion of Monroe, J., in *State v. Lafayette Fire Ins. Co.* (Sup. Ct. La.), 63 So. 630, 636.

<sup>17</sup> *Asbury v. Albemarle*, 162 N. C. 247, 78 S. E. 146, 150; *State ex rel. v. Edwards*, 42 Mont. 135, 111 Pac. 734, 32 L. R. A. (N. S.) 1078, Ann. Cas. 1912A, 1063; *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; *People ex rel. v. Houghton*, 182 N. Y. 301, 305; *People v. Lynch*, 51 Cal. 34, 21 Am. Rep. 677; *State ex rel. v. Standford*, 24 Utah 148, 156-159, 66 Pac. 1061; *State ex rel. v. Lane*,

181 Ala. 646, 62 So. 31; *Simpson v. Gage*, 195 Mich. 581, 161 N. W. 898, 900; *Grobbe v. Detroit Water Comrs.*, 181 Mich. 364, 370, 149 N. W. 675; *Branch v. Albee*, 71 Or. 188, 142 Pac. 598, 600.

"The theory of local self-government for municipal corporations is firmly established in this state." *Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30, 32.

"Our people have the inestimable right of local self-government." *State v. Bass*, 171 N. C. 780, 87 N. E. 972, 975.

Entire § 171, vol. 1, ante, quoted with approval in concurring opinion of Monroe, J., in *State v. Lafayette Fire Ins. Co.* (Sup. Ct. La.), 63 So. 630, 636.

**Local self-government recognized.** "There were cities and villages in Michigan before it became a state—municipalities for local government of common law origin and with common law rights, self-governing communities in matters of strictly local concern." *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953.

Ample and exclusive power is conferred upon the people of every municipal corporation to regulate their own affairs respecting municipal legislation and procedure. Respecting these matters the legislature cannot pass laws to repeal or amend municipal charters "even

harmony with the idea of local self-government,<sup>18</sup> however, this doctrine has not found a very firm lodgment in some states.<sup>19</sup>

by implication." *Portland v. Nottingham*, 58 Or. 1, 113 Pac. 28.

"The whole trend of modern thought and recent legislation is towards vesting in each municipality the management of its local affairs." *Cleveland v. Watertown*, 222 N. Y. 159, 177, 118 N. E. 500.

"Towns and cities are recognized in the constitution, and doubtless they have rights which cannot be infringed," holding that the establishment of police authorities by the state does not infringe the rights of local self-government. *Newport v. Horton*, 22 R. I. 196, 204, 47 Atl. 314, 50 L. R. A. 330.

To sustain the right of local self-government it is not necessary to claim that it is inherent. "It suffices to ascertain that the people in adopting the constitution intended to secure it to the inhabitants of the territory incorporated." What is the nature and extent of the power they actually vested in the local community, as such? The inquiry is, "the intent of the people in adopting the constitution, the general nature and basic elements of a municipal corporation as contemplated by them, and the nature, elements and powers of a legislature, according to their knowledge and conception of it at the time. These terms in the constitution mean now what they meant then, and their meaning at that time was, for the purposes of interpretation and construction, just what the masses un-

derstood it to be. The contemporaneous common knowledge of the subject derived from tradition, history, literature, science and law is the universally recognized test." *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, 993, L. R. A. 1917A, 1244, dissenting opinion Poffenbarger, J.

<sup>18</sup> State statutes relating to municipal corporations should be construed in harmony with local self-government, and the right of the state to exercise the general police powers. *Public Service Com. v. Helena*, 52 Mont. 527, 159 Pac. 24.

<sup>19</sup> *Smiddy v. Memphis* (Tenn. 1918), 203 S. W. 512, *State ex rel. v. Burr*, 65 Wash. 524, 118 Pac. 639.

The constitution of Rhode Island "contains no reference to local government, and nowhere attempts to restrain the power of the legislature over the various cities and towns," *Re Opinion of the Justices*, 34 R. I. 191, 83 Atl. 3, 8, distinguishing the constitution of Rhode Island in this respect from the Constitution of Michigan (as considered in 28 Mich. 228, 15 Am. Rep. 202) and that of Montana (as considered in 42 Mont. 135, 111 Pac. 734, 32 L. R. A. (N. S.) 1078). Compare *Newport v. Horton*, 22 R. I. 196, 204, 47 Atl. 314, 50 L. R. A. 330.

If the right is not guaranteed by the constitution, no inherent right of local self-government exists. *Booten v. Pinson*, 77 W. Va.

The right to select local officers to administer local affairs, without interference on the part of the central authority, is the doctrine guaranteed by a majority of the state constitutions.<sup>20</sup> The judicial decisions of New York for a series of years, in construing and applying in the practical administration of government in its several phases the constitutional provision of that state conferring upon local communities the right to select local officers to administer local affairs, demonstrate clearly that this fundamental conception has been undeviatingly adhered to, and the centralization of such power has been effectually prevented.<sup>21</sup>

412, 89 S. E. 985, 991, L. R. A. 1917A, 1244.

"There is not in the constitution of this state any express guaranty of local self-government for municipal corporations. There is nothing in the constitution from which this right can be legitimately inferred. How far a community shall be allowed to control its own affairs is left to the judgment and discretion of the general assembly." *Americus v. Perry*, 114 Ga. 871, 878, 40 S. E. 1004, 57 L. R. A. 230.

"The fact that municipal corporations, prior to the adoption of the constitution of 1877, were given the right and were exercising the right to control their own affairs through officers chosen by them would not prevent the general assembly from taking away this right; there being nothing in the constitution which imperatively requires it to be construed as guaranteeing that this right of local self-government for municipal corporation shall exist absolutely in all cases. The right of the people of a municipal corporation to control its affairs is not an inher-

ent right residing in the people, but a right dependent for its existence upon legislative will, and how far they shall be given this right is a matter addressed solely to legislative discretion." *Americus v. Perry*, 114 Ga. 871, 878, 40 S. E. 1004, 57 L. R. A. 230.

"Our constitution is a limitation of power, and such rights and powers of local government as are not conferred upon counties by the language of the constitution remain with the state and may be exercised by the legislature as the law-making power of the state. Rules and regulations for local county government and control, except as otherwise provided in the constitution, are as much within the control of the state as those matters which are more general and state wide." *Meehan v. Shields*, 57 Wash. 617, 107 Pac. 835.

<sup>20</sup> Section 176, Vol. 1, ante, and Section 176, post.

<sup>21</sup> "The plain intention of the section of the constitution in question was to preserve to localities the control of the official functions of which they were then pos-

The numerous organic provisions, expressed in many ways, restricting legislative authority in enacting, amending and repealing municipal charters, afford ample evidence of the recognition of the home rule principle,

sessed." *People v. Raymond*, 37 N. Y. 428, 431, per Grover, J.

"The obvious purpose was to secure to the people of the cities, town or villages of the state the right to have their local offices administered by officers selected by themselves, and in no case was it to be done by officers appointed by the direct action of the legislature." The legislature cannot "appoint a city, town or village officer in any case where the office existed at the adoption of the constitution." *People ex rel. v. McKinney*, 52 N. Y. 374, 378, per Andrews, J.

"As to offices known and in existence at the time of the adoption of the constitution this provision is absolute in its prohibition of an appointment by the central government or its authority, or by any body other than the electors, or some local authority designed by law." *People ex rel. v. Alberton*, 55 N. Y. 50, 56, per Allen, J.

"The purpose and object of section 2 of article 10 of the constitution, as is very obvious, was to secure to the several recognized civil and political divisions of the state the right of local self-government." *People ex rel. v. Alberton*, 55 N. Y. 50, 56, per Allen, J.

The constitution "was designed to protect and give force and effect to the principle of local self-government which has always been regarded as fundamental in our political institutions, and to be the

very essence of every republican form of government. The local government, even in the smallest division of the state, is the preparatory school in which the citizen acquires the rudiments of self-government, and hence these institutions have been justly regarded as the nurseries of civil liberty." *Rathbone v. Wirth*, 150 N. Y. 459, 487, per O'Brien, J.

"These and other commands of the different constitutions when read in the light of prior and contemporaneous history show that the object of the people in enacting them was to prevent centralization of power in the state and to continue to preserve and expand local self-government." *People ex rel. v. Tax Commissioners*, 174 N. Y. 417, 434 per Vann, J., reviewing New York cases.

"From this brief review of the parts of the constitution which relates to the instrumentalities and methods of local government, it is apparent that it constitutes the counties, cities, towns and villages of the state the civil divisions for political purposes and indispensable to the continuation of the government organized by it." *People ex rel. v. Becker*, 203 N. Y. 201, 208, per Collin, J.

"These cases (New York) establish that each of the political subdivisions specified in section 2 of article 10 of the constitution are within the protection of the home rule principle embodied in that

and a desire to have it applied in the administration of governmental affairs.<sup>22</sup>

constitutional provision and that the local rights of self-government exercised by each of those political subdivisions prior to the adoption of the present constitution are accorded immunity from legislative invasion." *People ex rel. v. Pelham*, 215 N. Y. 374, 384, 109 N. E. 513, per Seabury, J.

"This review makes plain the gradual but consistent growth of the home rule principle and discloses the manner in which it has been extended by the people of this state, so as to place the village of the state securely within its protection. Thus under our present constitution, the village while the smallest political subdivision established by the constitution, is as secure in its right to the enjoyment of local self-government as are the cities and towns of the state." *People ex rel. v. Pelham*, 215 N. Y. 374, 386, 109 N. E. 513, per Seabury, J., reversing 152 N. Y. S. 428, 166 App. Div. 779.

"While the assessment of property for the purposes of taxation in this state has always been a function of local officers, their duties may be modified or regulated by the legislature so long as there is no substantial impairment of the right of home rule or no intent or attempt to evade the constitutional provisions." *Re Watson's Estate* (N. Y. 1919), 123 N. E. 758, 764, holding constitutional a law imposing an additional tax on certain investments.

<sup>22</sup> "The legislative assembly shall not enact, amend or repeal

any charter or act of incorporation for any municipality, city or town." Const. Or., art. 11, § 2. By force of the constitutional provision, the electors of municipalities are subject to the constitution and criminal laws and such general laws as may be enacted by the legislature affecting the relation of the state to the locality, made the legislative assembly to enact the laws germane to the general purpose, and object of the municipality, free from legislative molestation, which autonomy in a sense constitutes a sovereign city, subject at all times, however, to the supreme will of the state, reserved by the people of the state through the initiative and referendum provisions of the fundamental law." *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 597.

"While there may be certain statements contained in *Straw v. Harris*, 54 Or. 424, 103 Pac. 777, indicative of a different conclusion than here announced they fall in the category of gratuitous observations unnecessary of consideration in a decision of the points involved. Nor do we think that the decisions of this court subsequent, yet following the wake of *Straw v. Harris*, conflict with the doctrine of this case." *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 597, 598.

"The said amendments to the constitution made radical changes as to the powers of cities and towns, and the obvious intention of the framers of said amendments and of the people who adopted

Other constitutional provisions with the same end in view appear in the sections which follow.

**§ 173. Municipal affairs defined and distinguished from state functions.<sup>23</sup>**

Freeholders', constitutional, home rule, optional, and statutory charters usually confer power on the local corporation to pass all laws and ordinances relating to its strictly municipal concerns, or for the government of its purely municipal affairs, subject to, not inconsistent, or in harmony, with, the constitution and laws, or general laws, or criminal laws (as in Oregon) of the state. Thus to create the embryonic *imperium en imperio*, it becomes necessary to distinguish local administration from state administration and separate state from municipal functions. To effect this, constitutions, statutes and charters employ, without definition, various expressions believed to have a definite and well-settled meaning. For example, those designed to apply to local government alone are termed "municipal affairs," "municipal concerns," "municipal purposes," "local mu-

them was to grant to cities and towns autonomy or local self-government. The intention was to free cities and towns from the control of the legislative assembly, and to confer upon them full power to legislate for themselves as to all local municipal matters." *Branch v. Albee*, 71 Or. 188, 142 Pac. 598, 600, 601.

<sup>23</sup> *Simpson v. Gage*, 195 Mich. 581, 161 N. W. 898, citing § 173, vol. 1, ante.

Last two paragraphs of § 173, vol. 1, ante, quoted with approval in concurring opinion of Monroe, J., in *State v. Lafayette Fire Ins. Co.* (Sup. Ct. La.), 63 So. 630, 636.

"The difficulty of locating the boundary between legislation that

is purely municipal, and therefore within the administrative competency of cities and legislation that lies without its fold, and consequently within the embrace of legislative enactment, is more apparent than real. Though it must be admitted that the differentiation is not and never can be totally free from perplexity, however, this unfortunate situation is the handmaid of many legal rules that either entwine or shade into each other without regards to the layman's dislike for complexity in legal jurisprudence." *Kalich v. Knapp*, 73 Or. 558, 145 Pac. 22, 26, quoting with approval part of § 173, vol. 1, ante.



nicipal functions," "internal municipal regulations," "internal business affairs of the municipality," etc., and those relating exclusively to state government as "state affairs," "general concerns," "sovereign state matters," etc.

These terms are rather suggestive than precise, and invite inquiry rather than answer it. It could not well be otherwise. The functions of the municipal corporations have never been completely differentiated from those of the state. Repeated attempts by constitution framers, legislators and courts have been successful in part only, and sometimes have introduced additional doubt and confusion. The development of local administration, what affairs municipal corporations have been accustomed to administer, in view of the policy of the particular state extending over a series of years in granting powers to incorporated cities and towns and the construction of such grants should always be borne in mind when it is sought to ascertain the meaning of any of the above terms. Obviously, the contemporaneous common knowledge of the subject derived from tradition, history, literature and the growth of the law on the specific subject should be invoked as a reasonable test.<sup>24</sup> It is familiar that the public policy of the state is found in the constitution and statutes, and when they are silent, in its judicial decisions and the constant practice of its public officers acquiesced in by the people. These several sources indicate to what extent the principles of the common law obtain.<sup>25</sup>

<sup>24</sup> See the dissenting opinion of Poffenbarger, J., in *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, 993 L. R. A. 1917A, 1244.

In England, an early distinction was drawn between mere town affairs and the affairs of the crown or general government. The town people acquired the right to regulate by their own town laws their internal affairs and by officers se-

lected by themselves to collect the town's taxes and to administer justice under their valid town ordinances. *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31.

<sup>25</sup> "The public policy of a state is expressed in its constitution and statutes, and in its common law as found in the opinions of its courts of last resort. If the constitution or statute speaks upon a subject

To say that when power is conferred upon a municipal corporation for municipal purposes the power becomes a municipal affair,<sup>26</sup> is not a definition of municipal affairs. Rather such effort to define is as indefinite as the expression itself. Almost as unsatisfactory is the statement that municipal affairs are those relating to the municipality in its organic and corporate capacity and included within its governmental or corporate powers. Likewise is the assertion that the powers of a municipal corporation as such are limited to legislation on purely municipal matters.<sup>27</sup> As much light is given, in briefer phrase, by merely asserting they are the internal business affairs of a municipality.<sup>28</sup> The decisions are replete with these and similar expressions purporting to be accurate definitions and certain guides to every mariner who enters upon this unsafe and somewhat treacherous sea.

**§ 174. Same—illustrations of state and municipal affairs.**

Public matters concerning the people of the state at large in common with the inhabitants of the given community are clearly within the sovereign jurisdiction of the state to be administered by it in whole or in part, exclusively, or concurrently with the local corporation; the separation of administration depending on the policy of the particular state as such policy has developed as disclosed in its laws, organic, statutory and decision. Agreeably to the current of late judicial judgments such matters embrace the administration of justice,<sup>29</sup> includ-

the public policy of the state is necessarily fixed to that extent. And when the legislature speaks and the courts construe that declaration we certainly have a conclusive rule as to the public policy of the state upon the subject thus treated." *Cathright v. Byllesby & Co.*, 154 Ky. 106, 157 S. W. 45, 55.

<sup>26</sup> *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780.

<sup>27</sup> *Morrow v. Kansas City*, 186 Mo. 675, 85 S. W. 572.

<sup>28</sup> *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923.

<sup>29</sup> State court's jurisdiction, of course, is a matter of state concern. *Detroit Civil Service Com.*

ing the creation of rights between citizens inter sese;<sup>30</sup> sovereign police power, comprising the maintenance of a police force to preserve the public peace in all parts of state;<sup>31</sup> protection against fire, according to a few decisions;<sup>32</sup> although regarded as a local function in many states;<sup>33</sup> the preservation of the public health, as sanitary regulations;<sup>34</sup> conservation of the forests and the

v. Engel, 187 Mich. 83, 87, 88, 150 N. W. 1081.

Trial and punishment of offenses defined by state laws. Robertson v. Police Court, 148 Cal. 131, 82 Pac. 838.

Juror fees in criminal actions. Jackson v. Baehr, 138 Cal. 266, 71 Pac. 167.

Collection of fines for misdemeanors punishable under state laws. Maryville v. Yuba County, 1 Cal. App. 628, 82 Pac. 975.

The question whether an execution can be issued upon an unrevived judgment after a lapse of years is clearly a matter pertaining to the general laws and policy of the state and not one relating strictly to the municipal affairs or coming under municipal control, and this is true although the judgment grew out of an assessment of the costs of a public park against lots within a prescribed benefit district by virtue of the municipal charter which prescribed the method of enforcing such assessments. The judgment in such case of a court of general jurisdiction is controlled by the statute and an execution based on it must follow the course of other executions issued out of such court. Kansas City v. Field, 270 Mo. 500, 514, 194 S. W. 39.

Traffic in intoxicating liquor, gambling and prostitution, state

concern. State ex rel. v. Linn, 49 Okl. 526, 153 Pac. 826.

State and municipal offender § 876, post.

<sup>30</sup> Sander v. St. Louis T. Co., 189 Mo. 107, 88 S. W. 648.

<sup>31</sup> State ex rel. v. Kansas City Public Commissioners, 184 Mo. 109, 88 S. W. 27; State ex rel. v. Mason, 153 Mo. 23, 54 S. W. 524.

<sup>32</sup> "The act of adopting, installing, equipping, and operating a fire department is a governmental function and not a municipal one." Smiddy v. Memphis (Tenn. 1918), 203 S. W. 512.

Firemen in cities of metropolitan class, salaries of which may be fixed by state. Adams v. Omaha, 101 Neb. 690, 164 N. W. 714.

Pensioning firemen, state matter. State ex rel. v. Love, 89 Neb. 149, 131 N. W. 196.

<sup>33</sup> "A city's fire department is distinctly a matter which concerns the inhabitants of the city as an organized community apart from the people of the state at large, peculiarly within the field of municipal activity and local self-government." Simpson v. Gage, 195 Mich. 581, 161 N. W. 898, citing § 173, vol. 1, ante.

<sup>34</sup> Public health, held part of state police power and inherent in the state. Detroit Civil Service Comrs. v. Engel, 184 Mich. 269, 150 N. W. 1081; Davock v. Moore,

flora and fauna within the state,<sup>35</sup> drainage regulations,<sup>36</sup> local sanitation including the manufacture and inspection of food;<sup>37</sup> general state education, embracing the public school system;<sup>38</sup> care of neglected and delinquent children;<sup>39</sup> all matters relating to general elections and election contests;<sup>40</sup> uniform system of keeping public

105 Mich. 120, 63 N. W. 424, 28 L. R. A. 783.

Creating metropolitan park districts, to provide open spaces for exercise and recreation, relates to "improvement and conservation of the public health, by encouraging out of door exercise and recreation in parks and parkways" within densely populated areas, held valid exercise of state's police power. *Re Opinion of the Justices*, 34 R. I. 191, 83 Atl. 3.

<sup>35</sup> Laws authorizing forest preserve districts that may embrace an entire county and providing that in such case the county officers shall be officers of the forest preserve district, held not to be a regulation of county affairs, since the conservation of the forests and the flora and fauna lying within their boundaries has not been deemed one of their proper powers, duties or functions. When such officers discharge their duties as officers of the forest preserve district, they are not acting as officers of the county. *Perkins v. Cook County Comrs.*, 271 Ill. 449, 459, 460, 111 N. E. 580.

<sup>36</sup> Drainage of New Orleans, held state police power. *State v. Flower*, 49 La. Ann. 1199, 1204, 22 So. 623.

<sup>37</sup> State board of health given power over local sanitation and giving it jurisdiction over the

manufacture and inspection of food within state, held valid as state matter. Constitution of Louisiana gives legislature power to create state and local boards of health. *Board of Health v. Susslin*, 132 La. 569, 61 So. 661, 663.

<sup>38</sup> *Hancock v. Board of Education*, 140 Cal. 554, 74 Pac. 44.

The maintenance of public schools is a matter not of local, but of state concern in Minnesota since the constitution requires the "legislature to establish a general and uniform system of public schools," an efficient system "in each township of the state." *Associated Schools, etc., v. School Dist. etc.*, 122 Minn. 254, 142 N. W. 325; *State ex rel. Smith v. St. Paul*, 128 Minn. 82, 150 N. W. 389, 391.

Education is not a "part of local self-government inherent in the township or municipality, except so far as the legislature may choose to make it such. The constitution has turned the whole subject over to the legislature." *Attorney-General v. Thompson*, 168 Mich. 511, 134 N. W. 722.

<sup>39</sup> *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 Pac. 560.

<sup>40</sup> *Ewing v. Hoblitzelle*, 85 Mo. 64.

The election of freeholders to frame a charter, and the election at which a vote is had to confirm

records and accounts;<sup>41</sup> establishment and control of all streets and ways;<sup>42</sup> service and rates of public utilities and public service companies;<sup>43</sup> general taxes, including occupation and income tax;<sup>44</sup> and in some states public

the charter are not municipal affairs. *Fragley v. Phelan*, 126 Cal. 383, 58 Pac. 923.

Law relating to election of commissioners, etc., is state matter. *Vroman v. Fish*, 170 N. Y. S. 421.

Election contest. State ex rel. v. Superior Court, 14 Wash. 604, 45 Pac. 23.

<sup>41</sup> Uniform system of bookkeeping and accounting of accounts and records of all municipalities of states and supervision thereof, held state concern. State ex rel. v. Burr, 65 Wash. 524, 530, 118 Pac. 639.

<sup>42</sup> Laws regulating stopping of street cars on approaching railroad crossings at grade, held state concern, not municipal. Such law applicable to city with freeholders' charter. *Peterson v. Chicago & Alton Ry. Co.*, 265 Mo. 462, 178 S. W. 182, disapproving *Wills v. Atchison T. & S. F. Ry. Co.*, 133 Mo. App. 625, 634, 113 S. W. 713, and *State v. Kessels*, 120 Mo. App. 233, 96 S. W. 494.

Motor vehicle laws. Regulating traffic, vehicles, etc., on highways, state power. *Bruce v. Ryan* (Minn. 1917), 164 N. W. 982.

Cities have power usually concurrent with state. State v. Larrabee, 104 Minn. 37, 115 N. W. 948.

City exclusive sometimes. *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594.

See § 227 et seq., vol. 1, ante, and § 227 et seq., ante.

In Oregon the regulation of street traffic is a municipal affair. *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 597.

Section 229C, post, § 1734, post.

<sup>43</sup> "Rate-making is a legislative act. It is inherent in and belongs primarily to the legislature. The rate-making power is a power of government—a police power of the state." *Benwood v. Public Service Com.*, 75 W. Va. 127, 83 S. E. 295; *Home Telephone and Telegraph Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. ed. 176.

The control and management of public utilities is not a matter of purely local or municipal concern, but one subject to the state's legislative will. State ex rel v. Public Service Com., 270 Mo. 429, 443-445, 192 S. W. 958, P. U. R. 1917D, 752.

The regulation of rates and service of public utilities is a matter of state or general concern and does not pertain solely to municipal affairs. *Woodburn v. Public Service Com.*, 82 Or. 114, 161 Pac. 391; *Portland Ry. L. & P. Co. v. Portland*, 210 Fed. 667.

Gas rates. *Tacoma G. & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655.

Telephone rates. State ex rel. v. Missouri & Kan. T. Co., 189 Mo. 83, 88 S. W. 41.

<sup>44</sup> Occupation tax. *Kansas City v. Lorber*, 64 Mo. App. 604.

improvements of various kinds, embracing local assessments and special taxation.<sup>45</sup>

The state may exercise all power, unless restricted by the constitution, in the creation of cities and towns, fixing their boundaries, and changing them, etc.,<sup>46</sup> and restricting municipal indebtedness, and the power of taxation.<sup>47</sup>

Under a state policy to allow certain cities to regulate matters of purely local and municipal concern by charter provision,<sup>48</sup> the enforcement of the lien of special tax bills for sidewalk construction,<sup>49</sup> proceedings for the condemnation of lands for public streets and assessing the damages and benefits,<sup>50</sup> and assessments for local improvements,<sup>51</sup> have been held matters of local and municipal concern.

Where the power of eminent domain exists in the city, the regulation of its exercise in the courts, has been held

<sup>45</sup> Assessments for improvements on abutting property, held may be regulated by general law in Oregon. *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 502.

<sup>46</sup> Section 121 et seq., vol 1, ante, section 121, et seq., ante.

Section 265, vol. 1, ante; section 265, ante.

Fixing boundaries of territory to be annexed to a municipal corporation. *People v. Ontario*, 48 Cal. 625, 84 Pac. 205.

Extending corporate limits. *State ex rel. v. Warner*, 4 Wash. 773, 31 Pac. 25.

<sup>47</sup> *Beck v. St. Paul*, 87 Minn. 381, 92 N. W. 328.

<sup>48</sup> *State ex rel. v. Field*, 99 Mo. 352, 12 S. W. 872; *Brunn v. Kansas City*, 216 Mo. 108, 117, 115 S. W. 446.

<sup>49</sup> *Stanton v. Thompson*, 234 Mo. 7, 11, 136 S. W. 698; *Carpenter v. Roth*, 192 Mo. 658, 91 S. W. 540;

*Harris v. Hunt*, 97 Mo. 571, 11 S. W. 236.

Local assessments for street improvements. *Turner v. Snyder*, 101 Minn. 481, 112 N. W. 868.

<sup>50</sup> *State ex rel v. Seehorn*, 246 Mo. 541, 557, 151 S. W. 716.

<sup>51</sup> By the Colorado Constitution, Colorado Springs was authorized to assume by its charter any powers which were local and municipal or "of local concern." Assessments for local improvements are "local and municipal" matters, like eminent domain for municipal purposes. "Indeed assessments for local improvements would seem to be typically and pre-eminently 'of local concern.' The city's powers with reference to local improvements are therefore plenary." *Board of Commissioners, etc. v. Colorado Springs* (Colo. 1919), 180 Pac. 301, 304.

a municipal matter.<sup>52</sup> So the regulation of presenting and filing claims against the city prior to action thereon and regulating the proceedings for review on appeal, have been held municipal affairs.<sup>53</sup>

Providing water, light and local conveniences and utilities, are usually regarded as municipal matters.<sup>54</sup>

Municipal elections and choice of municipal officers are municipal matters by virtue of the constitution of Oregon,<sup>55</sup> and in Washington the imposition of taxes concerning ordinary corporate affairs incidental to the existence of the organized corporation are local matters.<sup>56</sup> And this is the rule in many states.<sup>57</sup> Under certain laws, other matters have been held to be municipal affairs.<sup>58</sup>

<sup>52</sup> State ex rel. v. District Court, 87 Minn. 146, 91 N. W. 300.

Ordinance relating to the bonds of contractors and payment of laborers and materialmen, including the contents of the bonds and conditions and limitations as to their enforcement, differing in detail from the requirements of existing general laws. Grant v. Berrisford, 94 Minn. 45, 101 N. W. 940, 1113.

<sup>53</sup> Petersen v. Red Wing, 101 Minn. 62, 111 N. W. 840; State ex rel. v. District Court, 90 Minn. 457, 97 N. W. 132.

<sup>54</sup> Asbury v. Albemarle, 162 N. C. 247, 78 S. E. 146, 150; Helena Consolidated Water Co. v. Steele, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; State v. Andersen, 75 Or. 509, 147 Pac. 526, 529.

Water system in a city is not such a governmental function in which the state may have such interest as would give it power to compel its maintenance. Kenton Water Co. v. Covington, 156 Ky. 569, 161 S. W. 988.

"The operation of a water de-

partment being a governmental function upon all the authorities." Smiddy v. Memphis (Tenn. 1918), 203 S. W. 512.

<sup>55</sup> State ex rel. v. Portland, 65 Or. 273, 133 Pac. 62, 66.

<sup>56</sup> Hindman v. Boyd, 42 Wash. 17, 84 Pac. 609; State ex rel. v. Carson, 6 Wash. 250, 33 Pac. 428.

<sup>57</sup> Assessment and collection of local taxes for local purposes is not a state matter. People ex rel. v. Pelham, 215 N. Y. 374, 379, 109 N. E. 513.

See section 171, ante; section 188, post.

<sup>58</sup> Board of Poor Commissioners of Detroit, held local. Pryzbylowski v. Detroit Poor Comrs., 188 Mich. 270, 154 N. W. 117.

Licensing horse races is municipal affair where the municipality has power from the state to tax and regulate the matter. Alexander v. Elizabeth, 56 N. J. L. 71, 28 Atl. 51.

Witness fees in police court cases relating to the violation of ordinances are matters of municipal

### § 174a. Same—California.

In California the following have been held to be “municipal affairs”: The registration of votes for a municipal election,<sup>59</sup> election and removal of municipal officers when provided for in special charter,<sup>60</sup> state law forbidding the imposition of a license tax for the purpose of revenue,<sup>61</sup> charter section conferring power to impose license taxes for the purpose of revenue,<sup>62</sup> salaries of officers of the police and fire departments of the city,<sup>63</sup> control of the San Francisco almshouse,<sup>64</sup> functions of the local board of health,<sup>65</sup> the establishment of a private patrol service or system over a designated area within the corporate limits of a city,<sup>66</sup> street opening proceedings,<sup>67</sup> issuance for the repair of an existing school house and for a new school house.<sup>68</sup> “It appears to be settled law that a city having a freeholder’s charter is subject to general laws, even in municipal affairs, when the subject-matter is not covered by the charter.”<sup>69</sup>

### § 176. Right of municipal corporations to select local officers.<sup>70</sup>

By virtue of its plenary power over municipal corporations, unless restricted by the state constitution, the

concern alone. *State ex rel. v. Kimmel*, 256 Mo. 611, 165 S. W. 1067.

**Power to impound animals and charge fees for impounding animals astray within the city** has been granted to cities from time immemorial and is a matter of local concern. *Pueblo v. Kurtz* (Colo. 1919), 182 Pac. 884.

<sup>59</sup> *People ex rel. v. Worswick*, 142 Cal. 71, 75 Pac. 663.

<sup>60</sup> *Schaefer v. Herman*, 172 Cal. 338, 155 Pac. 1084.

<sup>61</sup> *Ex parte Helm*, 143 Cal. 553, 77 Pac. 453.

<sup>62</sup> *Ex parte Braun*, 141 Cal. 204, 74 Pac. 780, holding such charter

section was paramount to a general statute prohibiting such tax.

<sup>63</sup> *Popper v. Broderick*, 123 Cal. 456, 56 Pac. 53.

<sup>64</sup> *Weaver v. Reddy*, 135 Cal. 430, 67 Pac. 683.

<sup>65</sup> *People ex rel. Lawler v. Williamson*, 135 Cal. 415, 67 Pac. 504.

<sup>66</sup> *Ex parte Hitchcock* (Cal. App. 1917), 166 Pac. 849.

<sup>67</sup> *Byrne v. Drain*, 127 Cal. 663, 60 Pac. 433.

<sup>68</sup> *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014.

<sup>69</sup> *Sacramento v. Adams*, 171 Cal. 458, 153 Pac. 908, 910.

<sup>70</sup> Section 176, vol. 1, ante, quoted with approval in concur-



legislature may abolish existing municipal offices, although the terms of the incumbents thereof have not expired, by amendment of charter,<sup>71</sup> or provide a change in municipal organization, as a commission form of local government, and confer power on the governor to appoint the first commissioners to serve until the election of their successor, at the next municipal election and thereafter by the voters of the municipal-

ring opinion of Monroe, J., in *State v. Lafayette Fire Ins. Co.* (Sup. Ct. La.), 63 La. 630, 636, 637.

By constitution of Ohio, municipalities may provide manner of nominating, selecting, etc. *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N. E. 512; *State v. Hillenbrand* (Ohio, 1919), 126 N. E. 309.

Appointment of civil service commissioners. *State ex rel. v. George*, 92 Ohio 344, 110 N. E. 951.

By New York Constitution, local officers selected by local authorities, § 171, ante.

"At common law the citizens of towns and cities were subject to the crown, but their officers were not crown officers. Cities and towns elected their officers, and those officers enforced for them the customs and by-laws of their towns and cities. The citizens of London set great store upon electing their mayor: 'Come what might they would have no king but the mayor.' *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31, citing 1 Stubbs, Const. History, 674.

"The charters which conveyed to the townsmen these precious privileges of freedom of trade, of justice, and of internal govern-

ment had invariably to be purchased from the lord of the town whether king, noble or abbot, and paid for in hard cash." Taylor on the Origin and Growth of the English Constitution, 462.

A mere municipal officer cannot be held to be within the meaning of the Alabama Constitution, "in a state with a constitutional and statutory history like our own," an officer of the state. "Town law found its origin in, and owed its development to, the principles of local self-government, the basic principle upon which all Teutonic governments rest." The dwellers in towns "demanded and received the right to govern the towns in which they lived, in accordance with their own regulations not in contravention to the general laws of the realm \* \* \* the officers of a town were town officers, and the laws adopted by its people for their government as citizens of the town were town laws." *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31.

<sup>71</sup> *Van Dyke v. Thompson*, 136 Tenn. 136, 150-152, 189 S. W. 62; *Malone v. Williams*, 118 Tenn. 462, 103 S. W. 798, 121 Am. St. Rep. 1002.

ity.<sup>72</sup> A constitutional provision giving the legislature power to create state and local boards of health, define their duties and prescribe their powers, was held to include the power to determine the method of the selection of the members of such boards, and moreover, the exercise of such power was held not to infringe the constitution which gives the electors of the city the right to select their officers to administer police and administrative affairs of the city.<sup>73</sup> But under a constitution giving a city power to select its local officers, an act creating the office of fire marshal to be appointed by the governor, with powers of a local nature appertaining to police powers of the city and its local affairs, to direct the chief of the local fire department in investigation, etc., was declared unconstitutional.<sup>74</sup> So under a constitutional provision giving a municipality the right to choose the public officers who shall be charged with the exercise of the police power and with the administration of the affairs of such corporation, in whole or in part (with certain exceptions), a legislative act creating a board of public utilities for such municipality which does not provide for the election of the members thereof by the local electors or the municipal council or their appointment by the mayor, it has been held, contravenes such organic provision.<sup>75</sup>

<sup>72</sup> *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244.

Governor to appoint first three commissioners under commission form. *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31, 36.

Municipal or local officers in Alabama, considered from historical viewpoint in connection with legislative act providing for commission form of municipal government, wherein, the governor was to appoint the first commissioners and thereafter the commissioners were

to be elected by the voters of the city. *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31, quoting with approval from note 81, § 48, pp. 102, 103, vol. 1, ante.

<sup>73</sup> *Board of Health v. Susslin*, 132 La. 569, 61 So. 661, 663.

<sup>74</sup> *State v. Lafayette Fire Ins. Co.*, 134 La. 78, 63 So. 630.

<sup>75</sup> *New Orleans Board of Public Utilities v. New Orleans Ry. & Light Co.* (La. 1919), 82 So. 280, following *State v. Lafayette Fire Ins. Co.*, 134 La. 78, 63 So. 630.

**§ 177. State may regulate the selection of municipal officers.<sup>76</sup>**

The legislature may prescribe the qualifications of municipal officers and fix the manner of filling vacancies, but, of course, where the constitution provides that municipal officers shall hold until the next regular election, the legislature cannot extend the time.<sup>77</sup> The legislature may regulate the election and term of the collector of revenue of a city and state, to be elected by the municipality with a freeholder's charter, and such statute supercedes all special laws and charter provisions on the subject, since, by express constitutional provisions, such charter "shall always be in harmony with and subject to the constitution and laws of the state."<sup>78</sup>

**§ 178. Municipal officers distinguished from state officers.<sup>79</sup>**

In England it is familiar that an early distinction was drawn between a town officer and an officer of the crown.<sup>80</sup> A like distinction between a local officer and an officer of the state has always obtained in this country. "The general rule in the absence of special constitutional provision, is that all officers whose duties pertain to the exercise of the police power of the state are in that sense state officers, and under the control of the legislature, even though they may be officers of the municipality charged with the enforcement of the local police regulations of such municipality."<sup>81</sup> "In a popular sense a state officer is one whose jurisdiction is co-extensive with the state. In a more enlarged sense a state officer is one

<sup>76</sup> Section 177, vol. 1, ante, quoted (except second paragraph) and approved in concurring opinion of Monroe, J., in *State v. Lafayette Fire Ins. Co.* (Sup. Ct. La.), 63 So. 630, 637.

<sup>77</sup> *Scott v. Singleton*, 171 Ky. 117, 188 S. W. 302.

<sup>78</sup> *State ex inf. v. Koeln*, 270 Mo. 174, 192 S. W. 748.

<sup>79</sup> *Lambert v. Barrett*, 115 Va. 136, 78 S. E. 586, citing § 178, vol. 1, ante.

<sup>80</sup> Stubbs *Const. History* 674; Taylor, *Origin and Growth of the English Constitution*, 462; *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31.

<sup>81</sup> *State ex rel. v. Linn*, 49 Okl. 526, 153 Pac. 826, 829.

who received his authority under the laws of the state, and performs some of the governmental functions of the state.”<sup>82</sup> “In a more restricted sense the mayor, comptroller, treasurer, corporation counsel and like general officers elected on the general ticket, or appointed for the municipality are regarded as municipal officers. But in the broad sense municipal officers include all local, elective or appointive officers including appointees under the civil service law.”<sup>83</sup>

In Alabama a mere municipal officer is not within the meaning of the Constitution an officer of the state. He possesses “town” and not state authority. The fact that the governor appoints the first incumbents and the officers are created by legislative act, in no way affects the character of the office as a mere municipal office.<sup>84</sup>

### § 180. Same—illustrative cases of state and municipal officers.<sup>85</sup>

<sup>82</sup> Ex parte Preston (Tex. Civ. App.), 161 S. W. 115, quoting 23 Am. and Eng. Ency. of Law (2nd ed.) 327.

<sup>83</sup> Uvalde Asphalt Paving Co. v. New York, 134 N. Y. S. 50, 52, 149 App. Div. 491.

<sup>84</sup> For example, commissioners under a commission form of municipal government, under a law which provides that “said board of commissioners shall not have, possess or exercise any legislative, executive, judicial or administrative powers of the state or county, nor shall the offices held by them be state offices.” State ex rel. v. Lane, 181 Ala. 646, 62 So. 31, 33; Draper v. State, 175 Ala. 547, 57 So. 772.

<sup>85</sup> Members of board of election commissioners, created by state law, and appointed by a county court for a city, held “municipal officers” under Illinois Constitu-

tion forbidding increase of salary during term by legislature. People ex rel. v. Cook County Commissioners, 260 Ill. 345, 103 N. E. 282, affirming 177 Ill. App. 58.

Clerk of probate court in Illinois, held municipal officer relating to legislature increasing salary during term. Cook County v. Sennatt, 136 Ill. 314, 26 N. E. 491.

As to filling vacancies under particular laws, members of a city council, held not municipal officers. The council performs duties in which the state is interested, e. g., duties as to streets which are state highways. Lambert v. Barrett, 115 Va. 136, 78 S. E. 586, applying test of Burch v. Hardwick, 30 Gratt (Va.) 24, 33, 34, 32 Am. Rep. 640, and admitting that councilmen “are in a certain sense municipal officers,” on authority of Mitchell v. Witt, 98 Va. 459, 36 S. E. 528.

Members of board of education

**§ 181. Police recognized as agency of state.<sup>86</sup>**

The state may provide for a metropolitan police force for its cities and compel them to pay the expenses therefor. The police system is not a matter of local self-government, but a state affair. And this is true although the city has a constitutional or freeholder's charter. Such charter is subject to the laws of the state in all matters of state concern, and if there is a conflict between the charter provisions and the statute, the charter provisions are to that extent void.<sup>87</sup>

under Dallas, Texas, Charter, held municipal officer, and not a county, relating to removal from office. *Bonner v. Belsterling* (Tex. Civ. App.), 137 S. W. 1154, affirmed 104 Tex. 432, 138 S. W. 571.

**Two or more public corporations** may be organized whose powers and functions may be exercised by the same officers, as for example, a county and a forest preserve district. Thus the legislature may provide for the organization of public corporations which embrace territory situated wholly within or partly without the boundaries of another municipal corporation, whether city, town, village, county or township, as for example, a forest preserve district occupying the same or part of the same territory as a county, and constituting the officers of the county the executive officers of the forest preserve district.

"The legislature has provided by general law for the organization of forest preserve districts whose boundaries may be co-extensive with those of another municipality, such as a county, city, village or town, and that such district may embrace two or more of such smaller municipalities situated

wholly within the boundaries of a county, and that when they are so organized with boundaries co-extensive with those of other municipalities, the officers of the latter corporation shall also perform the duties and functions of the officers (commissioners) of such forest preserve district. In making such provision the legislature doubtless deemed that better co-operation would be secured between the two municipalities in that way." *Perkins v. Cook County Commissioners*, 271 Ill. 449, 460, 461, 111 N. E. 580.

<sup>86</sup> *Pollard v. Gregg*, 77 N. H. 190, 90 Atl. 176; *Ex parte Preston* (Tex. Civ. App.), 161 S. W. 115.

"Although such officers are chosen by local municipal authorities the performance of their duties is not a matter of local concern only. They are not mere servants and agents of the city, but are appointed and act for the benefit of the public at large. They are essentially state functionaries." *Anderson v. Shawnee County Comrs.*, 91 Kan. 262, 137 Pac. 799; *Peters v. Lindsborg*, 40 Kan. 654, 656, 20 Pac. 490.

<sup>87</sup> *State ex rel. v. Jost*, 265 Mo. 51, 175 S. W. 591.

In Oregon under the Constitution the city selects its police force; the state cannot; and the members thereof are held to be city officers in the same sense that a sheriff is a county officer and a constable a precinct or township officer.<sup>88</sup>

### § 182. Legislative control of officers and their functions.

The legislature cannot regulate the leave of absence of city officers and employers.<sup>89</sup> The legislature may prescribe the jurisdiction and functions of municipal officers, e. g., in creating a commission form of municipal government, it may say what powers the city shall and shall not possess, what offices shall exist and what officers shall exercise the several powers.<sup>90</sup>

Compensation of firemen of cities of the metropolitan class in Nebraska may be established by the state, and when so established the city may not prescribe a different compensation.<sup>91</sup> So in Tennessee the legislature may fix salaries of members of a city fire department.<sup>92</sup> In Washington, the legislature may create a bureau of public accounts, to inspect and examine records and accounts of municipal corporations for which the city must pay. This is held to be a state matter of general concern.<sup>93</sup>

<sup>88</sup> Branch v. Albee, 71 Or. 188, 142 Pac. 598, 602.

<sup>89</sup> State law providing leave of absence of officers and employees of fire department, held unconstitutional as special legislation, an attempt to regulate the internal affairs of cities, and "an unwarranted interference with their local rights of self-government under those principles declared upon that subject in *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103, and *Davidson v. Hine*, 151 Mich. 294, 115 N. W. 246, 15 L. R. A. (N. S.) 575, 123 Am. St. Rep. 267, 14 Ann. Cas. 352, since recognized, emphasized and enlarged in article 8 of our latest constitution." Simpson

v. Gage, 195 Mich. 581, 161 N. W. 898, 900.

<sup>90</sup> State ex rel. v. Lane, 181 Ala. 646, 62 So. 31, 35.

Constitution of Florida: "The legislature shall not pass special or local laws regulating the jurisdiction and duties of any class of officers except municipal officers, \* \* \* regulating the practice of courts of justice, except municipal courts." *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, 773.

<sup>91</sup> *Adams v. Omaha*, 101 Neb. 690, 164 N. W. 714.

<sup>92</sup> *Smiddy v. Memphis* (Tenn. 1918), 203 S. W. 512.

<sup>93</sup> State ex rel. v. Burr, 65 Wash. 524, 118 Pac. 639.

All city, town and village officers, in New York, whose election or appointment is not provided for by the constitution shall be elected by the electors of such cities, or of some division thereof, or appointed by such authority thereof as the legislature shall designate for that purpose. "Embodied in this section is the home rule principle under which the right of self-government is secured to the localities of the state," which includes the right to control the assessment and taxation of property for local purposes.<sup>94</sup>

## II. CONSTITUTIONAL PROVISIONS.

### § 185. General constitutional limitations of legislative power relating to municipal corporations.

By express prohibition contained in most of the state constitutions a municipal corporation cannot loan its credit, nor grant its credit to, nor in aid of, any person, association or corporation, public or private.<sup>95</sup>

The common constitutional inhibition that no municipal corporation, by vote of its citizens or otherwise, shall become a stockholder in any joint stock company, cor-

<sup>94</sup> State ex rel. v. Pelham, 215 N. Y. 374, 380, 109 N. E. 513, reversing 152 N. Y. S. 428, 166 App. Div. 779. See the New York cases construing this Constitutional section, set out in § 171, ante.

Legislative act conferring power on the governor to remove the president of a city commission from office for cause was sustained as constitutional. State v. Frazier (N. D. 1918), 167 N. W. 510.

<sup>95</sup> Constitution of New York, Art. 8, § 10; People ex rel. v. Prendergast, 128 N. Y. S. 1082, 1086.

An ordinance fixing the salary of officers, clerks and employes of a private corporation, as a museum, is forbidden by the constitution because it seeks to use public funds

for a private purpose. Burton v. Detroit, 190 Mich. 195, 156 N. W. 453.

Detroit forbidden to appropriate public funds for the support and maintenance of the Detroit museum of Art, since this is a private purpose, and this is true although the city has title to its property, has a representative on the board, and the object is a public one. Detroit Museum of Art v. Engel, 187 Mich. 432, 153 N. W. 700.

Constitution of California, held not applicable to the giving or lending of the credit of an agency of the state to the state, since the word "corporation" does not include the state. Sacramento v. Adams, 171 Cal. 458, 153 Pac. 908.

poration or association whatever, or raise money for, or loan its credit to, or in aid of, any such company, corporation or association precludes a city from being jointly interested in a railroad.<sup>96</sup>

Under a constitutional provision forbidding a "gift to an individual" by a municipal corporation, a direction of the city council to the city treasurer to pay a judgment rendered against a police officer for an assault occurring when he made an arrest, was held to be such gift and in contravention of the constitution, notwithstanding the existence of a statute authorizing cities to pay claims "equitably payable by the city though not constituting obligations legally binding on it."<sup>97</sup>

Constitutions forbid the use of municipal funds in payment of any obligation created against a municipal corporation under any agreement or contract made without express authority of law;<sup>98</sup> also, the giving of extra compensation to municipal officers, and it has been held that a statute which seeks to do this violates the constitutional provision forbidding the conferring of any gratuity for a private as distinguished from a public purpose.<sup>99</sup>

Constitutions forbid the legislature from imposing taxes upon municipal corporations for municipal purposes, and require that such power shall be vested in the corporate authorities.<sup>1</sup> Such provision renders void a legislative act seeking to compel a city, annexing a neighboring town, to purchase and pay for a water plant

<sup>96</sup> Const. Oregon, Art. 11, § 9; *Hunter v. Roseburg*, 80 Or. 588, 156 Pac. 267, rehearing denied 157 Pac. 1065.

<sup>97</sup> *Millnow v. Rafter*, 152 N. Y. S. 110, 89 Misc. Rep. 495.

<sup>98</sup> *Municipal Securities Corp. v. Kansas City*, 265 Mo. 252, 268, 177 S. W. 856; *Ross v. Gates*, 183 Mo. 338, 81 S. W. 1107; *State ex rel. v. Dierkes*, 214 Mo. 578, 113 S. W. 1077.

<sup>99</sup> *Wolcott v. Wilmington* (Del. Ch.), 95 Atl. 303.

<sup>1</sup> Constitution of Kentucky. "The general assembly shall not impose taxes for the purposes of any county, city, town or other municipality, but may by general laws confer on the proper authorities thereof, respectively, the power to assess and collect such taxes." *Kenton Water Co. v. Covington*, 156 Ky. 569, 161 S. W. 988.



owned and operated therein.<sup>2</sup> The regulation of water rentals by a state commission is not the levying of a tax within the meaning of the constitutional prohibition since a water rental is not a tax.<sup>3</sup>

The provision of the New York constitution relating to officers, providing that all city, town and village officers, shall be elected by the local electors, or appointed by local authorities, has been held to include those rights of self-government which relate to the assessment and collection of taxes for local purposes which the local communities enjoyed prior to the adoption of the constitution.<sup>4</sup>

A law requiring specified counties to establish detention houses for delinquent children, and certain cities therein to reimburse the county for caring for its delinquent children, was held in Utah not to violate the provisions of the constitution inhibiting the legislature from imposing taxes on local communities.<sup>5</sup>

The constitutional provision making it a condition precedent to the operation of street railroads, first to

<sup>2</sup> *Kenton Water Co. v. Covington*, 156 Ky. 569, 161 S. W. 988.

<sup>3</sup> *Public Service Com. v. Helena*, 52 Mont. 527, 540, 159 Pac. 24; *Wagner v. Rock Island*, 146 Ill. 139, 21 L. R. A. 519, 34 N. E. 545.

<sup>4</sup> "Corporate authorities" are the municipal officers either directly elected by the population to be taxed or appointed in some mode to which they have given their consent. Hence, members of a state board of horticulture, appointed by the governor, are not such. *State ex rel. Wright v. Standard*, 24 Utah 148, 160, 66 Pac. 1061.

<sup>5</sup> "Taxation for such local purposes is the concern of the village rather than the town, county and state of which the village is an

authorized subdivision. Within this limited local sphere the right to control the assessment and taxation of property for village purposes is a right which the village enjoys by virtue of the home rule provision of the constitution. It is not merely a privilege which the village is permitted to exercise by the courtesy of the legislature," holding an act unconstitutional which deprived a village of the right to assess and collect taxes for village purposes. The act created one board for several villages. *State ex rel. v. Pelham*, 215 N. Y. 374, 379, 380, 109 N. E. 513, reversing 152 N. Y. S. 428, 166 App. Div. 779.

<sup>5</sup> *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 Pac. 560, 563.

acquire the consent of the local authorities having control of the highways and streets, seeks to secure local self-government in this matter to each organized local community.<sup>6</sup>

<sup>6</sup> Consent of local authorities necessary to construct street passenger railways. Municipality may impose conditions. *Georgia Ry. & Power Co. v. Georgia Railroad Com.* (Ga. 1919), 98 S. E. 696, 698, 699.

**Local consent to operate street railroads.** "The provision of the constitution is peremptory and unlimited. It is part of the pervading intent of that instrument to give local bodies the control of local affairs. The public history of the time of which the court may take judicial notice shows that one of the prime objects of the people in calling a constitutional convention was to do away with special legislation which interfered with local affairs, or granted privileges to particular bodies and withheld them from others, with a semblance of partiality rather than of equal favor to all. That object was carried out in the constitution adopted, so broadly that it is a matter of grave doubt whether the object itself has not sometimes been defeated by tying the hands of the legislature too closely to permit it to help special localities with special needs by legislation which they really want and ought to have. But, however that may be in other matters the provision now under consideration, as already said, is peremptory and without expressed limitations of any kind. It is a gift direct from the constitution to the local bodies and

needs no help, nor permits any interference from the legislature. If any limitations are to be implied by the Courts, the implication must arise from necessity, as absolute, as peremptory and as unavoidable as the constitutional mandate itself. The burden therefore is on the party affirming that the exercise of the local authority is not valid. *Omne majus in se continet minus.* The man who can give the whole can give part, or who can grant absolutely can grant with a reservation of rent or other conditions. He who can consent or refuse without reason does not make his consent or refusal either better or worse by a good or a bad reason. The same principle applies to the present subject. It is conceded that the local authorities may impose some conditions, such as those relative to the police powers, but where is the grant to another body to supervise and limit the conditions, or say what they shall be? The legislature clearly cannot do it. The very purpose of the provision was to put an end to the legislature's interference. Nor can the Courts trespass upon the discretion given absolutely by the constitution to the local bodies." *Allegheny v. Millville, E. & S. St. Ry. Co.*, 159 Pa. 411, 415, et seq., 28 Atl. 202, conditions as to rate of fares and taxation of dividends, that is, a certain percentage of its dividends shall be paid to city.

In Missouri, it has been said that

**§ 187. Special and local laws relating to municipal corporations where a general law can be made applicable.**

Acts creating commission forms of government for cities of a specified population are not local or special

"This provision first appears in our Constitution in 1875. Until the adoption of the Constitution of 1865 such franchises were granted by the general assembly by special act without consent and often against the protest of the local authorities and the people of the several local communities of the state. The Constitution of 1865 prohibited the creation of corporations by special act, except for municipal purposes. In deference to the principle of home rule, or local self-government, then vigorously advocated in many jurisdictions, and as a result of such advocacy, found expression in state organic laws, by the Constitution of 1875, the consent of the local authorities was made a condition precedent to granting the right to construct and operate. The purpose of the provision was to give the local authorities of cities, towns, villages and local communities of the state unrestricted power to say whether street railways should or should not be constructed and operated in their respective localities. In expression the provision is direct, unequivocal, peremptory and unlimited. In apt words, the entire consent is vested exclusively in the local authorities and taken from the general assembly. Plenary power to consent or refuse the right to construct and operate necessarily involves the right or carries with it the power

to consent or refuse with or without reason, or with good or bad reason, or with or without terms and conditions, or with such terms and conditions as the proper local authorities may see fit to impose (Northern Central Ry. Co. v. Baltimore, 21 Md. 93); provided, always, that such terms and conditions are in harmony with the Constitution and with such laws of the state as do not contravene the purpose and spirit of the constitutional provision under review. Otherwise expressed, the constitution by requiring consent of the local authorities as a condition precedent to construct and operate grants to such authorities exclusive power to prescribe the terms and conditions upon which construction and operation shall proceed, and thus by implication excludes the imposition by the legislature either by formal statute or commission order of additional conditions inconsistent with the object of § 20, art. 12, but not of other conditions within the scope of the state's police power or such as may be necessary to compel the applicant to conform to the corporation laws of the State under which it was organized in event of departure therefrom.

"The state through the general assembly, either by general or special law, can give no part of such consent, since it has nothing to give, because the people on

laws.<sup>7</sup> In Washington an act authorizing cities of a named population to adopt a commission form which included cities of two existing classes, and thereby created a classification within a classification, was held not unconstitutional.<sup>8</sup>

A law authorizing all counties and municipalities to appoint sealers of weights and measures which is uniform in its operation, was held not a special law in California.<sup>9</sup>

adopting the Constitution in due and solemn form transferred such power to and vested it exclusively in the local authorities of the several communities of the state in terms which admits of no doubt, and such power cannot be taken away in whole or in part by any less authority than that which so transferred and vested it. The language of the provision would seem to be so clear, direct and comprehensive in expression as to exclude the idea that there could be any part of the consent remaining in the general assembly." *Re Kansas City Rys. Co.*, 3 Mo. P. S. C. 593, 611, 612, P. U. R. 1916E, 544.

This conclusion is supported by the Missouri decisions. *State ex inf. v. Lindell Ry. Co.*, 151 Mo. 162, 183, 52 S. W. 248; *Kavanaugh v. St. Louis*, 220 Mo. 496, 513, 514, 119 S. W. 552; *St. Louis & Meramec River R. Co. v. Kirkwood*, 159 Mo. 239, 253, 60 S. W. 110, 53 L. R. A. 300.

Like construction has been given to similar constitutional provisions in other jurisdictions. *West Chester Borough v. Postal Telegraph Cable Co.*, 227 Pa. 384, 76 Atl. 65; *McKeesport v. Pittsburg M. & C. R. Co.*, 213 Pa. 542, 62 Atl. 1075; *Plymouth Township v. Chestnut*

*Hill & N. R. Co.*, 168 Pa. St. 181, 32 Atl. 19. However, as clearly stated in a Pennsylvania case, having under review a like organic law: "This constitutional provision does not deprive the legislature of all power over the public highway; it may prohibit the construction of street railway upon any highway of the commonwealth, but it is without power to authorize the construction of a street railway upon any highway without the consent of the local authorities." *Appeal of Carlisle & M. S. R. Co.*, 245 Pa. 561, 91 Atl. 959. Nor does such law withdraw from the legislature the power to charter street railways and authorize them to operate in the locality or localities specified in such charter. It merely requires that the consent of the local authorities be first procured. *San Antonio Tn. Co. v. Altgelt*, 200 U. S. 304, 26 Sup. Ct. 261.

<sup>7</sup> *State v. Lane*, 181 Ala. 646, 62 So. 31.

<sup>8</sup> *State ex rel. v. Tausick*, 64 Wash. 69, 116 Pac. 651.

<sup>9</sup> *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941. Legislative act forbidding local license on insurance agents, general in its nature, was sustained. *Lovejoy v. Portland* (Or. 1920), 188 Pac. 207, 210-213.

A law providing for cities of a named class reciting that it "shall not apply to any city wherein the title to the waterworks therein located is in the name of the commissioners of waterworks," was held not a special or local law in Pennsylvania.<sup>10</sup>

A constitutional provision forbidding local or special laws, will not prevent the legislature from amending a special charter relating to the common schools. The fact that the electors of the city had voted against abandoning their special charter provision and adopting the provisions of the general law as to school, will not preclude the legislature from enacting such law. The purpose of the constitution "was to discourage dissimilarity, and to promote and encourage legislation which should be uniform on all subjects," mentioned, not that the provisions of the special charters of cities and villages then in existence could not be changed or modified.<sup>11</sup>

Where the subject of legislation relates to the exercise of corporate powers and duties of officers employed in the management of municipal affairs it is a proper basis of classification, e. g., providing the method of appointing and removing subordinate officers, clerks and employees of cities of a specified class, and forbidding them from taking an active or managing part in partisan political affairs.<sup>12</sup>

**§ 188. The legislature shall not regulate the business or internal affairs of municipal corporations.<sup>13</sup>**

The assessment and collection of taxes for local purposes is a business or internal affair of each incorporated

<sup>10</sup> Commonwealth ex rel. v. Elbert, 244 Pa. 535, 91 Atl. 227.

<sup>11</sup> People ex rel. v. Crawley, 274 Ill. 139, 144, 113 N. E. 119.

<sup>12</sup> Commonwealth ex rel. v. Hasskarl, 21 Pa. Dist. R. 119, approved in Duffy v. Cooke, 239 Pa. 427, 86 Atl. 1076.

<sup>13</sup> Local or special laws regulating the internal affairs of towns

and counties forbidden. Cook v. Ramsey, 86 N. J. L. 263, 90 Atl. 265.

State board of health may be given jurisdiction over local sanitation in New Orleans. Board of Health v. Susslin, 132 La. 569, 61 So. 661.

"By §§ 20 and 21, art. 8 (Const. Mich.) the legislature was required

community.<sup>14</sup> In Oregon the regulation of street traffic by ordinance pursuant to charter is a matter of internal municipal control.<sup>15</sup>

### § 189. Same—by commission.

The constitutional provision existing in many states that municipal functions shall not be delegated to com-

to provide a general law for the incorporation of cities, and the electors of each city, acting under such general law, were given plenary power, subject to the constitution and general laws of the state, over their local affairs. The debates of the constitutional convention demonstrate that the purpose of the framers was to vest in the people of municipalities full legislative control over their own problems of local self-government." In order to amplify the power thus conferred, § 21 was amended by the people at the election in November, 1912, and now reads as follows: "Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter, and to amend any existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and through its regularly constituted authorities, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general law of the state." *Grob- bel v. Detroit Water Commis- sioners*, 181 Mich. 364, 370, 149 N. W. 675.

<sup>14</sup> Constitution of New York: "All city, town and village of- ficers, whose election or appoint-

ment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such au- thorities thereof, as the legislature shall designate for that purpose." The assessment and collection of taxes for local purposes, e. g., in an incorporated village, for village purposes, is a business or internal affair appertaining to each incor- porated community or area, guar- anteed by the above home rule con- stitutional provision which munic- ipal corporations enjoyed when it was adopted, and which the state by its legislature cannot take away, although by virtue of the constitu- tion it may restrict the power of taxation, assessment, borrowing money and contracting of debts of municipal corporations, so as to prevent abuses in these respects. *People ex rel. v. Pelham*, 215 N. Y. 374, 379 et seq., 109 N. E. 513, re- versing 166 App. Div. 779, 152 N. Y. S. 428.

See New York cases in § 171, ante.

<sup>15</sup> A general state statute on the subject, held not to supersede the local regulations, and unconstitu- tional in so far as it attempted to repeal these regulations. *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 597.

missions or special commissions, is not violated by legislative acts creating commission forms of municipal government for cities and towns;<sup>16</sup> nor by acts creating public service or utility commissions and conferring upon such commissions all powers relating to service and rates of all public service corporations or public utilities operating in the state,<sup>17</sup> including those owned and operated by municipalities;<sup>18</sup> nor by acts creating juvenile court commissions;<sup>19</sup> nor by an act relating to improvement of highways and authorizing township commissioners to make contracts therefor.<sup>20</sup> But such

<sup>16</sup> A legislative act was held constitutional in West Virginia, changing the plan of municipal government to a commission form of five commissioners, the first commissioners to be appointed by the governor of the state to hold office for two years, and thereafter the commissioners were to be elected by the municipal electors. *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244, 1250.

<sup>17</sup> *Public Service Com. v. Helena*, 52 Mont. 527, 539, 159 Pac. 24. See § 229A, post.

Creation of a public service commission by amendment of a freeholder's charter, giving such commission control of revenues derived from the sale of water, held not to violate the constitution as to delegating municipal functions to special commissions; and when the legislature approves such amendment, as required in California, it does not exercise law making power as expressed in such constitutional inhibition. *Mesmer v. Los Angeles Board of Public Service Comrs.*, 23 Cal. App. 578, 138 Pac. 935.

<sup>18</sup> *Civic League of St. Louis v. St. Louis*, 4 Mo. P. S. C. 412.

<sup>19</sup> The legislature shall not delegate "to any special commission \* \* \* any power to make, supervise or interfere with any municipal improvement money, property or effects \* \* \* to levy taxes \* \* \* or to perform any municipal functions." *Juvenile Court Commission*: on its recommendation county commissioners shall establish detention homes for delinquent children, and delinquent children of city, taken care of, at such home, keep to be paid by such city, held does not violate the constitution as to special commissions because this is not a city function, but a state affair. *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 Pac. 560, dissenting opinion p. 560 et seq., holding that state ex rel. v. *Standford*, 24 Utah 148, 66 Pac. 1061 making a contrary ruling should control.

<sup>20</sup> *McKeown's Petition*, 237 Pa. 626, 632, 85 Atl. 1085, following *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. 44.

provision is violated by creating by legislative act bureaus of public morals applicable to certain cities.<sup>21</sup>

**§ 191. Uniform system of local government is usually required.<sup>22</sup>**

**§ 194. Legislative control of cities with constitutional or freeholders' charters.<sup>23</sup>**

A constitutional charter does not prevent the state from enacting a general law applicable to the whole state where the subject-matter of legislation is one in which the whole people of the state are concerned, e. g., regulating the operation of street cars in crossing railroad tracks, applicable in all cities of the state. The permission of the constitution to a city of a specified population to frame and adopt a charter for its own municipal government does not hamper nor thwart the state from exercising its police power to protect not only the inhabitants of such city, but the public generally.<sup>24</sup>

A city is not a sovereignty respecting matters of gen-

<sup>21</sup> Pennsylvania constitution forbidding delegation to any special commission any power to perform any municipal function whatever, held violated by legislative act creating bureau of public morals in certain cities to investigate and act on conditions and matters touching sex relationship affecting public morals. *Moll v. Morrow*, 253 Pa. 442, 98 Atl. 650.

<sup>22</sup> "A uniform system of county government \* \* \* is a system or plan of government of the several counties in the state which is uniform, so that its several parts shall be applied to each county. \* \* \* The laws must be uniform generally and applicable to all of the counties throughout the state." Hence, a law relating to horticulture applicable to counties growing

fruit trees to the number of 5,000 or more, and allowing the increase of deputy inspectors without limit in counties of 20,000 population, does not provide a uniform system. *State ex rel. v. Standford*, 24 Utah 148, 161, 66 Pac. 1061.

Establishment of detention homes for delinquent children in all counties containing cities of the first and second class, held not to violate constitution relating to uniform system of county government, since the law has no relation whatever to county government. *Salt Lake County v. Salt Lake City*, 42 Utah 548, 134 Pac. 560.

<sup>23</sup> *Long Beach v. Lisenby*, 175 Cal. 575, 166 Pac. 333.

<sup>24</sup> *Peterson v. Chicago and Alton Ry. Co.*, 265 Mo. 462, 178 S. W. 182.



eral concern, matters not pertaining strictly and exclusively to local municipal affairs. Cities and towns are subject to all general laws of the state in existence when their charters were adopted and those enacted thereafter of the character contemplated and passed in the manner prescribed by the constitution, whether by the legislature or by the people of the state at large.<sup>25</sup>

<sup>25</sup> *Riggs v. Grants Pass*, 66 Or. 266, 134 Pac. 776; *State ex rel. v. Tillamook*, 62 Or. 332, 124 Pac. 637, Ann. Cas. 1914C, 483; *Schubel v. Olcott*, 60 Or. 503, 120 Pac. 375; *Portland v. Nottingham*, 58 Or. 1, 113 Pac. 28; *Kiernan v. Portland*, 57 Or. 454, 111 Pac. 379, 112 Pac. 402, 37 L. R. A. (N. S.) 339; *Branch v. Albee*, 71 Or. 188, 142 Pac. 598.

"Inside their boundaries and in relation to matters purely local they are as regards regulations by the state legislature supreme; beyond these boundaries they are invested with no power except that which the legislature may see fit to grant them in common with all other cities, and under like circumstances." *Thurber v. McMinnville*, 63 Or. 410, 128 Pac. 43.

"By granting and reserving to the people of municipalities the power to enact and amend their charters and adopt local or special laws, the state has not surrendered her sovereignty to the municipalities."

"Within their boundaries cities are clothed with power to regulate matters purely local. However, a city is not constituted as a sovereignty as regards all matters of legislation, but is still to a certain extent a mere agency of the state of which it is a part. Beyond such municipal boundaries and in matters of general concern not pertain-

ing solely to local municipal affairs, cities are amenable to the general laws of the state which do not infringe upon the right of cities to local self-government." This is so whether such laws are enacted by the legislature or by the people of the state at large. *Coleman v. LaGrande*, 73 Or. 521, 144 Pac. 468.

Constitutional provisions of Oregon conferring the initiative and referendum powers upon the legal voters of every municipality in the state, and empowering the qualified electors of every such municipality to frame, adopt and amend their own charter, subject to the constitution and criminal laws of the state, are not violated by a general state statute giving a right of action against public corporations, except counties, due to injuries resulting from some act of commission or omission on the part of such public body, because the same constitution ordains that "every man shall have remedy by due course of law for injury done him in his person, property or reputation." Since all of the provisions of the constitution must be construed together (*Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Branch v. Albee*, 71 Or. 188, 142 Pac. 598) it is clear that the remedy secured by the statute was comprehended by the constitution, and therefore

In Oregon a general law changing the police pension plan provided by a municipal charter, applicable to one city only, was held unconstitutional, as it was an attempted amendment of the city charter, which power was reserved to the electors of the city by the constitution.<sup>26</sup> And in the same state a motor law, general in its terms, was held not to supersede or repeal a local regulation promulgated by ordinance on the same subject, enacted pursuant to charter.<sup>27</sup>

**§ 195. Special constitutional provisions forbidding legislative control.**

A constitutional provision forbidding the legislature from enacting or amending municipal charters and conferring upon municipalities the power of initiative and referendum in local legislation has been held not to preclude the legislature from passing general laws applicable to cities and towns,<sup>28</sup> e. g., assessments for im-

in existence when the municipal charters became effective. *Coleman v. LaGrande*, 73 Or. 521, 144 Pac. 468.

<sup>26</sup> *Branch v. Albee*, 71 Or. 188, 142 Pac. 598, 602, holding police officers, city officers under the home rule provision of the constitution.

<sup>27</sup> Oregon Constitution: The legislature "shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town." "This language admits of no other interpretation than that the people purposed to curtail the power of the legislature in all matters of legislation pertaining to the creation of a municipal charter, its amendment or nullification." *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594.

See section 195, post.

<sup>28</sup> Initiative and referendum amendment, June 6, 1906, of Ore-

gon Constitution: "The initiative and referendum powers reserved to the people by this Constitution are hereby further reserved to the legal voters of every municipality and district, as to all local, special and municipal legislation of every character in or for their respective municipalities and districts. The manner of exercising said powers shall be prescribed by general laws, except that the cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation." *Branch v. Albee*, 71 Or. 188, 142 Pac. 598, 600; *Rose v. Portland*, 82 Or. 541, 162 Pac. 498.

"To the extent that attributes of sovereignty are granted to local subdivisions the language carrying the grant should be strictly construed for the reason that such

provements on abutting owners.<sup>29</sup>

Under the Ohio constitution providing that municipalities shall have authority to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws, a general law specifically forbidding local authorities from regulating the speed of motor vehicles by ordinance, by-law or resolution, was held unconstitutional.<sup>30</sup>

### III. SAME—CLASSIFICATION OF MUNICIPAL CORPORATIONS— GENERAL AND SPECIAL OR LOCAL LAWS.

§ 197. Classification of municipal corporations authorized and described.<sup>31</sup>

§ 198. "General law," "public law," "special law," and "local law" defined and distinguished.

A law so framed in good faith that by its terms it should apply to all parts of the state when they come within the scope and purpose of the enactment is a general law.<sup>32</sup> Thus a law applicable to one city only, at the date of its enactment is not a special, but a general law.<sup>33</sup> An act, therefore, providing for a commission form of government for cities according to population, which under the existing conditions applied to one city only

grant is a limitation upon the power of the legislature." *Rose v. Portland Port*, 82 Or. 541, 162 Pac. 498; *Thurber v. McMinnville*, 63 Or. 410, 414, 128 Pac. 43.

<sup>29</sup> *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 502.

<sup>30</sup> "It is sufficient to say that the general assembly of Ohio cannot deprive a municipality of its constitutional rights." *Fremont v. Keating*, 96 Ohio St. 468, 470.

See section 194, ante.

<sup>31</sup> Legislature may classify. *Kirkpatrick v. People (Colo. 1919)*, 179 Pac. 338.

Classification which is illusory or

impossible or double relating to police force, condemned. *Cook v. Ramsey*, 86 N. J. L. 263, 90 Atl. 265.

Double limitation of a class, held bad. *Helfer v. Simon*, 53 N. J. L. 550, 22 Atl. 120; *Goldberg v. Dorland*, 56 N. J. L. 364, 28 Atl. 599.

<sup>32</sup> *Covington v. Thompson*, 145 Ala. 98, 38 So. 679.

General law uniform in its operation, etc. *Kirkpatrick v. People (Colo. 1919)*, 179 Pac. 338.

<sup>33</sup> *Milwaukee v. Reiff*, 157 Wis. 226, 146 N. W. 1130.

was held constitutional, since by its terms it may apply to others when they grow in population.<sup>34</sup>

**§ 199. Same—difference between governmental and private powers as to classification.**

A legislative act permitting a municipality in the construction of any building or the performance of any public work, to provide, by ordinance, municipal regulation, or contract, that any portion or all of the work on the building, or the work on the public improvement, shall be done within its territorial limits, and also validating all ordinances, regulations or contracts theretofore made so providing, was held local or special within the provision of the Pennsylvania constitution as to the regulation of labor, trade, mining or manufacturing. The court stated that while an act is not local as to place, which applies to all municipalities, no adequate reason has been given for placing municipalities in a class with respect to the place of performing work or preparing materials incident to contracts for the erection of public buildings so as to prevent the act being special in respect to its subject within the meaning of the constitutional provision.

“The subject-matter of the statute does not relate to the exercise of a governmental power or function of the municipality in which it acts as representative or agent of the state in carrying out the purpose of the local government for which it was created, but deals with functions which concern only local business and matters with respect to which the state is not interested, and in the

<sup>34</sup> “Local law” in the Alabama constitution is a “law which applies to any political subdivision or subdivisions of the state less than the whole.” “This act operates in only one city as conditions now are, but in terms it applies and will apply to all cities that

may hereafter come within its class. Legislation is intended not only to meet the wants of the present but to provide for the future.” *State ex rel. v. Thompson*, 193 Ala. 561, 69 So. 461; *Crenshaw v. Joseph*, 175 Ala. 579, 57 So. 942.

performance of which the municipality should be regarded merely as a private corporation with the corresponding powers and dealing incident to such bodies. Classification with respect to governmental functions has been uniformly held proper on the ground that legislation adapted to one municipality may be totally unsuited to another by reason of difference in population, etc.; with respect, however, to private undertakings not a part of governmental functions of the municipality, and in which the state has no concern, the same reason for classification does not exist, and propriety thereof must stand the test applied to legislation for the government of private corporation.”<sup>35</sup>

<sup>35</sup> “This subject was fully discussed in *Commonwealth v. Casey*, supra, where the Act of July 26, 1897 (P. L. 418), regulating the hours of workmen employed by the state, or by municipalities, was held a special law within article 3, section 7, of the constitution, regulating labor, trade, mining and manufacturing even though its provisions applied to all municipalities of the state. We there said (231 Pa. 179, 80 Atl. 81, 34 L. R. A. (N. S.) 767): It is impossible to suggest a difference between municipal corporations and private corporations that would make a regulation as to the number of hours to be employed in a day suitable for one class, unsuitable for the other. There is no pretense, that there is any such difference. So far as labor is concerned, no more is involved in the construction of public works than in private enterprises of like character.

“The present act restricts the place where ‘any portion or all of the work on said buildings’ shall

be done. While it does not expressly mention materials, one of the apparent objects of the legislature was to remove the doubt as to the validity of ordinances such as those in this case, requiring stone to be cut in the city, and unless the act be construed as applying to the preparation of materials it is without effect, as to the actual work of constructing a municipal building is impossible elsewhere than within the borders of the municipality. If the municipality may require stone cutting to be done within its boundaries, it may also extend this requirement to all materials and supplies and provide for their production or manufacture within its limits. An escape is impossible from the conclusion that such action would result in a regulation of labor, trade, and manufacturing, and must, consequently, be special legislation within the meaning of the constitution.” *Taylor v. Philadelphia*, 261 Pa. 458, 104 Atl. 766, 767.

### § 200. Tests to distinguish general or special from local law.

“The fact that the law may be or seems to be arbitrary and unreasonable in some of its provisions does not render the same a local or a special law.” The test is whether the law operates uniformly throughout the state upon all persons and localities under like circumstances. If so, the law is general.<sup>36</sup>

### § 204. Population as a basis of classification.

Population is a substantial basis for the classification of cities in a law providing for a commission form of city government.<sup>37</sup>

<sup>36</sup> A law providing for the organization of forest preserve districts is not special which applies alike to all counties in the state similarly situated, that is, which contain one or more natural forests and a city, town or village; and in case there are several natural forests in the county it permits the organization of as many forest preserve districts in such county as there are forest preserves capable of being organized into districts which contain one or more cities, villages or towns, or the organization of all of the contiguous forest preserves into one forest preserve district or the whole county into such a district, and authorizes the commissioners of such district to lay out and preserve as many of such forests as they may deem desirable or necessary for the public good. *Perkins v. Cook County Commissioners*, 271 Ill. 449, 262, 463, 111 N. E. 580, distinguishing *People v. Rinaker*, 252 Ill. 266.

<sup>37</sup> *State ex rel. v. Thompson*, 193 Ala. 561, 69 So. 461; *Crenshaw v.*

*Joseph*, 175 Ala. 579, 57 So. 942.

Differences in population is a proper basis for classification. *Griffin v. Drennen*, 145 Ala. 128, 40 So. 1016.

“The effort to arrange the powers and duties of local governmental agencies according to the increasing difficulties and responsibilities that wait upon increasing populations appears to be entirely reasonable,” e. g., a form of government for a town of 1,000 would be inadequate for a city of 100,000 or 1,000,000. Uniformity through the state as to municipal powers is not intended to be enjoined by the Constitution. The limitation is that the subject shall be dealt with by general law, and hence all municipalities of the same class shall be governed by the same charter. *State ex rel. v. Thompson*, 193 Ala. 561, 69 So. 461, 465; *McNeill v. Sparkman*, 184 Ala. 96, 63 So. 977; *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534.

In absence of provision the federal census may be adopted as to

**§ 205. Act applicable to one city or object only.**

If the classification is reasonable and not merely a subterfuge or an attempted evasion the fact alone that the law is applicable to one city only at the date of its passage will not render it unconstitutional.<sup>38</sup>

The rule is well settled in Missouri that a classification according to population which applied to one city or county only at the time of the passage of the law and at the time of the judicial proceedings to test its validity is constitutional classification.<sup>39</sup> Accordingly it was

population relating to classification of cities and towns. *State v. Prevo*, 178 N. C. 740, 101 S. E. 370.

<sup>38</sup> *Milwaukee v. Reiff*, 157 Wis. 226, 146 N. W. 1130; *State ex rel. v. Thompson*, 193 Ala. 561, 69 So. 461.

<sup>39</sup> *Bambrick Bros. Construction Co. v. Semple Place Realty Co.*, 270 Mo. 450, 458, 193 S. W. 543; *State ex rel. v. Sheehan*, 269 Mo. 421, 190 S. W. 864.

"The propriety of such a classification according to population has been settled in this state." "The rule that a statute which related to a class of persons or class of things is general, while one which only applies to particular persons or things is special, has been generally announced in this and other jurisdictions. (*State ex rel. v. Taylor*, 224 Mo. 393, 477, 478, and cases cited; *Etling v. Hickman*, 172 Mo. 267, and cases cited; *The State ex rel. Dickason v. County Court of Marion County*, 128 Mo. 427; *Lynch v. Murphy*, 119 Mo. 163; *State ex rel. Lionberger v. Tolle*, 71 Mo. 645, 650).

"It is, however, an essential adjunct of this rule that the classification made by the legislature

shall rest on a reasonable basis and not upon a mere arbitrary division made only for purposes of legislation. (*State ex rel. v. Roach*, 258 Mo. 541, 563; *Hawkins v. Smith*, 242 Mo. 688, 696). When this is borne in mind, and a statute is enacted upon a basis justifying its classification and is made to apply to all persons who may hereafter fall within its purview, it is not special legislation.

"It has been repeatedly decided in this state that classification according to population was sufficient to render an act containing such a classification a general law. (*State ex inf. Crow v. Continental Tobacco Co.*, 177 Mo. 1; *State ex rel. v. County Court*, 128 Mo. 427, 442; *State ex rel. v. Bell*, 119 Mo. 70). Nor has the rule as to such a standard been altered by the fact that such an act has been found applicable only to one city, (*State ex inf. Crow v. Fleming*, 147 Mo. 1; *State ex rel. v. Mason*, 55 Mo. 486; *State v. Keating*, 202 Mo. 197; *State ex rel. v. Speed*, 183 Mo. 186; *Ex Parte Lucas*, 160 Mo. 218). *State ex inf. v. Southern*, 265 Mo. 275, 286, 287, 177 S. W. 640.

ruled that a constitutional provision forbidding the enactment of special or local laws was not violated by a statute providing that "in all counties in this state which contain or which may hereafter contain more than fifty thousand inhabitants, and whose taxable wealth exceeds or may hereafter exceed the sum of forty-five million dollars, or which adjoin or contain therein, or may hereafter adjoin or contain therein, a city of more than one hundred thousand inhabitants by the last decennial census, the county surveyor shall be *ex officio* county highway engineer." <sup>40</sup>

On the contrary, a proviso in a statute which recited that, "in all counties in this state which contain or may

<sup>40</sup> "The evident motive of the legislature in the enactment of the clause under consideration was to classify the counties of the state as they then or in the future might have a population exceeding fifty thousand and taxable property exceeding forty-five million dollars, for the reason that the counties which should fall within such a class would naturally have different and greater needs, corresponding to the differences between their condition and other counties of less population and less wealth. Neither did the legislature lose sight of this object in the disjunctive part of the sentence, which provided that counties adjoining or containing them or in the future a city of more than one hundred thousand inhabitants should belong to the same class. The purpose in each clause of the sentence was to create a distinction based upon difference in population and in wealth, for, if, as the legislature rightfully assumed, counties of fifty thousand inhabitants would acquire coincidentally a taxable

wealth of forty-five million dollars, it might be well assumed that such counties would not have less wealth when they should embrace or adjoin cities containing one hundred thousand inhabitants. We judicially know that such classification would cause the act in question to apply to a number of counties in this state, and we are unable to see any good reason why the lawmaking power should not have created the classification as set out in the above quoted portion of the statute with a view of having it applied as it does in terms to all counties that may hereafter become subject to its provisions, in view of the evident fact that it will necessarily apply to an increasing number of counties as the state shall progress in wealth and population. Our conclusion is, that this provision of the statute is not obnoxious to the provisions of the constitution forbidding the enactment of certain special laws." State *ex inf. v. Southern*, 265 Mo. 275, 287, 288, 177 S. W. 640.



hereafter contain two hundred thousand and less than four hundred thousand inhabitants, and which county or counties contain one hundred and fifty miles or more of macadamized roads outside of municipal corporations, and which county or counties pay to the county surveyor a salary of three thousand dollars or more annually, the county surveyor of such county or counties shall be *ex officio* county highway engineer," was held a special and local law which by its specifications as infallibly pointed out a particular county as if, instead of such circumlocution, the proviso has mentioned that county by name. The court recognizes as a matter of judicial knowledge and public history that when enacted the proviso could not have applied to any other county in the state. Nor could it be said, in the opinion of the court, that it created a future class into which other counties might fall, for an inspection of its language shows that the determining conditions of its application are expressed in words of present import.<sup>41</sup>

<sup>41</sup> "It will be perceived by the language of this concluding clause the Legislature attempted to create a classification of counties falling within the limits of population of two hundred thousand minimum and four hundred thousand maximum, eschewing all others, and further specifying that such counties should now contain a certain number of miles of macadamized roads, which should be outside of other cities, and that their county surveyor should receive a salary of three thousand dollars or more. This proposed classification is not based upon a natural division of counties according to general standards of population and wealth, but purports to rest upon a selected number of inhabitants not less than a given amount and not beyond a fixed limit. The

Legislature must have known that this favored intermediary state had only been reached by Jackson County, Missouri. It also must have been aware that said county alone possessed outside of its towns 150 miles of macadamized roads and was then paying its County Surveyor a salary of three thousand dollars per year, (R. S. 1909, § 10737). It is seen at a glance that this proviso dealt exclusively with existing conditions as to its application, except as to the matter of population as to which it purported to include such counties as might hereafter enter the particular zone of legislation. The proviso at the time of its enactment could not have applied to any other than Jackson county. Its terms negative any other basis for its enactment than an arbi-

**§ 211. The legislature cannot divide or add classes.**

An act authorizing cities of a specified class to adopt a commission form of government at the option of the voters, it has been held, does not create another class of cities.<sup>42</sup>

**§ 212. Special or local laws to take effect on event of future contingency or within limited time.<sup>43</sup>**

Laws to take effect in any particular municipality only when accepted by the voters at an election, or when adopted by the city council, are constitutional.<sup>44</sup> The rule

trary prescription of a specific state of the growth of population of the county and a present particular kind and extent of road mileage, and a present payment of a certain salary of a county surveyor." *State ex inf. v. Southern*, 265 Mo. 275, 288, 289, 177 S. W. 640.

<sup>42</sup> "As to the objection that the act creates in fifth class of cities, the answer is, that the bill does not alter the pre-existing classification of the city of Kirksville as one of the third class, but leaves it and all other cities which shall adopt its provisions, in the same class to which they theretofore belonged. It merely gives to them for purpose of administration, similar governmental powers and functions, and expressly provides that all these new methods of administration may be surrendered and those which such cities formerly had may be resumed at any time at the option of the voters." *Barnes v. Kirksville*, 266 Mo. 270, 180 S. W. 545.

"The mere fact that the constitution requires the classification of municipalities to be according to population does not further re-

strict the legislature as to the manner in which they shall be made or created. This constitutional provision is an authorization, and not a limitation. It was undoubtedly adopted to avoid any contention that a classification according to population would be an arbitrary one. Many courts have held that an act general in its terms and operation, applicable to certain cities which may constitute a portion only of a class theretofore existing creates a new classification in itself, and is valid as such." *State ex rel. v. Tausick*, 64 Wash. 69, 116 Pac. 651, 655, citing *Eckerson v. Des Moines*, 137 Ia. 452, 115 N. W. 177; *Parker-Washington Co. v. Kansas City*, 73 Kan. 722, 85 Pac. 781; *State v. Graham*, 16 Neb. 74, 19 N. W. 470; *McCarter v. McKelvey*, 78 N. J. L. 3, 74 Atl. 316; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

<sup>43</sup> Law as to street improvements not to take effect until accepted by vote of electors, valid. *Carr v. Hyattsville*, 115 Md. 545, 81 Atl. 8.

<sup>44</sup> *Barnes v. Chicopee*, 213 Mass. 1, 4, 99 N. E. 464; *Graham v.*

has been declared in New York that while the legislature may not delegate the power to make a charter for a city or village it may itself do that and then permit the electors to determine whether they will adopt it or not, and if the same be adopted it becomes the charter with the same force and effect as if the legislature had created it by an act for that specific purpose.<sup>45</sup> Like rulings have been made in other states in sustaining general laws authorizing a choice of form of municipal government, as the commission, city manager, or aldermanic plan, to be determined by vote of the electors of the particular municipality.<sup>46</sup>

## § 216. Indirect or legislative amendment of municipal charters.<sup>47</sup>

### IV. LEGISLATIVE CONTROL OF CORPORATE PROPERTY.

## § 219. Legislative control of corporate property—general consideration.

The due process of law clause of the 14th Amendment of the constitution of the United States does not limit the authority of the state legislature over one of the sub-alternate governmental instrumentalities which it has

Roberts, 200 Mass. 152, 85 N. E. 1009; Prince v. Crocker, 166 Mass. 347, 360, 44 N. E. 446, 32 L. R. A. 610; Cole v. Tucker, 164 Mass. 486, 489, 41 N. E. 681, 29 L. R. A. 668.

Option city government laws. Cunningham v. Cambridge, 222 Mass. 574, 111 N. E. 409.

An option law to be valid "must be a complete enactment in itself. It must contain an entire and perfect declaration of the legislative will, and must require nothing to perfect it as law. The only thing that may be left to the people to determine is whether they will

avail themselves of its provisions." Holt Lumber Co. v. Oconto, 145 Wis. 500, 506, 130 N. W. 709, approving State ex rel. v. Sawyer Co., 140 Wis. 634, 123 N. W. 248.

<sup>45</sup> The act offered different forms of government, allowing the electors by vote to adopt the one they desired. Cleveland v. Watertown, 222 N. Y. 159, 163, 118 N. E. 500, reversing 179 App. Div. 954.

<sup>46</sup> Section 124A, ante.

<sup>47</sup> In Oregon, the legislature may amend municipal charters by general law. Churchill v. Grants Pass, 70 Or. 283, 141 Pac. 164.

created and endowed with administrative powers and over the public property placed by legislative enactment in its custody and control.<sup>48</sup> Accordingly, the property of which a municipal corporation has acquired absolute ownership as an agency of the state, and which it holds strictly for public uses is subject to legislative control. It may be transferred to some other agency of government charged with the same duties, or it may be devoted to other public purposes.<sup>49</sup> The property held by a municipal corporation in its private capacity is not subject to the unrestricted control of the legislative, and it cannot be deprived of such property against its will, except by the exercise of eminent domain with payment of full compensation.<sup>50</sup> While municipalities have the right to

<sup>48</sup> "It is true that it has been considered in some jurisdictions that as municipal corporations such as cities and towns possess a dual character—one essentially local, dealing with interests peculiar to the people composing it, and the other that of an agency of the state, dealing with matters that concern the state at large—they are in their first character, in a sense, private corporations, and under the support of the doctrine of implied constitutional guaranty of local self-government, may invoke the protection of the guaranty of due process of law against an attempt upon the part of the legislature to compel them to levy taxes and expend money for something purely local without their consent. But the almost uniform judicial utterance is to the effect that the due process clause does not fetter or clog the plenary power of the legislature to compel taxation and expending of money for such municipal corporations for some public purpose

which is beneficial to such municipalities and in which the general public has an interest; and within such purpose is the opening, improving, and maintenance of public highways." *School Town of Windfall City v. Somerville*, 181 Ind. 463, 471, 104 N. E. 859, 862, holding valid a legislative act providing that real property of common school corporations shall be liable to special assessment for public improvements already made.

<sup>49</sup> "This power has always been exercised in this commonwealth upon some principle of public justice of the communities affected." *Higginson v. Boston Treasurer, etc.*, 212 Mass. 583, 585, 99 N. E. 523; *Springfield v. Springfield Street Ry. Co.*, 182 Mass. 41, 64 N. E. 577; *Worcester v. Worcester Consolidated Street Ry.*, 182 Mass. 49, 196 U. S. 539, 25 Sup. Ct. 327, 49 L. ed. 591; *Agawam v. Hampden*, 130 Mass. 528; *Rawson v. Spencer*, 113 Mass. 40.

<sup>50</sup> *Higginson v. Boston Treasurer, etc.*, 212 Mass. 583, 585, 99

sell and lease corporate property held in a proprietary capacity, e. g., lighting plant, the legislature may prescribe the mode of disposition, which, of course, must in substance be observed.<sup>51</sup>

§ 220. Same—waterworks.

Although the state may regulate as to service and rates, water plants owned and operated by municipalities,<sup>52</sup> it is usually held that such property is not employed for governmental purposes, but that in such ownership and operation, the municipality acts in its proprietary capacity, free from legislative interference.<sup>53</sup>

§ 221. Same—parks.

In a Massachusetts case the city acquired the fee of the park land under authority of a statute and had expended large sums of money in improvements. A later statute authorized the erection of a building within the limits of the park on specified conditions. The question for decision was, whether the legislature could so ordain without the consent of the city either by its voters or its

N. E. 523; *Ware v. Fitchburg*, 200 Mass. 61, 68, 85 N. E. 951; *Mount Hope Cemetery v. Boston*, 158 Mass. 509, 33 N. E. 695, 35 Am. St. Rep. 515.

<sup>51</sup> *McDonald v. Price*, 45 Utah 464, 146 Pac. 550, approving § 1180, vol. 3, ante.

<sup>52</sup> Section 229A, et seq., post.

<sup>53</sup> *Public Service Com. v. Helena*, 52 Mont. 527, 534, 159 Pac. 24, following *Helena Consolidated Water Co. v. Steele*, 20 Mont. 1, 49 Pac. 382, 37 L. R. A. 412; *Blades v. Detroit Water Comrs.*, 122 Mich. 366, 81 N. W. 271; *Kenton Water Co. v. Covington*, 156 Ky. 569, 576, 161 S. W. 988; *Covington v. Commonwealth*, 19 Ky. Law. R. 105, 107, 39 S. W. 836,

saying that waterworks property has been invariably treated by that court as property used for the profit or convenience of the citizens collectively, and hence, subject to taxation.

Water system is not used for "governmental purposes," but is used for "public purposes," hence, it is exempt from taxation. *Board of Councilmen of Frankport v. Com.*, 29 Ky. Law. Rep. 699, 94 S. W. 648.

"The measure for the construction of waterworks is peculiarly a local one and it is within the authority of a municipality to make suitable provision therefor." *State v. Andresen*, 75 Or. 509, 147 Pac. 526, 529.

council and without the exercise of the power of eminent domain. It was ruled that the property was held by the city as an agency of government, and not as a private corporation, and therefore, the legislature had the power to appropriate it or any part of it to another public use without the consent of the city.<sup>54</sup>

**§ 222. Same—wharves.<sup>55</sup>**

**§ 225. Same—transfer to another class of public officers.**

It is competent for the legislature to divest a city of the power to administer a trust fund created by will wherein the city was constituted trustee to establish and maintain a library for the free use of the people of the city forever, and confer the power of administration upon a board of trustees selected by the city council.<sup>56</sup>

**V. LEGISLATIVE CONTROL OF STREETS AND HIGHWAYS.**

**§ 227. Legislative control of streets is paramount.<sup>57</sup>**

**§ 228. Power delegated to municipal corporations to regulate streets.<sup>58</sup>**

<sup>54</sup> *Higginson v. Boston Treasurer, etc.*, 212 Mass. 583, 99 N. E. 523.

<sup>55</sup> *City sold pier. American Ice Co. v. New York*, 217 N. Y. 402, 112 N. E. 170, reversing 156 App. Div. 945, 142 N. Y. S. 1106.

<sup>56</sup> *Handley Trustees v. Winchester*, 111 Va. 360, 373, 70 S. E. 131.

See § 219, ante.

<sup>57</sup> Legislature has supreme authority over streets and highways, unless limited by state constitution. *School Town v. Somerville*, 181 Ind. 463, 104 N. E. 859, 862; *Vincennes v. Vincennes Traction Co.* (Fed. 1918), 120 N. E. 27, 29.

Control is in state to be exer-

cised in such manner as not forbidden by state constitution. *Western Union Tel. Co. v. Hopkins*, 160 Cal. 106, 116 Pac. 557.

Legislature may grant right to use street for railroad tracks, subject to consent of the city. *New York Central & H. R. Co. v. New York*, 202 N. Y. 212, 95 N. E. 638, affirming 127 N. Y. S. 513, 142 App. Div. 578.

See § 1310, post.

<sup>58</sup> *Re Joiner Street in Rochester*, 164 N. Y. S. 272, 177 App. Div. 361.

Care of highways and bridges is under sovereign governmental power of the state. *Markey v. Queens County*, 154 N. Y. S. 675,

Va. LEGISLATIVE CONTROL OF PUBLIC UTILITIES OWNED AND OPERATED BY THE MUNICIPALITY OR OPERATED WITHIN ITS LIMITS.

§ 229a. General consideration.

During recent years, the states, with few exceptions, have established state boards generally known as public service or public utility commissions, sometimes called corporation commissions, and sometimes designated rail-

49 N. E. 71, 39 L. R. A. 46; Central Life Assur. Soc. v. Des Moines (Ia. 1919), 171 N. W. 31.

State may delegate its sovereign power over highways and bridges to cities and towns. Henry v. Saratoga Springs, 155 N. Y. S. 942, 171 App. Div. 827.

**Local consent to granting railroad franchise required.** "This is peremptory and not permissive in its nature, and confers no franchise or right of any kind upon any person or corporation. This is not denied, and is too obvious for argument." Birmingham and Pratt Mines St. Ry. Co. v. Birmingham St. Ry. Co., 79 Ala. 465, 58 Am. Rep. 615.

The provision is peremptory and without express limitations of any kind. "It is a gift directly from the constitution to the local bodies. and needs no help or permits any interference from the legislature." Allegheny v. Millville E. & S. St. Ry. Co., 159 Pa. 411, 28 Atl. 202.

"No street railroad shall be constructed within any city, town or incorporated village without the consent of the local authorities having the control of the streets or highways proposed to be occupied by such street railroad." Held not

a direct grant of authority to municipalities, and a withholding from the legislature of any authority or control over street railroads within any city, town or incorporated village. As the power of the legislature in the absence of constitutional inhibition, in granting such franchises is absolute, with or without the consent of the local authorities or the inhabitants, it is obvious that this provision was intended simply as a restraint upon the power of the legislature in this respect, namely, that the legislature could not directly grant the authority, without the consent prescribed, and it does not destroy, hamper or thwart the power of the legislature to forbid municipalities from granting such authority except on such terms which the legislature in its discretion may impose; but it is also equally clear that it confers upon municipalities power to impose other additional terms and conditions, than those which may be prescribed by the legislature or to deny consent entirely." Denver v. Mercantile Trust Co., 201 Fed. 790, 798, 799, 120 C. C. A. 100.

See § 1311, post.

road commissions. In a few states these commissions are created by organic or constitutional provisions, but in most instances they originate by legislative enactments.

Whether by their establishment municipal jurisdiction is excluded, in whole or in part, or alone obtains, or is concurrent with that of the state, in the regulation of the service and rates of public utilities serving the people of the local community, or where the municipality itself owns and operates the plant and serves its inhabitants, is a question solely of constitutional and legislative intent. Usually the creating law is made the supreme law of the state, in the regulation and supervision of all public utilities within the state, and when this is the case it follows as a necessary sequence that all prior laws, either in the form of statute, municipal charter or ordinance inconsistent with the powers thus conferred must be held to be superseded. Therefore, the municipality itself in supplying the service, being in the nature of a public service corporation as to rates and service, is subject to supervision and regulation of the state commission unless it should be exempt either expressly or by implication from the operation of the state law; for example, where the particular municipality has a home rule, constitutional or a freeholders' charter and owns and operates the utility in its corporate and proprietary capacity, the question is presented whether in the enterprise of supplying the service it is to be regarded as engaged in a business of purely municipal and local concern which matter is by the constitution of the state intended to be committed to local self-government.

Obviously, there is no power in the municipality to supervise and regulate such utilities where the purpose of the state law is to establish a complete and uniform system throughout the state area for the supervision and regulation of public utility rates and service, whether furnished by individuals, corporations or municipalities, and to create an administrative agency of the state for



the enforcement of such powers as are conferred by the state law.<sup>59</sup>

This conclusion does not mean that the municipality may not under the police power prescribe reasonable regulations as a protection to the health, life and safety of its inhabitants and all who may be within its corporate boundaries, even as applied to public service corporations, but such regulations are incident to the state's sovereign police power and must be so restricted. Under the guise of a police regulation the municipality cannot undertake to prescribe service, rates or charges containing inequalities, unjust discriminations, undue preference or advantages, contrary to the state law and free from state investigation or regulation by the state commission. When by the terms of an applicable statute the regulation of the rates and service of all public utilities within the state is made the exclusive function of the state commission,<sup>60</sup> this becomes a rule of action binding upon all branches of government, state or mu-

<sup>59</sup> California-Oregon Power Co. v. Grant's Pass, 203 Fed. 173; Seattle Electric Co. v. Seattle, 206 Fed. 955; Troy v. United Traction Co., 202 N. Y. 333, 95 N. E. 757; State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861.

The state law "is an elaborate law bottomed on the police power," and intended to provide a "complete, rounded scheme for dealing with the business of public utilities at every spot where the shoe pinches the public or the utility." State ex inf. v. Kansas City Gas Co., 254 Mo. 515, 534, 535, 163 S. W. 854.

"The public service law was intended to provide a complete system for the supervision and regulation of public service corporations, and the intention of the legislature to repeal or supply all former acts inconsistent therewith

is clearly expressed in the language of the statute. \* \* \* There being no reasonable doubt that the legislative intent was to make the Public Service Act the supreme law of the state in the regulation and supervision of public service corporation, and this being so, it follows as a necessary sequence that all laws inconsistent with the powers thus conferred must be held to be repealed or supplied thereby." York Water Co. v. York, 250 Pa. 115, 95 Atl. 396.

Under some laws public utilities owned by the municipality are not subject to state control. Springfield Gas & Electric Co. v. Springfield (Ill. 1920), 126 N. E. 739.

<sup>60</sup> Public Service Commission v. Helena, 52 Mont. 527, 159 Pac. 24, P. U. R. 1916F, 389; Woodburn v. Public Service Commission, 82 Or. 114, 161 Pac. 391, 395.

nicipality, and upon the people as well.<sup>61</sup> Under a constitution requiring ordinances to be consistent with the general laws of the state, when the state acts upon the subject-matter, the authority of the city to act thereon ceases, e. g., a law creating a commission with power to regulate street railways. In such case there is no room for concurrent jurisdiction, and hence the city must give way.<sup>62</sup>

**§ 229b. Municipal jurisdiction—constitutional or freeholders' charter.**

The fact that the particular municipality has a home rule, constitutional or freeholders' charter, adopted by its electors by virtue of the state constitution, and was given at such time exclusive control of all local or strictly municipal affairs without central interference, and of such state or general affairs as the agent of the state as the then existing law sanctioned, and which might thereafter be committed to it by the state to be exercised in like manner as the agent of the paramount authority, does not in the least limit the authority of the state through the state commission, to exercise whatever powers it may possess in the premises by virtue of the state statute. The city in furnishing the service cannot be viewed as acting solely in its corporate and proprietary capacity, and hence, engaged in a business of purely municipal and local concerns, nor can the city in performing such service be regarded as an *imperium in imperio*

<sup>61</sup> York Water Co. v. York, 250 Pa. St. 115, 119, 95 Atl. 396.

<sup>62</sup> Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892, following State ex rel. v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78, 29 Am. and Eng. Ann. Cas. 78 and note.

Rate regulation for public service belongs to state's police powers. Tipton v. Tipton Light & Heating

Co., 176 Iowa 224, 157 N. W. 844, 849.

State public service commission has control of service of street railways. Powers of city, as to existing, therefore was withdrawn by public service commission law. Re United Ry. Co., 4 Mo. P. S. C. 499, 502; Murphy v. Missouri Pacific Ry. Co., 2 Mo. P. S. C. 471, 482-490.

and consequently entirely free from state supervision and regulation.

A municipal charter framed and adopted by the people of a particular community, called either a home rule, constitutional or freeholders' charter, stands on no higher legal plane as respects the rightful jurisdiction of the state than a legislative charter, either general or special, for all municipal charters are subject to and controlled by the general laws of state.<sup>63</sup>

In determining this question, therefore, it is unnecessary to distinguish between municipal and state government, that is, municipal and state affairs. Notwithstanding purely municipal affairs have not as yet been clearly differentiated in all cases, in view of the uniform course of judicial decision in all the states, it is not open to controversy that the exercise of the power in the regulation of service and rates of public utilities has always been regarded as state rather than municipal because such regulation involves the exercise of an undoubted sovereign power of the state.<sup>64</sup>

### § 229c. Same—same—rates.

It is familiar law that the legislative branch of the nation or the state is vested with power to regulate private property which is devoted to public use.<sup>65</sup> It is settled that this includes the power to regulate rates to be charged by corporations, private, quasi-public, public or municipal, entrusted with a franchise of a public utility character for service. The power of regulation is within the exclusive jurisdiction of the state that grants the franchise or that suffers it to be exercised within its borders.<sup>66</sup> Such power may be exercised by the

<sup>63</sup> § 323, vol. 1, ante; § 323, ante.

<sup>64</sup> § 1734, post; § 1734, vol. 4, ante.

<sup>65</sup> *Munn v. Illinois*, 94 U. S. 113, 130, 24 L. ed. 77; *Michigan Central Rd. Co. v. Michigan R. R. Commission*, 236 U. S. 615, 35 Sup. Ct.

422, P. U. R. 1915C, 263; *Griffen v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240.

<sup>66</sup> *State ex rel. v. Missouri & Kansas Tel. Co.*, 189 Mo. 83, 100, 88 S. W. 41; *Danville v. Danville Water Co.*, 180 Ill. 235, 54 N. E.

state, either directly or by its legislative department, or the state may in due manner authorize it to be exercised by a commission or commissioners legally created by it.<sup>67</sup> In the latter instance the commission acts in the ex-

224; *Madison v. Madison Gas & Elec. Co.*, 129 Wis. 249, 264, 108 N. W. 65, 116 Am. St. Rep. 944.

Section 1734, post; § 1734, ante, vol. 4.

<sup>67</sup> *Florida. State v. Florida East Coast R. Co.*, 69 Fla. 480, 68 So. 729.

*Georgia. Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S. E. 508.

*Kansas. State v. Flannelly*, 96 Kan. 372, 382, 152 Pac. 22; *State ex rel. v. Wyandotte County Gas Co.*, 88 Kan. 165, affirmed 231 U. S. 622; *Emporia v. Emporia Telephone Co.*, 90 Kan. 118, 133 Pac. 858.

*Massachusetts. Board of Survey of Arlington v. Bay State Ry.*, 224 Mass. 463, 113 N. E. 273; *Fall River v. Public Service Com.*, 228 Mass. 575, 117 N. E. 915.

*Missouri. State ex rel. v. Public Service Commission*, 259 Mo. 704, 168 S. W. 1156.

*Nebraska. State v. Clarke*, 98 Neb. 566, 153 N. W. 623.

*New York. Saratoga Springs v. Saratoga Gas, etc., Co.*, 107 N. Y. S. 341.

*New York.* 122 App. Div. 203.

*Oregon. Cates v. Public Service Commission*, 86 Or. 442, 168 Pac. 939, 67 Pac. 791; *Woodburn v. Public Service Commission*, 82 Or. 114, 161 Pac. 391, L. R. A. 1917C, 98, Ann. Cas. 1917.

*Washington. State v. Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287, Ann. Cas. 1913D, 178.

*United States. Portland Ry. Light & Power Co. v. Portland*, 210 Fed. 667.

Section 1735, vol. 4, ante; § 1735, post.

Public service commission law supersedes ordinance fixing telephone rates and gave commission power to raise rates. *State ex rel. v. King County Superior Court*, 67 Wash. 37, 120 Pac. 861, L. R. A. 1915C, 287 Ann. Cas. 1913D, 78.

Ordinance fixing electric light rates by virtue of statute, held superseded by public service commission law giving commission power over rates. *Union Electric Light & Power Co. v. St. Louis*, 253 Mo. 592, 161 S. W. 1166.

Rates fixed by city in granting location may be changed by the state through the public service commission. *Board of Survey of Arlington v. Bay State Street Ry.*, 224 Mass. 463, 113 N. E. 273.

With certain exceptions, the Massachusetts act places the subject of fares on all street railways under the exclusive control of the public service commission. Statute, held constitutional and the power of the commission is "plenary over the regulation and establishment of fares of street railways independently of whatever conditions may have been imposed in antecedent grants of location by selectmen of towns or municipal boards." *Fall River v. Public Service Commission*, 228 Mass. 575, 117 N. E. 915, 917.

ercise of the power simply as the agent of the state. Such is the situation in nearly all the states. Thus the regulation of the rates for public service, inherent as it is in the sovereign or police power of the state, does not exist in the municipal corporation, unless such power has been delegated either expressly or by necessary implication to the municipality by the legislature.<sup>68</sup>

**§ 229d. Same—same—withdrawing municipal jurisdictions.**

Where the city owns the public utility and supplies the service to its inhabitants without state supervision and regulation and has done so for a considerable period, the inquiry is limited to ascertaining whether the legislature in enacting the statutes of supervision and regulation of public utilities has delegated the power to the municipal authorities of the particular municipality to regulate the rates and service of the public utilities operating within its limits or such utilities as are owned and operated by the municipality, or has withdrawn municipal power of supervision and regulation as theretofore existing.

In permitting designated municipalities to adopt their own charters state constitutions customarily provide, in effect, that such charters shall be in harmony with and subject to the constitution and laws of the state, and that notwithstanding such charters the state legislature shall have the same power over such municipalities as it has over other municipalities of the state.<sup>69</sup>

Many cities prior to the enactment of state regulation and the creation of a state commission, by virtue of their charters emanating by force of the state constitution, or by virtue of statutes had exclusive control of the rates and service of public utilities owned and operated by them within their limits. In brief, prior to the inauguration of state regulation certain states had committed

<sup>68</sup> § 1734, 1736, vol. 4, ante;  
§ 1734, 1736, post.

<sup>69</sup> Const. of Mo., art. IX, §§ 23,  
25, Amendment 1903, § 22.

the subject to such class of municipalities and it so remained until the state by the enactment of state regulation and the creation of a commission withdrew it from such cities and conferred it exclusively upon the state commission. In such circumstances all conflicting charter and ordinance provisions relating to the subject are superseded by the state statutes. The state law becomes the supreme law of the state and supersedes all other laws in whatever form, for the supervision and regulation of the service and rates of all public utilities of the state, whether owned and operated by individuals, private corporations or municipalities, either with constitutional, home rule or freeholders' or legislative charters.

**§ 229e. Same—same—charter power.**

Constitutional authority to frame and adopt a municipal charter for the government of the community does not confer upon the city the right to assume all powers the state may exercise within the city limits, but only those incident to it as a municipality or which concerns matters of purely local government. The constitution does not "confer unlimited power on the city to regulate by its charter all matter strictly local, for there are many matters local to the city requiring governmental regulation which are foreign to the scope of municipal government."<sup>70</sup> Therefore, provisions of a municipal charter conferring power upon the city "to regulate the construction, maintenance, equipment, operation, service, rates and charges of public utilities, and compel, from time to time, reasonable extensions of facilities for such service," and that the municipal legislative body "shall at all times have full power, to be exercised by ordinance, over all public utilities now or hereafter existing in the city, and may regulate the charges for the use, service or product thereof and establish whatever requirements may be

<sup>70</sup> State ex rel. v. Missouri & Service Com., 82 Or. 114, 161 Pac. Kansas Telephone Co., 189 Mo. 83, 391, 394.  
88 S. W. 41; Woodburn v. Public

necessary to secure efficient use, service or products, and no terms or conditions contained in any grant shall limit or impair this power," in view of the foregoing well settled principles, were declared inoperative and of no effect.<sup>71</sup>

**§ 229f. Same—railroad and street crossings.**

Whether the state or municipality has exclusive jurisdiction of grade crossings within the municipal area or whether such jurisdiction is concurrent is to be determined by the suggestions which follow. Sometimes state jurisdiction is denied on the ground that such jurisdiction is vested exclusively by the state constitution, state statutes and the municipal charter in the city. When a home rule, constitutional or freeholders' charter is adopted by the electors it sometimes confers in express terms upon the city exclusive control within its corporate limits of its public highways, streets, avenues, alleys and public places; exclusive control of the laying and constructing of steam and street railroad tracks, crossings, etc. In brief, exclusive control over the public ways, including all reasonable police regulations appertaining thereto within the limits of the city, is frequently committed to the local government; however, such control and all other powers which may be exercised lawfully by the municipality originating by virtue of its charter, in the language, in substance, of state constitutions or statutes, shall always be in harmony or consistent with and subject to the constitution and laws of the state.

Under the regulatory statutes, the jurisdiction, supervision, powers and duties of the state commission ordinarily is made to extend to all railroads within the state and to all transportation of persons and property thereon, and to the person or corporation owning, leasing, operating or controlling the same; to all common carriers oper-

<sup>71</sup> State ex rel. v. Public Service Commission, 270 Mo. 429, 443-445, 192 S. W. 958.

ating or doing business within the state, and to all public utility corporations and persons operating within the state. In addition to conferring jurisdiction in general terms, as outlined, these regulatory statutes often confer, in express language, exclusive power upon the state commission to regulate all crossings of railroads with highways within the state.

A recital of the powers which may be exercised respectively by the municipality and the state, according to the letter of the laws above mentioned, relating to highways crossing railroads at grade or otherwise within the municipal area, presents an apparent conflict of jurisdiction. As in physics two objects cannot occupy the same space at the same time, so in administration, two jurisdictions, state and municipal, cannot exercise exclusive power at the same time of the same subject-matter. However, the municipality may exercise certain powers concurrently with the state,<sup>72</sup> but charter or ordinance provisions designed to regulate state affairs in conflict with statutes are void, unless authorized by state authority.<sup>73</sup>

A reiteration of the well settled principles which follow will aid in the solution of the question. Although the general rule is that the city or town may only exercise such powers as legitimately belong to its local and internal affairs, it is entirely competent for the state to confer in express terms such powers as will enable the municipality to exercise a power, notwithstanding a statute provides for the exercise of the same power by the state. And where the regulation of a specific matter has been expressly and exclusively given to the local corporation, whether it be intrinsically state or municipal, the corporation may exercise the power so conferred, unfettered, until such time as it is legitimately withdrawn by the state. But, whether the municipal corporation may exercise control of state matters, must be determined by the legislative intent; and such intent must also decide

<sup>72</sup> Johnson v. Great Falls, 38 Mont. 369, 99 Pac. 1059.

<sup>73</sup> § 843, vol. 2, ante.



whether such control is to be exclusive or whether it is to be exercised concurrently with that of the state.<sup>74</sup>

In our system the governmental and legal view is that the state antedates the municipal corporation, and, hence, the charter is, in theory, a delegation of a portion of the state's powers for local self-government.<sup>75</sup> In the eye of the law, the state has all necessary power for the protection of the property, health and comfort of the public, and it may delegate this power to its municipal corporations in such manner as may be deemed desirable for the best interest of the public.<sup>76</sup> In legal language, we say that the state delegates its power relating to civil government or local administration to counties, cities, towns and other forms of public corporations.<sup>77</sup> The courts regard municipal charters as instruments conferring privileges or recognizing rights emanating from the state, the paramount authority.<sup>78</sup>

A municipal charter framed and adopted by the people of a particular community, as is authorized in Arizona, Colorado, California, Michigan, Minnesota, Missouri, Ohio, Oklahoma, Oregon, Texas, Washington and other states, usually termed a home rule, constitutional or freeholders' charter, as mentioned above, stands on no higher legal plane as respects the rightful jurisdiction of the state than a legislative charter, either general or special, for all municipal charters are subject to and controlled by the general laws of the state.<sup>79</sup> Furthermore, it should

<sup>74</sup> § 877, vol. 2, ante.

<sup>75</sup> *Kelly v. Meeks*, 87 Mo. 396; *State ex rel. v. Wilcox*, 45 Mo. 458; *Ruggles v. Collier*, 43 Mo. 353; *St. Louis v. Clemens*, 43 Mo. 395; *St. Louis v. Russell*, 9 Mo. 507; *State v. Simonds*, 3 Mo. 414.

<sup>76</sup> *Stontenburgh v. Hennick*, 129 U. S. 141, 147, 9 Sup. Ct. 256, 32 L. ed. 637; *Covington v. East St. Louis*, 78 Ill. 548.

<sup>77</sup> § 124, 318, vol. 1, ante.

<sup>78</sup> § 165, ante; § 165, vol. 1, ante.

<sup>79</sup> § 323, vol. 1, ante; § 323, ante;

*Re Cloherty*, 2 Wash. 137, 139, 140, 27 Pac. 1064; *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 771; *Kennedy v. Miller*, 97 Cal. 429, 32 Pac. 558; *Ewing v. Hoblitzelle*, 85 Mo. 64; *Kansas City v. Lorber*, 64 Mo. App. 604.

By virtue of the California Constitution, power to lay out and regulate streets, including opening them over existing railroad property and authority to regulate the street crossings over railroad tracks is a "municipal affair."

be mentioned here that, it is apparent from each and every provision of many of these regulatory statutes that they deal with all municipal corporations in the state on precisely the same plane, and many of them expressly provide that the term "municipality," when used in the law, includes a city, village or town.<sup>80</sup>

In the consideration of the question of jurisdiction, the general observations may be made, first, that it is familiar that the police power primarily inheres in the state; second, if the state constitution does not forbid, the state may delegate a part of that power to its municipal corporations, either in express terms or by implication;<sup>81</sup> and third, in the absence of constitutional inhibition the state may resume at any time when deemed expedient the authority which it has delegated to the municipal corporation.<sup>82</sup> For example, the power to regulate and control public rights in the streets.<sup>83</sup>

As mentioned above, when a city adopts a home rule, constitutional or freeholders' charter some statutes provide, either literally, in substance, or in effect, that, such city shall have *exclusive control* over its public highways, streets, avenues, alleys and public places, any law of this state to the contrary notwithstanding.<sup>84</sup> From such language the position is sometimes taken that exclusive municipal control must exist permanently, and that such power once conferred by the state upon the municipality is irrevocable and cannot at any time thereafter be withdrawn. This position is untenable and finds no support whatever in reason or the adjudications.

The charter involved was a freeholders' charter emanating under the Constitution containing a provision that such charter should not be subject to control by general laws as to municipal affairs. *Los Angeles v. Central Trust Co.* (Cal. 1916), 159 Pac. 1169.

<sup>80</sup> Missouri Public Service Commission Law, § 2, par. 17.

<sup>81</sup> *Metcalf v. St. Louis*, 11 Mo. 102; *Sanders v. Southern Elec. Ry.*

*Co.*, 147 Mo. 411, 427, 48 S. W. 885; *Jackson v. Kansas City Ft. S. & M. R. R. Co.*, 158 Mo. 621, 58 S. W. 32; *St. Louis v. Crown*, 29 Mo. 330; *State v. Gordon*, 60 Mo. 383.

<sup>82</sup> *Harmon v. Chicago*, 110 Ill. 409, 51 Am. Rep. 698.

<sup>83</sup> *New England Tel. & Tel. Co. v. Boston Terminal Co.*, 182 Mass. 397, 65 N. E. 835.

<sup>84</sup> *R. S. Mo.*, 1909, sec. 9752.

Moreover, exclusive control means such control for the purposes of municipal government only, and is not intended to exclude the state control in matter clearly within its jurisdiction.<sup>85</sup> Constitutional grant of power to frame a freeholders' charter is never designed to deprive the state of any of its rightful authority in governmental affairs within the boundaries of any of its municipal corporations. Its purpose is to sanction and perpetuate the existing municipal and state governmental conditions. It is a recognition that there are purely state governmental functions as well as strictly municipal matters. The principle of local self-government is sought to be perpetuated and extended. It is not intended to allow the state to surrender to any local public authority any of its just powers without reserving to itself power to revoke or recall such surrender at any time the state chooses. Hence, exclusive control must be understood as limited to municipal matters—that is, exclusive control for the purpose of local or municipal government as distinguished from state or central government.

While as mentioned, purely municipal affairs have not as yet been clearly differentiated in all cases,<sup>86</sup> in view of the uniform course of judicial decision, it is manifest that the exercise of the power over grade crossings has always been regarded as state rather than municipal, in that it involves a police regulation appertaining to a highway. More specifically, the subject-matter of regulation is a public highway within an urban area, and hence, termed a street. Therefore, the inquiry is invited: Is the subject-matter involved state or municipal?

In the absence of constitutional restriction, the prevailing legal rule is that the state control of highways is paramount, subject to the property rights and easements of the abutting owners.<sup>87</sup> The control of highways, includ-

<sup>85</sup> *State ex rel. v. Mo. & Kansas City Telephone Co.*, 189 Mo. 83, 97-100, 88 S. W. 41.

<sup>86</sup> §§ 173, 174, vol. 1, ante; § 173, 174, ante.

<sup>87</sup> § 227, ante; § 227, vol. 1, ante; § 1310, post; § 1310, vol. 3, ante.

Railways are declared to be public highways by state organic laws. Mo. Const. 1875, art. XII, § 14.

ing streets and public ways in urban centers, being a strictly state function, may be resumed by the state at any time after such control has been granted to incorporated cities and towns, whether operating under a legislative (general or special) or home rule, constitutional or freeholders' charter. Moreover, the specific purpose is the regulation of a grade crossing. The object is to promote the convenience of the public and thus protect life and limb. This is an exercise of the police power. The protection is not restricted to the inhabitants of the particular municipal corporation but extends to all persons rightfully at the crossing sought to be regulated, whether as pedestrians or in vehicles, or as passengers on the trains passing this point, and whether such passengers are residents of the particular municipal corporation or the state, or any state or country.

It is thus evident that the power sought to be exercised in the regulation of the grade crossing is a pure state police power. It may be conceded that prior to the enactment of the state regulatory statutes the particular municipal corporation, by virtue of its charter emanating by force of the state constitution had exclusive control of the regulation of grade crossings within its corporate limits—that is, the state had committed the subject to such municipal authorities, and it so remained until the state by the enactment of the regulatory statutes withdrew it from such city and conferred it exclusively upon the state agency created by it.<sup>88</sup> Expressed in other phrase: When the legislative act relates to state affairs and the law is general in its terms and in form substantially as the state constitution prescribes, all conflicting charter provisions within the express scope of such act, are superseded touching the operation of the state act, since such charter provisions are not in harmony with the constitution and laws of the state, but are inconsistent therewith.<sup>89</sup> And hence, the jurisdiction of the city over

<sup>88</sup> *St. Louis v. Shields*, 52 Mo. 351. Mo. 119; *State ex rel. v. Stobie*, 194 Mo. 14; *St. Louis v. Meyer*,

<sup>89</sup> *St. Louis v. Klausmeier*, 213 185 Mo. 583; *St. Louis v. Dorr*,

the subject theretofore existing as the agent of the state must give way, for so only can any uniform and efficient policy of administration be carried out. Under these statutes, therefore, a state commission may for the preservation of human life and the protection of property regulate the crossings of railroad tracks and the crossings of railroad tracks with highways and streets, forbid such crossings at grade, require the separation of the grade by the construction of a viaduct or subway,<sup>90</sup> or the installation

145 Mo. 466, 41 S. W. 1094, 46 S. W. 976, 42 L. R. A. 686, 68 Am. St. Rep. 575; State ex rel. v. Bell, 119 Mo. 70, 24 S. W. 765; State ex rel. v. Police Comrs., 80 Mo. App. 206, 184 Mo. 109, 77 S. W. 215, 88 S. W. 27; State ex rel. Ziegenhein v. St. Louis & San Francisco Ry. Co., 117 Mo. 1, 22 S. W. 910; State ex rel. v. Higgins, 125 Mo. 364, 28 S. W. 638; State ex rel. v. Miller, 100 Mo. 439, 13 S. W. 677; Owen v. Baer, 154 Mo. 434, 55 S. W. 644; State ex rel. v. Tolle, 71 Mo. 645; Ewing v. Hoblitzelle, 85 Mo. 64; State ex rel. v. Jost, 265 Mo. 51, 175 S. W. 591.

<sup>90</sup> De Haven v. Mo. Pac. Ry. Co., 4 Mo. P. S. C. Rep. 573; Knapp v. United Rys., 3 Mo. P. S. C. Rep. 551, P. U. R. 1916E, 56.

Although the city has a constitutional charter, the state in its exercise of the police powers may regulate street railways crossing railroad tracks. Peterson v. Chicago & Alton Ry. Co., 265 Mo. 462, 178 S. W. 182.

An ordinance requiring a viaduct or bridge over railroad tracks, held superseded by public service commission law vesting such power in a state commission. State ex rel. v. Missouri Pacific Ry. Co., 262 Mo. 720, 174 S. W. 73.

Legislature may create a railway terminal station commission, to relieve public of danger, and delay from obstructions of streets by railroads crossing streets at grade. People ex rel. Simon v. Bradley, 207 N. Y. 592, 101 N. E. 766, affirming 155 App. Div. 882.

The term crossing includes all crossings from one side to the other of the railroad, whether by passing over or under the tracks. Wheeler v. Rochester & S. Ry. Co., 12 Barb. (N. Y.) 227, 232; St. Paul & S. C. R. R. v. Murphy, 19 Minn. 500, 522.

The word crossing as used in the act is sufficient in scope to include all crossings. State ex rel. v. Public Service Commission, 271 Mo. 270, 284, 197 S. W. 56.

"A crossing of roads in the primary and natural sense of the word, is an intersection of them in the same plane, and while an under pass is a structure which obviates the necessity of a crossing in a broader sense the work covers all the means by which the travel passes from one side to another of an observing line." Libby v. Canadian Pacific Railway, 82 Vt. 316, 73 Atl. 593.

State may separate grade crossing and apportion expense. "A railroad

of safety devices, as interlocking plants, or like protection.<sup>91</sup>

A majority of these regulatory statutes are sufficiently broad to vest in the state commission such powers.

## VI. LEGISLATIVE CONTROL OF FUNDS AND REVENUES.

### § 230. Legislative control of funds and revenues.

Public moneys in the custody of municipalities is subject to state control and disposition for governmental purposes, within the limitations of the constitution.<sup>92</sup>

is a public utility, and the state may, in the exercise of the police power, and it is its duty where the public safety demands it, require the separation of grade crossings for the preservation of human life and the protection of property." The power of determining whether a particular grade crossing is so dangerous to life and property of the public as to require a separation may be conferred on an administrative body, and it is not a delegation of legislative authority. "While a state may not deprive a municipality of its discretion in incurring expenses for improvements of a local corporate character, such municipality cannot stand in the way of the state's exercise of its police powers for the preservation of life and the promotion of the public welfare." A state commission may be authorized to apportion the expenses of separating grades at crossings between public corporations as a county and township, since such separation is not an improvement of a local corporate nature, but for the protection of the general public. *Chicago, M. & St. P. Ry. Co. v. Lake County* (Ill. 1919), 122 N. E. 526, 529, approving *North Fork Drain-*

*age Dist. v. Rector Drainage Dist.*, 266 Ill. 536, 107 N. E. 895.

<sup>91</sup> *Public Service Commission v. St. Louis & San Francisco R. Co.*, 4 Mo. P. S. C. 117; *Missouri Kansas & T. Ry. Co. v. Chicago & Alton Rd. Co.*, 4 Mo. P. S. C. 78; *Missouri, Kansas & T. Ry. Co. v. Kansas City, C. & S. Ry. Co.*, 4 Mo. P. S. C. 60.

<sup>92</sup> §§ 234, 237, post.

"The revenues of a city raised by taxation, though levied for specific purposes, are so far subject to the legislative will that by it they may be applied to other uses of the municipality, subject, of course, to constitutional limitations." *Reno v. Stoddard*, 40 Nev. 537, 167 Pac. 317.

State may control the appropriation of moneys of the city to maintain its police departments and the number of policemen to be appointed, etc. *State ex rel. v. Jost*, 265 Mo. 51, 175 S. W. 591.

Legislature may compel cities to pension firemen, to be paid from fire department funds. *State v. Love*, 89 Neb. 149, 131 N. W. 196, 34 L. R. A. (N. S.) 607.

As to issuing bonds for public improvements, without or with vote

VII. POWER OF LEGISLATURE TO IMPOSE OBLIGATIONS, CONTROL MUNICIPAL CONTRACTS, PUBLIC IMPROVEMENTS AND LIABILITIES.

§ 234. Power of legislature to impose obligations.<sup>93</sup>

§ 237. Compelling payment of claims.<sup>94</sup>

There are a class of claims against municipal corporations which under many constitutions cannot be legalized by statute or charter. For example, in New York, where they are void or invalid because they do not arise from the performance of a "county, city, town or village purpose."<sup>95</sup>

Under the New York Constitution providing that no county, city, town or village shall "be allowed to incur any indebtedness except for county, city, town or village purposes," a charter provision authorizing payment of

of town. *Murphy v. Webb & Co.*, 156 N. C. 402, 72 S. E. 460.

Power to maintain library by taxation, with limitation. *Tampa v. Prince*, 63 Fla. 387, 58 So. 542.

Compel city to pay expense of maintenance of state bureau of inspection of accounts, etc., of local officers. *State ex rel. v. Burr*, 65 Wash. 524, 528, 118 Pac. 639.

Board of trustees of a pension and relief fund of firemen, created by statute, held mere state agent instituted for a public purpose, and "holding a power of attorney which is revocable at the option of the state." The statutes creating it are not contracts, and the board cannot contest the state's right concerning the disposition of the funds it holds. *State ex rel. v. Board of Trustees*, 141 La. 427, 75 So. 103, 107.

<sup>93</sup> § 230, ante.

May impose obligation to construct and equip new school build-

ings, issue bonds therefor. *Van Arsdale v. Justice*, 133 N. Y. S. 661, 75 Misc. Rep. 495.

May impose obligation to pay portion for maintenance of park system, etc. Re Opinion of the Justices, 34 R. I. 191, 83 Atl. 3, 8.

<sup>94</sup> *Forman v. Sewerage & Water Board*, 135 La. 1031, 66 So. 351, quoting with approval from § 237, vol. 1, ante.

Whether in a given case the legislature has kept within its powers or has exceeded it is, of course, a judicial question. Re *Gréene*, 166 N. Y. 485, 495, 60 N. E. 183; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586.

<sup>95</sup> *Chapman v. New York*, 168 N. Y. 80, 61 N. E. 108, 56 L. R. A. 846, 85 Am. St. Rep. 661; *Stemmler v. New York*, 179 N. Y. 473, 72 N. E. 581; Re *Jensen*, 44 App. Div. 509, 60 N. Y. S. 933; Re *Straus*, 44 App. Div. 425, 61 N. Y. S. 37.

equitable but illegal or invalid claims, in whole or in part, upon hearing in the discretion of a specified board, does not conflict with such constitutional provision; that is, claims arising from the performance of a "city purpose," e. g., one based upon work done and material furnished to the city in the exercise of a city purpose in constructing a city water supply system.<sup>96</sup>

<sup>96</sup> *People ex rel. Prendergast*, 128 N. Y. S. 1082, 1086, distinguishing *Re Greene*, 166 N. Y. 485, 60 N. E. 183; *Conlin v. San Francisco*, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17, and *Conlin v. San Francisco*, 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 751, and approving *Wrought-Iron Bridge Co. v. Attica*, 119 N. Y. 204, 23 N. E. 542, which holds that the legislature has power to legalize a claim based on equity and justice.

"The distinction between the gratuity which the constitution now forbids and the meritorious claim which it permits municipal bodies to satisfy, notwithstanding judgment adverse to the claimant is apparent. Where such final judgment is upon the merits, for the legislature to vacate or disregard it and direct the levy of taxes to pay it, either without a new trial or with judgment upon it, would be the bestowal of a gratuity. But where such judgment is upon the merits, but because of some defect in the authority of the officers to bind the municipal body for which they assume to act, and this in good conscience is not decisive against the justice of the claim, the legislature may, in order that justice shall prevail, direct its re-examination and determination, and if found to be just, direct that it be provided for by taxation.

The limitations which the law wisely imposes upon the powers of public officers and their methods of exercising them may sometimes result in vesting in the municipal body, without fault of the individual, his money or labor or their products beyond remedy or recall, except by special legislative act. The legislature may ratify what it might have originally authorized, and it seems to be right that it should have the power to relieve against the special injustice which may sometimes result from the limitations it has imposed upon the authority of the officers which it has empowered with the administration of its municipal creatures." *Re Greene*, 166 N. Y. 485, 494, 495, 60 N. E. 183.

The California Constitution provides that "the legislature shall not have power to make any gift or to authorize the making of any gift of public money to any individual, municipality or other corporation." In the California decisions it appears that no distinction is recognized between a mere gratuity and the payment of a claim resting upon a moral obligation, but without enforceable legal basis. *Conlin v. San Francisco*, 114 Cal. 404, 46 Pac. 279, 33 L. R. A. 751; *Conlin v. San Francisco*, 99 Cal. 17, 33 Pac. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17;



**§ 239. Legislative control of municipal contracts.**

Within the constitutional limitations the legislature has general power to legalize invalid acts of public officers. "What it could have dispensed with lawfully in the beginning it may dispense with lawfully in the end." It is familiar that tax levies irregular, due to failure to observe statutory provisions, may be legalized by confirmatory act. "The principle underlying this rule is not confined to tax cases, but is one of general application."<sup>97</sup>

Subject to the constitution, the legislature may impose restrictions on the letting of contracts or refrain from so doing.<sup>98</sup>

**§ 240. Same subject—hours of labor—validating contracts.**

"It belongs to the state, as guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done in its behalf, or on behalf of its municipalities," and "no court has authority to review its action in that respect."<sup>99</sup>

It is competent for the state to give preference to its own citizens, or at least to citizens of the United States. Accordingly a New York legislative act was sustained as valid and constitutional which provided that in the construction of public works by the state or a municipality, or by persons contracting with the state or a municipality only citizens of the United States should be employed.<sup>1</sup>

Creighton v. San Francisco, 42 Cal. 446.

A broader basis of interpretation has been applied in New York. *People ex rel. v. Prendergast*, 128 N. Y. S. 1082, 1086.

<sup>97</sup> *People ex rel. v. Prendergast*, 128 N. Y. S. 1082, 1086.

<sup>98</sup> *People ex rel. v. Prendergast*, 128 N. Y. S. 1082, 1085.

<sup>99</sup> *Atkins v. Kansas*, 191 U. S.

207, 222, 223, 24 Sup. Ct. 124, 48 L. ed. 148, quoted with approval in *Heim v. McCall*, 239 U. S. 175, 191, 36 Sup. Ct. 78, 60 L. ed. 206 affirming 214 N. Y. 629, 108 N. E. 1095, which reversed 165 App. Div. 449, 150 N. Y. S. 933.

<sup>1</sup> *People v. Crane*, 214 N. Y. 154, 108 N. E. 427, Ann. Cas. 1915B, 1254, reversing 165 App. Div. 449, 150 N. Y. S. 933, and distinguish-

A legislative act limiting the hours of labor to eight hours a day for all laborers, workmen and mechanics employed by a city, and on all public work in a city, "except in cases of extraordinary emergency," authorizing increased pay if required to work more than eight hours, applying to only one city, was held not unconstitutional as depriving contractors of equal protection of the law, etc.<sup>2</sup>

#### VIII. CONCLUSIONS RELATING TO LEGISLATIVE CONTROL.

### § 246. Right of local self-government exists without express constitutional provision.<sup>3</sup>

ing *People v. Orange County Road Const. Co.*, 175 N. Y. 84.

The Supreme Court of the United States held that the New York statute was not unconstitutional under the privilege and immunity clause of the United States Constitution, or under the equal protection or due process of law clause, or the Fourteenth Amendment, nor was it in violation of the treaty of the United States with Italy. *Heim v. McCall*, 239 U. S. 175, 36 Sup. Ct. 78, 60 L. ed. 206, affirming 214 N. Y. S. 629, 108 N. E. 1095.

<sup>2</sup> The court directed attention to the fact that counsel referred to decisions holding similar statutes unconstitutional, especially the text in *Dillon on Municipal Corporations*, and said: "It must be conceded that these authorities are in direct conflict with the validity of the present statute but there are on the other hand many other decisions holding the contrary view," and mentions *Atkins v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. ed. 148, as sustaining a similar statute, except it applied to laborers, and mechanics em-

ployed by or on behalf of the state, or by or on behalf of any county, township or other municipality therein, whereas the Maryland statute is limited in its application to laborers and mechanics employed by or on behalf of the mayor and city council of Baltimore. *Sweeten v. State*, 122 Md. 634, 90 Atl. 180, 182.

Law of Congress applicable to District of Columbia only was sustained. *Penn. Bridge Co. v. United States*, 29 App. D. C. 452, 10 Ann. Cas. 719.

<sup>3</sup> "Assertions of inherent right, occasionally found in the course of argument, mean no more than that as municipal corporations were known at the date of the adoption of the constitution local self-government was an invariable attribute or element thereof, just as a piston and a steam chest are now known to be parts of steam engines, wheels, necessary elements of wagons, and foundations, essential parts of houses. In that sense it was literally and indisputably inherent. \* \* \* In construing the constitution as a whole, or any

provision of it, as to any matter not made plain and certain by its terms, the courts must look beyond it and take into consideration as guides to the intention all of that common knowledge of the subject in the light of which the people framed and adopted the provision in question, just as in the case of the construction of any other instrument. \* \* \* From the earliest dawn of Anglo-Saxon civilization and English jurisprudence municipal corporations have had the power of local self-government. \* \* \* No authority of the legislature beyond that of creation, regulation and abrogation had ever been asserted in England or America prior to the adoption of the constitution of this state. As municipal corporations were then known, the right of local self-government was historically, politically and economically inherent in them. As a legislature was then known it had like inherent power, among other innumerable things, to charter, regulate and abolish corporations, having the right of local self-government. To say it had any kind of power to charter, regulate and abrogate corporations not having such right is mere assumption unsustained by anything in common knowledge. Not found in the words of the constitution, nor in common knowledge, there is no basis for the assertion that it is inherent in the legislature. It had no existence, wherefore the people could not have known it when they adopted the constitu-

tion, and for the same reason it has no place, as an element or factor, in the inquiry for the popular intent. On the other hand, they knew no legislature had ever assumed authority to create a corporation without power of self government, and that no existing corporation lacked such power. \* \* \* The test of meaning is the popular intent at the date of the adoption of the instrument, not some other date. An unwritten constitution may grow, expand and contract; but a written constitution can not. It means the same always. For its meaning we must go to the time of its adoption. Knowing what a West Virginia municipal corporation was in 1872 we know what kind the people intended to intrust with the exercise of the power of taxation. Their intention then is the law of the constitution now." Dissenting opinion of Poffenbarger, J., in *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, 993-997, L. R. A. 1917A, 1244, citing among other cases *Gibbons v. Ogden*, 9 Wheat. (U. S.) 188, 6 L. ed. 23; *Dred Scott v. Sanford*, 19 How. (U. S.) 393, 15 L. ed. 691; *South Carolina v. United States*, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. ed. 261, 4 Ann. Cas. 737; *People v. Hurlbut*, 24 Mich. 44, 88, 9 Am. Rep. 103, to support the foregoing doctrine of constitutional construction, as opposed to that invoked in *Redell v. Moores*, 63 Neb. 219, 88 N. W. 243, 55 L. R. A. 740, 93 Am. St. Rep. 431, and like decisions.

## CHAPTER 5.

### CORPORATE NAME.

§ 251. Actions—variance.

§ 254. Change of name.

#### § 251. Actions—variance.

Judicial notice will be taken of the name of each municipality of the state.<sup>1</sup>

#### § 254. Change of name.

The legal requirements in a proceeding for a change of name must be observed in substance, and the record must so disclose affirmatively.<sup>2</sup>

It appears a change of name may arise from usage, at least it seems to have been so ruled in one case. A municipal corporation organized under a particular name, subsequently sought to change its name to Dora, but certain fatal defects in the proceedings rendered the same void, but after the void court order, the inhabitants continued to give the name Dora and mail was so addressed to them. Here it was held that Dora became the legal name notwithstanding the void proceedings.<sup>3</sup>

Where pending litigation, a city becomes part of another municipal corporation by annexation, the cause may proceed in the new name.<sup>4</sup>

<sup>1</sup> Gravlee v. Moore, 184 Ala. 131, 63 So. 557.

<sup>2</sup> Turtle Creek Borough, 65 Pa. Super. Ct. 48, 50 (following Re Summit Borough, 114 Pa. 362, 7 Atl. 219); McKinney v. Bibb County, 168 Ala. 191, 52 So. 756;

Blount v. Johnson, 145 Ala. 553, 39 So. 910.

<sup>3</sup> Gravlee v. Moore, 184 Ala. 131, 63 So. 557.

<sup>4</sup> Rudolph v. Birmingham, 188 Ala. 620, 65 So. 1006.

## CHAPTER 6.

### CORPORATE SEAL.

§ 256. When seal required.

#### § 256. When seal required.

It is sometimes held that exemplification of a municipal ordinance is not admissible in evidence unless duly certified under the corporate seal.<sup>1</sup>

<sup>1</sup> This ruling applies the statute according to its express provision and holds that the corporate seal is essential to the validity of a certificate by the clerk to documents he is authorized to certify. *Sewell v. Tallapoosa*, 145 Ga. 19,

88 S. E. 577, 579, following *Georgia Ry. Co. v. Bond*, 111 Ga. 13, 36 S. E. 299.

Seal required. *Harrington Co. v. Horster* (N. J. Eq. 1918), 108 Atl. 150.

## CHAPTER 7.

### CORPORATE BOUNDARIES.

- § 259. Corporate limits must be fixed and certain.
- § 260. Presumption arising from long acquiescence as to location of boundaries.
- § 261. Construction of description of boundaries—illustrative cases.
- § 263. Same—reference to bodies of water.
- § 264. Two public corporations in the same limits.
- § 265. Power of state in establishing and changing municipal boundaries.
- § 266. Special acts affecting boundaries generally forbidden.
- § 267. Enlargement of boundaries by annexation of territory—restrictions.
- § 268. Various methods of extending limits and annexing territory.
- § 269. Same—submission of question to inhabitants or property owners.
- § 270. Discretion in submitting question of extension to vote.
- § 271. Corporate limits changed by municipal corporations or local tribunals—delegation of legislative power.
- § 272. Conditions of annexation—what territory may be included—general doctrine.
- § 273. Same—definition of “platted,” “lots,” “blocks.”
- § 274. Reasonableness of annexation—in general—illustrative cases.
- § 276. Reasonableness of annexation—contiguous or adjacent territory.
- § 279. Detachment of municipal territory.
- § 281. Proceedings to annex or detach territory—in general.
- § 282. Same—sufficiency of ordinance.
- § 283. Same—requisites and sufficiency of notice.
- § 284. Same—sufficiency of petition—illustrative cases.
- § 285. Same—plat or plan of property to be annexed to petition.
- § 286. Same—the evidence.
- § 287. Same—the judgment or order.
- § 288. Same—action to test validity of proceeding.
- § 290. Same—collateral attack on annexation proceedings.
- § 291. Same—review.
- § 292. Defects may be cured.
- § 293. Effect of change of limits in general—illustrative cases.
- § 294. Condition of public property and debts after change—apportionment.
- § 295. Taxation and exemptions on change of limits.
- § 296. Municipal subdivisions or wards.

**§ 259. Corporate limits must be fixed and certain.**

It is axiomatic that a public corporation can exercise its function only within the limits of its jurisdiction.<sup>1</sup> This principle is alike applicable to countries and state.<sup>2</sup> Although the location of the municipal boundaries may be defective if the description "is not so uncertain as to make it impossible to determine the territory intended to be included in the municipality," the act of incorporation will not be void.<sup>3</sup>

**§ 260. Presumption arising from long acquiescence as to location of boundaries.**

In many instances where a great time has elapsed or where for some reason the boundary is indefinite or un-

<sup>1</sup> Gainesville v. Dunlap, 147 Ga. 344, 94 S. E. 247; Gutowski v. Baltimore, 127 Md. 502, 96 Atl. 630; Mineral County Court v. Piedmont, 72 W. Va. 296, 78 S. E. 63.

"Its officers and agents are limited also in this respect, and can only perform their official duties within the limits of the corporation they represent." Commonwealth v. Stahr, 162 Ky. 388, 391, 172 S. W. 677.

<sup>2</sup> The general rule applicable to municipalities as well as to states is that the power and jurisdiction of the city are confined to its own limits and to its own internal concerns. Duluth v. Orr, 115 Minn. 267, 132 N. W. 265.

"It is conceded that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law, without the circle in

which that law operates." Rose v. Himely, 4 Cranch (U. S.) 279, 2 L. ed. 608, per Chief Justice Marshall.

<sup>3</sup> Lane ex rel. v. Attorney General, 63 Fla. 220, 57 So. 662; State ex rel. v. Sammons, 62 Fla. 303, 57 So. 196.

The petition and notice described the area as "including the territory within a radius of one mile from the Southern Railway depot at Constitution," and the court order, provided that "said incorporation shall extend one mile in every direction from the present location of the Southern Railway depot at Constitution," held limits sufficiently described. Constitution v. Chestnut Hill Cemetery Assn., 136 Ga. 778, 71 S. E. 1037, following Cook v. Johnson, 47 Conn. 175, 36 Am. Rep. 64.

Construction of intent of legislature in extending boundaries. People v. Antioch, 17 Cal. App. 751, 121 Pac. 945.

certain it has been held that the boundary generally recognized and acquiesced in by the municipality and the inhabitants is the true boundary,<sup>4</sup> but this rule does not apply where the time is short or where the boundary involved is not indefinite or uncertain.<sup>5</sup>

**§ 261. Construction of description of boundaries—illustrative cases.**

“What are boundaries is a matter of law for the court; where they are a matter of fact for the determination of the jury under proper instructions from the court.”<sup>6</sup>

In determining the extent of municipal limits, monuments and plain lines of location prevail over mere acts of user or attempted assumption of jurisdiction.<sup>7</sup>

The location of a town in a legislative act “as the same has heretofore been laid off in lots, streets and alleys,” was held, in the absence of adverse evidence that tracings on an old map might be regarded as fixing the limits.<sup>8</sup>

<sup>4</sup> An ordinance defined the corporate boundaries and they were recognized for years by the authorities and inhabitants, held, it would be presumed in absence of record that the ordinance was published as required. *Depue v. Banschbach*, 273 Ill. 574, 113 N. E. 156.

**Assessing taxes** by city on lands for period of thirty years and acquiescence that they were part of city, held practical or common sense construction should be adopted. *Leary v. Jersey City*, 208 Fed. 854, 126 C. C. A. 12, affirming 189 Fed. 419.

**Long acquiescence** by the town, its officers and all persons interested in boundaries which have been acted upon by the town, its officers and the public for some 38 years, and never questioned until

the suit, held such contemporaneous interpretation is sufficient to justify the court in resolving any doubt it might have as to the meaning of the ambiguous language employed in favor of sustaining such long unquestioned interpretation. *People v. Antioch*, 17 Cal. App. 751, 757, 121 Pac. 945.

<sup>5</sup> *Highland Park v. Reker*, 173 Ky. 206, 211, 190 S. W. 706.

**Mistake of taxing officers** believing a residence was beyond city limits, is not binding. *Asher v. Pineville*, 140 Ky. 670, 674, 131 S. W. 512.

<sup>6</sup> *Commonwealth v. Stahr*, 162 Ky. 388, 391, 392, 172 S. W. 677.

<sup>7</sup> *Commonwealth v. Stahr*, 162 Ky. 388, 390, 172 S. W. 677.

<sup>8</sup> *Strasburg v. Chandler* (Va. 1918), 97 S. E. 313.



§ 263. Same—reference to bodies of water.

Boundaries of a municipal corporation bordering on navigable waters may be extended for purposes of jurisdiction by the building of wharves, piers or structures, permanently filled in with earth and extending into the water; or, by natural accretions or gain of soil or alluvion; or, the filling out from the shore and reclaiming the land from the inundation of the water.<sup>9</sup> But floating piers and floating vessels fastened to the docks do not extend the jurisdiction of the municipality. Floating and immovable piers concerning jurisdiction are distinguished by the decisions. To extend the jurisdiction the improvements must be of a fixed nature, permanent structures, e. g., wharves, piers, warehouses, or the filling out from the shore.<sup>10</sup>

§ 264. Two public corporations in the same limits.

While two lawfully and fully organized municipal corporations cannot have jurisdiction and control at one time of the same population and territory for the same purpose,<sup>11</sup> in the absence of constitutional restrictions, no objection exists to the power of the legislature to authorize the formation of two municipal corporations in the same territory at the same time for different purposes, and to authorize them to co-operate so far as co-operation may be consistent with or desirable for the accomplishment of their respective purposes.<sup>12</sup>

<sup>9</sup> *Treuth v. State*, 120 Md. 257, 87 Atl. 663, 665, 47 L. R. A. 1161.

<sup>10</sup> *Treuth v. State*, 120 Md. 257, 87 Atl. 663, 666, 47 L. R. A. 1161; *State v. Eason*, 114 N. C. 787, 19 S. E. 88, 23 L. R. A. 520, 41 Am. St. Rep. 811.

<sup>11</sup> *Beyer v. Athens* (U. S. C. C.), 249 Fed. 849, 852.

"It is of the essential nature of jurisdiction that two authorities cannot exercise power in the same territory over the same subject at

the same time." Rule applied to a park board and a municipality. *South Park Comrs. v. Chicago City Ry. Co.* (Ill. 1919), 122 N. E. 89, 91.

<sup>12</sup> *People v. Bowman*, 247 Ill. 276, 93 N. E. 244.

In Washington a port district may occupy the same territory or a part thereof, of a county or city, since the general powers of a county or city are sufficiently different to constitute a port a munic-

## § 265. Power of state in establishing and changing municipal boundaries.

The creation of municipal corporations, change in their boundaries by annexation or severance of territory, and the conditions upon which such creation or change may be made, are legislative and not judicial questions.<sup>13</sup> Un-

icipal corporation of "quite a different character," notwithstanding the port district is vested with some of the powers and authorized "to make expenditures and incur indebtedness for some of the things for which a county and city may make expenditures and incur indebtedness." *Paine v. Port of Seattle*, 70 Wash. 294, 126 Pac. 628, 632.

Two port districts adjoining situated on the same river where the watershed of one is in a sense the watershed of the other. *State ex rel. v. Johnson*, 76 Or. 85, 144 Pac. 1148, 147 Pac. 926.

"The school district of Detroit is coextensive in geographical limits with the city. Each is an independent corporation. Public corporations organized for the same purpose, with the same rights, powers and duties could not exist in the same territory. *Serafford v. Gladwin County Sup'r*, 41 Mich. 647, 2 N. W. 904, but where they are organized for different purposes, have different rights and duties relating to entirely different matters, they may and often do occupy the same territory, working in harmony each within the scope of its authority. In such cases the burden of maintenance falls, as a rule, on the same persons and property, and for such corporations to be so organized as to co-operate in the conduct of their several af-

fairs and avoid duplication of agencies essential to each tends to economy and convenience. It is well settled that making a person an ex officio officer, of one organization by virtue of his holding office in another does not tend to merge the two organizations. *People v. Edwards*, 9 Cal. 286; *People v. Ross*, 38 Cal. 76; *Hemingway v. Stansell*, 106 U. S. 399, 1 Sup. Ct. 473, 27 L. ed. 245." *Attorney General v. Thompson*, 168 Mich. 511, 522, 134 N. W. 722, 726, 727.

**The Illinois Farm Drainage Act** is held to be independent of, and to be construed without reference to the levee act. The drainage act expressly authorizes the formation of one drainage district within the boundaries of another existing drainage district. *Lewis v. Drainage Commissioners*, 161 Ill. App. 570, 574.

<sup>13</sup> Georgia. *White v. Forsyth*, 138 Ga. 753, 76 S. E. 58.

Indiana. *Pittsburg, etc., R. Co. v. Anderson*, 176 Ind. 16, 95 N. E. 363.

Kentucky. *Gernert v. Louisville*, 155 Ky. 589, 159 S. W. 1163.

Minnesota. *State ex rel. v. Gilbert*, 127 Minn. 452, 459, 460, 149 N. W. 951 (citing § 265, vol. 1, ante); *Winona v. School District*, 40 Minn. 13, 41 N. W. 539, 3 L. R. A. 46, 12 Am. St. Rep. 687; *State v. Simons*, 32 Minn. 540, 21 N. W. 750.

New York. *People ex rel. v.*

less restricted by the constitution, therefore, the state has plenary power in this respect.<sup>14</sup>

A change in corporate boundaries may be made only when and as prescribed by law.<sup>15</sup> If the power is not

Purdy, 136 N. Y. S. 667, 152 App. Div. 175.

New Jersey. *State v. Wildwood*, 83 N. J. 188, 84 Atl. 274.

S. Dakota. *Cole v. Watertown*, 34 S. D. 69, 147 N. W. 91.

Virginia. *Strasburg v. Chandler* (Va. 1918), 97 S. E. 313.

<sup>14</sup> *People v. Rock Island*, 271 Ill. 412, 111 N. E. 291.

The legislature may provide for the organization of a public corporation embracing territory of a city, village or town. *Perkins v. Cook County Comrs.*, 271 Ill. 449, 111 N. E. 580.

Legislature may extend boundaries with or without referendum, if the constitution does not forbid. *McGraw v. Merryman* (Md. 1918), 104 Atl. 540, 543, citing § 265, ante, vol. 1.

The legislature not only may originally fix the limits of the corporation, but it may, in the absence of any constitutional restriction, authorize the annexation of additional territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or in the annexed territory." *Cohen v. Houston* (Tex. Civ. App.), 176 S. W. 809, 813.

It is no constitutional objection to the compulsory annexation "that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which,

in the absence of special constitutional restrictions, belongs to the legislature to determine." *Cohen v. Houston* (Tex. Civ. App.), 176 S. W. 809, 813, 814.

"The legislature of the state has power to define what shall be urban property and what shall be county property. It has power to define the limits of the cities and towns of the commonwealth. All persons hold their property subject to this power of the legislature to include it within the boundaries of a city when the public necessity so requires. City property is subject to burdens and enjoys benefits not possessed by country property. The including in a city of property which had theretofore been without the city is the act of the state." *Gernert v. Louisville*, 155 Ky. 589, 159 S. W. 1163.

<sup>15</sup> *Couch v. Marvin*, 67 Qr. 341, 136 Pac. 6.

In Texas, cities on navigable streams and under special charters may extend their limits, in order to acquire land for the benefit of navigation, by ordinance. *Orange v. Rector* (Tex. Civ. App. 1918), 205 S. W. 503.

Boundaries cannot be changed by city officers and employees, e. g., performing work or other acts beyond the municipal area. Municipal authorities cannot alter the limits unless sanctioned by law, and when so authorized the power to change must be exercised in the circumstance and manner so pre-

exercised directly by the legislature the courts may determine the existence and the validity of the mode of its exercise.<sup>16</sup>

**§ 266. Special acts affecting boundaries generally forbidden.<sup>17</sup>**

**§ 267. Enlargement of boundaries by annexation of territory—restrictions.<sup>18</sup>**

scribed. *Commonwealth v. Stahr*, 162 Ky. 388, 391, 172 S. W. 677; *Pittsburg, etc., R. Co. v. Anderson*, 176 Ind. 16, 95 N. E. 363.

City was incorporated under a constitution exempting its charter from direct change or destruction by the legislature; held it could not be annexed by another adjoining municipality which had power to extend its limits by annexation of contiguous territory, even by a majority vote of the electors, since they had power only to enact or amend the law giving their city a legal entity, but no power to repeal their charter. The voters cannot repudiate their municipal functions and obligations "or lay them aside except under the sanction of the whole people of the state in whom now resides the power formerly exercised by the legislature in that behalf. The constitution has not provided for municipal suicide." *McKeon v. Portland*, 61 Or. 385, 122 Pac. 291.

<sup>16</sup> *People ex rel. v. Rock Island*, 271 Ill. 412, 420, 111 N. E. 291; *True v. Davis*, 133 Ill. 522, 22 N. E. 410, 6 L. E. A. 266.

<sup>17</sup> *People ex rel. v. Rock Island*, 271 Ill. 412, 418, 111 N. E. 291; *Couch v. Marvin*, 67 Or. 341, 136 Pac. 6; *State ex rel. v. Tillamook*

*Port*, 62 Or. 332, 124 Pac. 637, Ann. Cas. 1914C 483.

<sup>18</sup> *Hislop v. Joplin*, 250 Mo. 588, 157 S. W. 625.

Territory to be annexed should be populated sufficiently, to hold an election as specified by law. *Couch v. Marvin*, 67 Or. 341, 136 Pac. 6.

In Illinois a city cannot be organized, with a village annexed to it, having unorganized or unincorporated territory within its boundaries and entirely surrounded by it, and this result cannot be accomplished by the annexation of territory. *Morgan Park v. Chicago*, 255 Ill. 190, 99 N. E. 388.

**Boundaries of representative or judicial districts may not be disturbed**, under some constitutions in extending limits. A statute authorizing annexation of part of a township to a city, withdrawing territory from one representative district and annexing it to another, violates such organic provision. *Cook v. Kent County Board*, 190 Mich. 149, 155 N. W. 1033, 1035, approving *People ex rel. v. Holihan*, 29 Mich. 116.

Where the act of consolidation expressly provides for the maintenance of the territorial integrity of the legislative districts, the an-

**§ 268. Various methods of extending limits and annexing territory.<sup>19</sup>**

Annexation acts are to be liberally construed in favor of the public.<sup>20</sup>

**§ 269. Same—submission of question to inhabitants or property owners.<sup>21</sup>**

nexation will be upheld. *Smith v. Saginaw*, 81 Mich. 123, 45 N. W. 964.

This constitutional provision for the preservation of the representative districts is satisfied by including in the order of submission a provision that the annexation shall be for all purposes save for the purpose of electing representatives. *Collins v. Detroit*, 195 Mich. 330, 161 N. W. 905; *Oakman v. Wayne County Supervisors*, 185 Mich. 359, 152 N. W. 89.

<sup>19</sup> Council of city first submits question to the qualified elector; second, the electors vote thereon, and if a majority vote favors annexation; third, a petition is presented to the county court, praying therefor. *Batesville v. Ball*, 100 Ark. 496, 140 S. W. 712, 715.

By ordinance. *State ex inf. v. Maplewood* (Mo. App.), 193 S. W. 989; *Miller v. Lincoln*, 94 Neb. 577, 143 N. W. 921.

By ordinance enacted by council, with or without application or petition; usually upon petition; protests sometimes expressly allowed. Council has exclusive authority, subject to judicial review, to determine question of annexation, and no conditions can be imposed by residents of territory to be annexed. In such relation the council "acts in a governmental and legislative capacity, and its

discretion is not to be controlled except as it is restrained by constitutional and statutory provisions." *White v. Glasgow*, 148 Ky. 13, 146 S. W. 19.

If a majority vote favors a petition praying for annexation is presented to the county court, and if within thirty days after a transcript shall be delivered as provided, no notice of complaint against annexation is given, at the end of said thirty days the territory shall be deemed and taken to be included in and a part of city. Held, thirty days, not from date of election. *Tulsa St. Ry. Co. v. Oklahoma Union Traction Co.*, 27 Okl. 339, 113 Pac. 180, 183.

<sup>20</sup> Presumptions are against the legislature granting exclusive rights and against the imposition of limitations upon the powers of government. *Northfolk v. Northfolk County Water Co.*, 113 Va. 303, 74 S. E. 226.

<sup>21</sup> *Arkansas. Batesville v. Ball*, 100 Ark. 496, 140 S. W. 712.

*Iowa. Lehigh Sewer P. & T. Co. v. Lehigh*, 156 Ia. 386, 136 N. W. 934; *Rafferty v. Clermont*, 180 Ia. 1391, 164 N. W. 199.

*Minnesota. State ex rel. v. Dover*, 113 Minn. 452, 130 N. W. 74.

*Michigan. Collins v. Detroit*, 195 Mich. 330, 161 N. W. 905.

*Missouri. State ex rel. v. West*

## § 270. Discretion in submitting question of extension to vote.

If the constitution does not forbid, it is discretionary with the legislature to provide for a referendum in the extension of corporate limits.<sup>22</sup>

## § 271. Corporate limits changed by municipal corporations or local tribunals—delegation of legislative power.<sup>23</sup>

Plains, 163 Mo. App. 166, 147 S. W. 163.

Oregon. *Cooke v. Portland*, 69 Or. 572, 139 Pac. 1095; *Thurber v. Henderson*, 63 Or. 410, 128 Pac. 43.

Pennsylvania. *McDonough v. Gensemer*, 49 Pa. Super. Ct. 449.

Washington. *Paine v. Seattle*, 70 Wash. 294, 127 Pac. 580.

**Constitution** may give power to voters to extend limits. *Cohen v. Houston* (Tex. Civ. App.), 205 S. W. 757.

**Power in electors to amend charter** confers authority on voters to exclude territory from municipal limits. *Flavel Land & Devel. Co. v. Leinenweber*, 81 Oregon 353, 158 Pac. 945.

**Initiative petition**; provision as to heading with warning clause against illegal signing, held not mandatory. *Day v. Salem*, 65 Or. 114, 131 Pac. 1028. See §§ 694-694C.

**Local self government principle** applied. Hence, approval of voters of annexed district required. Power to enact and amend charter is not authority to annex without consent of voters in such territory. *Landess v. Cottage Grove*, 64 Or. 155, 129 Pac. 537.

**Election** to be held as law prescribes, otherwise void. State ex

rel. v. *Tillamook Port*, 62 Or. 332, 124 Pac. 637, Ann. Cas. 1914C 483, §§ 414-416, post.

“**District proposed to be annexed.**” Statute required majority vote in the “district proposed to be annexed,” held meant that portion of each township to be annexed must vote affirmatively before annexation can follow; and not either a part of a single township to be annexed or the several parts of two or more townships which might in one proceeding be annexed. *Cook v. Kent County Board*, 190 Mich. 149, 155 N. W. 1033.

<sup>22</sup> *McGraw v. Merryman* (Md. 1918), 104 Atl. 540, 543, citing section 265, vol. 1, ante.

<sup>23</sup> The corporate boundaries cannot be altered by municipal officers or employees. Unless the power is conferred by the state the municipal authorities or inhabitants may not change the corporate limits; and when such power is conferred it must be exercised under the circumstances and in the manner prescribed. *Commonwealth v. Stahr*, 162 Ky. 388, 391, 172 S. W. 677.

Evidence held inadmissible that city had worked the road involved and kept it in repair at the city's

**§ 272. Conditions of annexation—what territory may be included—general doctrine.<sup>24</sup>**

The existence of the conditions specified, and the observance of the substantial mandatory provisions of the law, must appear, to validate the annexation.<sup>25</sup> Courts can do nothing more than determine whether the conditions prescribed by the legislature existed when annexation occurred. No inflexible rule can be laid down by which the question can be answered, for each case

expense exercising jurisdiction thereover, and had extended its police jurisdiction over it. *Commonwealth v. Stahr*, 162 Ky. 388, 391, 172 S. W. 677.

Conferring power upon courts as to annexation, etc., is not an attempt to confer legislative functions upon courts. *Schweigert v. Abbott*, 122 Minn. 383, 387, 142 N. W. 723; *Irons v. Independent School Dist.*, 119 Minn. 119, 123, 137 N. W. 303; *Oppengaard v. Renville County Board*, 110 Minn. 300, 125 N. W. 504.

<sup>24</sup> *Morgan Park v. Chicago*, 255 Ill. 190, 99 N. E. 388; *State ex inf. Major v. Kansas City*, 233 Mo. 162, 134 S. W. 1007; *Alexandria v. Alexandria County*, 117 Va. 230, 84 S. E. 630, 636, quoting with approval parts of § 272, vol. 1, ante.

**Rules to be applied** in determining the reasonableness of extension of city limits, taken from an Arkansas case (*Vestal v. Little Rock*, set out in § 272, vol. 1, ante) have been approved by the Missouri Supreme Court. *State ex inf. v. Kansas City*, 233 Mo. 162, 213, et seq., 134 S. W. 1007, approved in *Hislop v. Joplin*, 250 Mo. 588, 599, 600, 157 S. W. 625.

**Marsh land** unplatted between

the city and territory to be annexed must be included. The contemplated extension is to be considered as an entirety. *Warwick County v. Newport News*, 120 Va. 177, 90 S. E. 644.

**Annexation statute** held to apply to both existing and to future municipal corporations of the kind designated. *State ex rel. v. Gilbert*, 127 Minn. 452, 149 N. W. 951.

<sup>25</sup> *People ex rel. v. Lemoore* (Cal. App. 1918), 174 Pac. 93; *New Iberia v. Iberia Parish Police Jury*, 135 La. 769, 66 So. 193; *Fabric Fire Hose Co. v. Vicksburg* (Miss. 1918), 77 So. 911, holding that annexation cannot include territory of another incorporated town.

**Essential conditions.** If territory sought to be annexed does not meet conditions prescribed by statute, it cannot be annexed, whether inhabited or not. *People v. Los Angeles*, 154 Cal. 220, 97 Pac. 311; *Capuchino Land Co. v. San Bruno* (Cal. App. 1917), 167 Pac. 178.

Under law authorizing the inclusion of inhabited territory only, uninhabited areas, of course, are excluded. *People v. Monterey Park* (Cal. App. 1919), 181 Pac. 825.

must depend, to some extent at least, on its own particular facts.<sup>26</sup>

In Minnesota what territory shall and what territory shall not be included is a question of fact to be determined by the people immediately interested within the limits fixed by the legislature.<sup>27</sup>

Under a general law, it was held in Oregon, a city may extend its boundaries over territory belonging to the state, including a state institution, but, of course, the city can exercise no control over state property that will interfere with the state authority. The city laws may be enforced upon state territory as elsewhere so long as they do not encroach upon its sovereign rights or powers. State and county property are frequently within the limits of municipalities.<sup>28</sup>

Conditions favorable to annexation sufficiently appear where the probative force of the evidence is to the effect that the lands sought to be annexed are necessary; that they are more valuable for town than for agricultural and horticultural purposes; that many occupied residences were already thereon; that some of the lands along the corporate lines had been sold as acreage, and streets and alleys had been opened therein; that residents had complained of the sanitary conditions; and that police protection was required.<sup>29</sup>

§ 273. Same — definition of “platted,” “lots,” “blocks.”<sup>30</sup>

<sup>26</sup> State v. Alice, 112 Minn. 330, 127 N. W. 1118, approved in State ex rel. v. Gilbert, 127 Minn. 452, 458, 459, 149 N. W. 951.

<sup>27</sup> State ex rel. v. Dover, 113 Minn. 452, 130 N. W. 74; State ex rel. v. Gilbert, 127 Minn. 452, 458, 149 N. W. 951.

“The soundness of their judgment in passing on the question must be tested as questions of fact \* \* \* are tested on appeal.”

State v. Dover, 113 Minn. 452, 130 N. W. 74, 539.

<sup>28</sup> Day v. Salem, 65 Or. 114, 131 Pac. 1028, 1030, 1031.

<sup>29</sup> Fowler v. Ratterree, 110 Ark. 8, 160 S. W. 893, stating that it is within the doctrine of Vestal v. Little Rock, 54 Ark. 321, 329, 15 S. W. 891, 16 S. W. 291, 11 L. R. A. 778 (set forth in § 272, vol. 1, ante).

<sup>30</sup> Platted and unplatted lands.



# § 274. Reasonableness of annexation—in general—illustrative cases.<sup>31</sup>

Courts may determine what are the corporate limits established,<sup>32</sup> and whether a municipal corporation in extending its limits has exceeded the legislative authority,<sup>33</sup> but the policy of annexation as a public necessity is a political function and is determined by the legislature in enacting the statutes providing for its accomplishment when certain conditions are shown to exist in prescribed proceedings.<sup>34</sup> "The court is called upon by the statute to express no opinion as to its wisdom as a matter of public policy. It has only to determine upon the evidence adduced, the rights of the opposing parties in the particular case before it, whether upon the facts and circumstances established by the evidence, the city is entitled to any extension at all, and, if any, how much, and the

State ex rel. v. Wichita, 88 Kan. 375, 128 Pac. 369.

Statute forbid annexation of unplatted lands. Part of tract sought to be annexed was platted and part unplatted, held void in toto. Sharkey v. Butte, 52 Mont. 16, 155 Pac. 266.

Law authorizing annexation of unplatted land whenever the same "is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary-line of such city," was construed to mean two-thirds of any single boundary—the word "any" held to mean "any one out of a number." State ex rel. v. Kansas City, 93 Kan. 420, 422, 144 Pac. 218.

<sup>31</sup> Bowman-Hicks Lumber Co. v. Oakdale (La. 1919), 81 So. 367; Norfolk County v. Portsmouth (Va. 1919), 98 S. E. 755; Collins v. Detroit, 195 Mich. 330, 161 N. W. 905; State ex rel. Blair v. Center Creek Mining Co., 262 Mo. 490, 171

S. W. 356; Alexandria v. Alexandria County, 117 Va. 230, 84 S. E. 630, 636, quoting with approval part of § 274, vol. 1, ante.

In Nebraska a village in one county may annex territory in another county. Wakefield v. Utecht, 90 Neb. 252, 133 N. W. 240, distinguishing Tabor, etc., R. Co. v. Dyson, 86 Iowa 310, 53 N. W. 245, construing a different statute.

<sup>32</sup> Section 261, ante.

<sup>33</sup> Red River Valley Brick Co. v. Grand Forks, 27 N. D. 8, 145 N. W. 725, 727; Glaspell v. Jamestown, 11 N. D. 86, 88 N. W. 1023.

<sup>34</sup> Controlled by grant in statute. Limited by such power. Cole v. Watertown, 34 S. D. 69, 147 N. W. 91.

Grant to annex requires strict observance with its terms and strict construction will be applied. Red River Valley Brick Co. v. Grand Forks, 27 N. D. 8, 145 N. W. 725.

terms and conditions upon which such extension shall be granted.”<sup>85</sup>

Some laws as construed confer broad powers on the governing legislative body. The members thereof are often in effect made the sole judges as to when and in what manner the corporate limits may be extended or diminished, subject it is true, to due observance of the substantial mandatory provisions of the controlling law, and to the approval of a majority of the legal voters of the city or territory affected, when so required. When done by resolution or ordinance, it is to be noted that,

<sup>85</sup> *Alexandria v. Alexandria County*, 117 Va. 230, 84 S. E. 630, 635.

“Nearly, if not all, of the questions to be determined under the provisions of this act, are questions of fact. The power so much inveighed against in the court to determine the necessity for, or expediency of, annexation, is controlled by the existence of facts and circumstances justifying action. The necessity for, or expediency of, enlargement, is determined by the health of the community, its size, its crowded condition, its past growth, and the need in the reasonably near future for development and expansion. These are matters of fact, and when they so exist as to satisfy the judicial mind of the necessity for, or expediency of, annexation, then in accordance with the provisions of the act, the same must be declared. It is manifest that the legislature, carrying out the provisions of the constitution, intended, as doubtless did the enactors of the organic law, to require that every annexation should depend upon evidence showing the

necessity for, or expediency of, annexation, that the terms proposed are reasonable and fair, and the provisions for the future management of the territory just.” *Henrico County v. Richmond*, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001, approved in *Alexandria v. Alexandria County*, 117 Va. 230, 84 S. E. 630.

“It is not a sufficient defense to the demands of a city that its corporate limits be extended for sanitary reasons, to point to the fact that the health of its citizens is and has been for some years good. A municipality has the right, and it is its duty, to take such precautionary steps as may reasonably be deemed necessary to secure to its population continued good health.” *Alexandria v. Alexandria County*, 117 Va. 230, 84 S. E. 630, 634.

Annexation of county territory to city, embarrassment of county as to its revenue by reason of annexation, is not test of validity of proceeding. *Warwick County v. Newport News*, 120 Va. 177, 90 S. E. 644.

courts possess undoubted power to pass upon the reasonableness of such action.<sup>36</sup>

"Reasonableness" is a word of extensive and broad meaning. The question as to reasonableness of extension, it has been said, "is at least quasi judicial." Unless clearly unreasonable "courts should be prone to disturb existing conditions. They cannot very well go into the details about the alimony of a municipality, nor can they determine with any degree of certainty whether the territory taken in will be self-sustaining or not." "In order to characterize the measure of a body as unreasonable it must be made to appear by abundant evidence that it is unreasonable."<sup>37</sup>

By statute in Mississippi "reasonable and unreasonable," relating to annexing or detaching territory, "must be construed as relating to the interests of the entire municipality."<sup>38</sup>

### § 276. Reasonableness of annexation—contiguous or adjacent territory.<sup>39</sup>

<sup>36</sup>State ex rel. v. West Plains, 163 Mo. App. 166, 171, 147 S. W. 163.

Where extension is by ordinance, its passage makes out prima facie of reasonableness. State ex inf. v. Maplewood (Mo. App.), 193 S. W. 989, following Hislop v. Joplin, 250 Mo. 588, 157 S. W. 625.

<sup>37</sup>Lawrence v. Mansfield, 129 La. 672, 56 So. 633.

<sup>38</sup>Thomas v. Long Beach, 111 Miss. 329, 71 So. 570, following Forbes v. Meridian, 86 Miss. 243, 38 So. 676.

<sup>39</sup>Contiguous territory. Sanders v. Coeur d' Alene, 27 Idaho 353, 149 Pac. 290; Tulsa St. Ry. Co. v. Oklahoma Union Traction Co., 27 Okl. 339, 113 Pac. 180.

Limited to contiguous territory. No incorporated city, town or vil-

lage can be annexed to another unless they adjoin each other. Morgan Park v. Chicago, 255 Ill. 190, 99 N. E. 388.

May annex "abutting and contiguous territory." Farlin v. Hill, 27 Mont. 27, 69 Pac. 237. Changed to "contiguous platted tracts or parcels of land." Sharkey v. Butte, 52 Mont. 16, 155 Pac. 266.

Territory contiguous or adjacent to the city which has been by act or acquiescence of the owner subdivided into tracts of not over 20 acres "may by ordinance be included in the city. Land suitable for city purpose, and adjacent to one of the principal boulevards of the city is within the province of this law. Miller v. Lincoln, 94 Neb. 577, 143 N. W. 921.

In Kansas property consisting of

### § 279. Detachment of municipal territory.<sup>40</sup>

The municipal authorities can in no case alter the corporate boundaries unless the power to do so has been conferred upon them by the state.<sup>41</sup> A change in the boundaries of a municipal corporation in effect, constitutes an amendment of its charter,<sup>42</sup> and in Oregon, such au-

one body of land may be annexed to a city of the first class at one time, if the whole of the tract thus annexed is contiguous to the city, although part of the tract may be owned by different persons. *Mason v. Kansas City* (Kan. 1918), 173 Pac. 535, following *Hurla v. Kansas City*, 46 Kan. 738, 27 Pac. 143.

"Adjacent" in a statute relating to school districts means districts so united or joined together as to form a compact district or territory. *People v. Keechler*, 194 Ill. 235, 62 N. E. 525.

<sup>40</sup> *Morrison v. Lafayette* (Colo. 1919), 184 Pac. 301; *Thiel v. Alexander* (S. D. 1919), 171 N. W. 209.

Detaching contiguous track or tracks. *Gypsum v. Lundgren*, 61 Colo. 332, 157 Pac. 195.

Under some statutes as construed when a city has annexed territory, it cannot either directly or indirectly dissever such territory. *Commonwealth v. Marks*, 248 Pa. 518, 94 Atl. 191.

**Petition for**, land owners in arrears for taxes. *Hendricks v. Julesburg*, 55 Colo. 59, 132 Pac. 61.

Owners of unoccupied territory in a village may petition for its severance whenever they wish to have such lands detached. Held, statute of limitation has no application in such case. *MacGowan v. Gibbon*, 94 Neb. 772, 144 N. W. 808.

**Agricultural lands** may be severed, although the municipal corporation has a bonded indebtedness. *Re Yeargain*, 43 Okla. 593, 143 Pac. 844.

Severance of land used for farming; judgment against sustained. *Re Town of Union*, 177 Iowa 403, 159 N. W. 178.

Unplatted land used exclusively for farming purposes included within the limits of a municipality, although with the tacit permission of its owner may be severed at the instance of such owner or his grantee under the Nebraska statute, on a proper case being made out. "Where the owner of unplatted land has used it exclusively for agricultural purposes for some years, but has tacitly submitted to its inclusion in the incorporated limits of a town, he is not estopped from proceeding under the statute to have it disconnected therefrom." *Joerger v. Bethany Heights*, 97 Neb. 675, 678, 151 N. W. 236; *Gregory v. Franklin*, 77 Neb. 62, 108 N. W. 147; *Osmond v. Smathers*, 62 Neb. 509, 87 N. W. 310.

<sup>41</sup> *Pittsburg, etc., R. Co. v. Anderson*, 176 Ind. 16, 95 N. E. 363.

<sup>42</sup> *Cooke v. Portland*, 69 Or. 572, 139 Pac. 1095.

**Change in boundaries is amendment of charter**, since any change must necessarily contract or enlarge the sphere of its municipal

thority is committed to the legal voters of the municipality by the constitution.<sup>43</sup>

If the essential facts and conditions exist, territory may be excluded from a municipality.<sup>44</sup> Where it is manifest that neither the interests of the inhabitants of the town as it will remain in event the territory shall be excluded therefrom, nor of the inhabitants of the territory sought to be excluded will be in any wise conserved by the retention of such territory within the corporate limits of the town, it may be excluded, if such is the intention of the law.<sup>45</sup>

The existence of the requisite conditions, under certain statutes, renders the granting of the severance imperative.<sup>46</sup>

### § 281. Proceedings to annex or detach territory—in general.

Where two bodies, as a city council and county jurisdiction, and therefore constitutes an amendment of its charter. *Morgan Park v. Chicago*, 255 Ill. 190, 99 N. E. 388, following *Galesburg v. Hawkinson*, 75 Ill. 152; *People v. Ellis*, 253 Ill. 369, 376, 97 N. E. 697, holding that annexation or severance of territory is pro tanto a new organization of the municipality, and the act is changing the charter, and is on the same footing as an act for original incorporation.

<sup>43</sup> *Flavel Land & D. Co. v. Leinenweber*, 81 Or. 353, 158 Pac. 945.

<sup>44</sup> Fact that town will suffer a loss of revenue, no reason. *Johnson v. Castlewood* (S. D. 1918), 168 N. W. 124.

<sup>45</sup> *Thomas v. Long Beach*, 111 Miss. 329, 71 So. 570, following *Forbes v. Meridian*, 86 Miss. 243, 33 So. 676.

Statute provided that if "jus-

tice and equity require that such territory, or any part thereof, be disconnected from such city or village," the court shall enter a decree accordingly. In an action to disconnect territory, under such statute the burden is upon the petitioner to establish by sufficient averments and evidence that justice and equity require such territory to be disconnected. *Haney v. Hyannis*, 97 Neb. 220, 149 N. W. 405.

<sup>46</sup> Court found land detached located within the unplatted portion of the city, contained forty acres and was exclusively used for agricultural purposes and that it could be detached without affecting the symmetry of the city, held, no discretion and severance must be granted. *Jones v. Red Lake Falls*, 116 Minn. 454, 134 N. W. 121, following *Hunter v. Tracy*, 104 Minn. 378, 116 N. W. 922.

missioners, have concurrent jurisdiction, the body first acquiring jurisdiction may proceed.<sup>47</sup>

As the jurisdiction is special,<sup>48</sup> a substantial compliance with all mandatory requirements is essential,<sup>49</sup> and sometimes a strict observance is demanded.<sup>50</sup>

In some states the proceeding may be initiated by petition and consummated by ordinance.<sup>51</sup>

Sometimes the formal steps embrace: First, the passage of an ordinance accurately describing the territory

<sup>47</sup> § 138, vol. 1, ante.

**Date of filing petition** and not the date of petition controls. *State ex rel. v. Clark*, 21 N. D. 517, 131 N. W. 715.

<sup>48</sup> *Estrem v. Slater* (Iowa 1917), 165 N. W. 263.

<sup>49</sup> *Highland Park v. Reker*, 173 Ky. 206, 210, 190 S. W. 706; *Alexandria v. Alexandria County*, 117 Va. 230, 84 S. C. 630.

**Directory provisions.** When by ordinance provision a certified copy of the ordinance is to be filed with the clerk of the county court, and one with the recorder, it was held directory, as it is merely intended to give notice of change so that the territory severed may be excluded in the extension taxes. *People ex rel. v. Ellis*, 253 Ill. 369, 377, 97 N. E. 697.

<sup>50</sup> **Strict construction** adopted in North Dakota especially of statutes permitting a city council to annex territory in direct opposition to the wishes and protests of those whose interests are to be affected. *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N. W. 725, 732, following *Stern v. Fargo*, 18 N. D. 289, 12 N. W. 403, 26 L. R. A. (N. S.) 665.

**Fraudulent colonization of voters** which did not change the re-

sult, that is, where the proposition to annex was carried by legal voters. After rejection of all such fraudulent votes, is not to be considered. *State ex rel. v. Gilbert*, 127 Minn. 452, 455, 456, 149 N. W. 951.

<sup>51</sup> In Illinois the severance is consummated by the passage of an ordinance providing therefor, and such ordinance cannot be repealed. *People ex rel. v. Ellis*, 253 Ill. 369, 377, 97 N. E. 697, following *People v. Binns*, 192 Ill. 68, 61 N. E. 376.

In Illinois when a petition is filed the city council acquires jurisdiction to decide all preliminary questions concerning the sufficiency of the petition and the steps required by the statute to authorize the passage of an ordinance, and if it commits an error its action and decision cannot be attacked in any proceeding not for the direct purpose of impeaching its action. Its determination is in effect a judgment having all the properties of a judgment pronounced by a legally created court of limited jurisdiction. Of course, it is essential that the council shall have jurisdiction to act. *People ex rel. v. Ellis*, 253 Ill. 369, 374, 97 N. E. 697.

to be annexed or severed; second, publication of the ordinance as the law directs; and third, if no remonstrance is presented within a named period, an ordinance may be enacted annexing or disconnecting the territory, and thereupon the new limits become established.<sup>52</sup>

### § 282. Same—sufficiency of ordinance.

Failure to observe substantial mandatory requirements renders the ordinance annexing or detaching territory invalid;<sup>53</sup> as an ordinance disregarding the requirement that upon change the entire boundary as changed should be declared in one ordinance.<sup>54</sup>

Presumptions exist in favor of the validity of such ordinances.<sup>55</sup> The ordinance, it is often said, makes out a *prima facie* case, and places the burden of proving the contrary upon the one who denies.<sup>56</sup> Evidence to overthrow the ordinance, it is quite generally held, must be clear, unequivocal and wholly satisfactory. Courts will not look closely into mere matters of judgment where fair grounds for difference of opinion exist.<sup>57</sup>

<sup>52</sup> *Highland Park v. Reker*, 173 Ky. 206, 210, 190 S. W. 706; *Bardstown v. Hurst*, 121 Ky. 119, 28 Ky. L. Rep. 603, 89 S. W. 724.

**Remonstrating** against annexing territory allowed, hearing without delay, policy of law. *Preston v. Paintsville*, 158 Ky. 700, 166 S. W. 188.

<sup>53</sup> *Highland Park v. Reker*, 173 Ky. 206, 190 S. W. 706.

Substantial compliance with legal provisions will be sufficient. *Alexandria v. Alexandria County*, 117 Va. 230, 84 S. E. 630, following *Henrico County v. Richmond*, 106 Va. 282, 55 S. E. 683, 117 Am. St. Rep. 1001.

Sufficiency of ordinance as to calling the election and providing for judges and polling places.

*State ex rel. v. West Plains*, 163 Mo. App. 166, 147 S. W. 163.

Failure to specify how territory to be annexed shall be managed is not fatal to the validity of ordinance. *Warwick County v. Newport News*, 120 Va. 177, 90 S. E. 644.

<sup>54</sup> *State ex rel. v. Wichita*, 88 Kan. 375, 128 Pac. 369, 371.

<sup>55</sup> Presumption exists that an annexing ordinance was proceeded by the essential statutory preliminaries. *State ex rel. v. Hutchinson* (Kan. 1918), 175 Pac. 147, 149.

<sup>56</sup> *State ex inf. v. Maplewood* (Mo. App.), 193 S. W. 989.

<sup>57</sup> *Hislop v. Joplin*, 250 Mo. 558, 599, 157 S. W. 625; *Copeland v. St. Joseph*, 126 Mo. 417, 431, 29

The broad discretion conferred upon the legislative body of a municipal corporation to extend or reduce the corporate limits by resolution or ordinance, submitting the question to the legal voters of the territory to be affected is subject to the general power of courts to declare such action void for unreasonableness. The reasonableness may be determined upon an inspection of the ordinance when its unreasonableness appears upon its face, or upon proof of facts *aliunde* which shows its unreasonableness.<sup>58</sup>

**§ 283. Same—requisites and sufficiency of notice.**

If the statute defines how notice of the resolution of the city council for annexation shall be printed and posted, clearly the council has no power either to enlarge or limit the requirements.<sup>59</sup>

**§ 284. Same—sufficiency of petition—illustrative cases.**

Without a sufficient petition no jurisdiction is conferred on the tribunal empowered to act.<sup>60</sup> Where a

S. W. 281; *St. Louis v. Weber*, 44 Mo. 547, 550.

<sup>58</sup> *State ex rel. v. West Plains*, 163 Mo. App. 166, 171, 147 S. W. 163; *State ex rel. v. Birch*, 186 Mo. 205, 219, 85 S. W. 361.

<sup>59</sup> *State ex rel. v. Clark*, 21 N. D. 517, 131 N. W. 715, 718.

Sufficiency of ordinances as to publication of notice of election for vote on extension. *State ex rel. v. West Plains*, 163 Mo. App. 166, 174, 147 S. W. 163.

**Amendment of resolution** describing territory proposed to be annexed by materially reducing the amount to be included allowed, without giving new notice describing reduced territory. *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N. W. 725.

<sup>60</sup> *State ex rel v. McKinley*, 132 Minn. 48, 155 N. W. 1064; *Schweigert v. Abbott*, 122 Minn. 383, 389, 390, 142 N. W. 723, (holding that the statute is mandatory, and its requirement that the petition be signed by the percent of the voters stated cannot be dispensed with by the court); *Johnson v. Clontarf*, 98 Minn. 281, 285, 108 N. W. 521.

**Warning clause.** Laws require that a warning clause against illegal signing shall be placed at the head of an initiative petition. Held, mandatory. *Day v. Salem*, 65 Or. 114, 131 Pac. 1028.

**Qualification of signers.** In proceedings to sever, law usually requires the petition to be signed by a majority of the "property hold-



city council had power to determine whether the requisite number of electors had signed the petition, it was held that the council might direct its clerk to make the necessary investigation and report, after which the council could act.<sup>61</sup>

As to the petition defining the territory to be annexed or severed, under a law prescribing that the description of the territory to be incorporated shall "suitably" describe "such district with common certainty," a petition to extend the corporate limits purporting to give boundaries of the territory to be annexed in eight different bounds or courses, three of which were ponds or streams, leaving the exact boundaries doubtful and uncertain, it was held did not meet such statutory requirements. "The description of the territory should be such that upon a fair and reasonable construction its boundaries should be evident without reference to doubtful rules of legal interpretation." The court rejected the contention that in construing the description there should be applied those legal rules of construction which have been sometimes invoked in the interpretation of doubtful and uncertain clauses in deeds or wills; also the further contention that

ers" in the territory sought to be disconnected, held law meant resident landowners, not holders of personal property. *Stason v. Albia*, 150 Ia. 207, 129 N. W. 809.

Statute requiring petitioners for annexation to be "legal voters residing within such territory," held restricted to resident citizens qualified to vote at the time they signed the petition. *State ex rel. v. McKinley*, 132 Minn. 48, 155 N. W. 1064.

The signing of a petition to vote bonds to be paid by means of taxation will not estop the owner of unoccupied territory in a village to ask that such territory be severed. *MacGowan v. Gibbon*, 94

Neb. 772, 774, 144 N. W. 808.

**Nebraska.** In an action to annex additional territory to a village the burden is upon the village to establish by sufficient averments that the territory sought to be annexed will be benefited by the annexation, or that justice and equity require that such territory be annexed." *Wakefield v. Utecht*, 90 Neb. 252, 133 N. W. 240, approved in *Haney v. Hyannis*, 97 Neb. 220, 149 N. W. 405.

<sup>61</sup> *Wolfskill v. Los Angeles* (Cal. 1918), 174 Pac. 45, distinguishing and intimating the rule as too rigid in *Sumpf v. San Luis Chispo County Supervisors*, 131 Cal. 364, 63 Pac. 663, 82 Am. St. Rep. 350.

even if the description given in the petition is ambiguous or there is inconsistency in several particular words, if necessary, words may be supplied by intendment, and particular clauses or provisions qualified, transposed or rejected in order to ascertain and give effect to the intention.<sup>62</sup>

**§ 285. Same—plat or plan of property to be annexed to petition.**<sup>63</sup>

**§ 286. Same—the evidence.**<sup>64</sup>

**§ 287. Same—the judgment or order.**<sup>65</sup>

<sup>62</sup> *People ex rel. v. Patchogue*, 217 N. Y. 466, 468, 469, 112 N. E. 169, affirming 156 N. Y. S. 1096, 171 App. Div. 347.

<sup>63</sup> Platting subdivision, owner may locate lot lines. *Wolpert v. Chicago*, 280 Ill. 187, 117 N. E. 447.

Platting subdivision. *Miller v. Fisher*, 77 Or. 532, 151 Pac. 971.

Approval of plats by city council, discretion. *People ex rel. v. Massieon*, 279 Ill. 312, 116 N. E. 639; *Carter v. Council Bluffs*, 180 Ia. 227, 163 N. W. 195.

It is not requisite to the validity of a plat that the wife of the proprietor shall acknowledge the plat, under a statute directing acknowledgement by the proprietors. *Phillips v. Arkansas Valley Interurban Ry. Co.*, 89 Kan. 835, 133 Pac. 429.

<sup>64</sup> Evidence must show extension reasonable. *Thomas v. Long Beach*, 111 Miss. 329, 71 So. 570.

Annexation; method of viewing evidence, sufficiency. *Warwick County v. Newport News*, 120 Va. 177, 90 S. E. 644.

If evidence shows territory sought to be severed is necessary

for sanitary and police purposes, petition will be denied. *Platt Pressed & Fire Brick Co. v. Van Meter*, 170 Ia. 509, 153 N. W. 178.

Evidence must show that some portion of the territory sought to be annexed will be benefited by the annexation or that justice and equity require its annexation. *Haney v. Hyannis*, 97 Neb. 220, 149 N. W. 405; *Wakefield v. Utecht*, 90 Neb. 252, 133 N. W. 240; *Bisenius v. Randolph*, 82 Neb. 520, 118 N. W. 127.

<sup>65</sup> Express power to annex territory gives implied power to make necessary incidental orders. *Oakman v. Hosmer*, 185 Mich. 359, 152 N. W. 89.

Judgment adverse to severance will be disturbed only in event of abuse of discretion. *Platt Pressed & Fire Brick Co. v. Van Meter*, 170 Ia. 509, 153 N. W. 178.

In acting on a petition to sever territory, the court cannot exclude part and refuse part, but must grant or refuse as a whole. *Cole v. Watertown*, 34 S. D. 69, 147 N. W. 91.

Court order may refer to ordinance as to disposition of revenue

**§ 288. Same—action to test validity of proceeding.**

The state may raise the question of power and jurisdiction of a municipal corporation, as it creates, gives and takes away, and usually private parties may not do so. "When a city has by ordinance taken over additional territory, a private citizen will not ordinarily be heard to question the law under color of which such action has been taken."<sup>66</sup> But it appears the rule is quite well established that a taxpayer may test the validity of annexation by injunction against the collection of taxes on property in the added territory.<sup>67</sup> However, this has been denied.<sup>68</sup>

concerning improvements, etc., where the law requires the ordinance to declare the terms and conditions of annexation, and make provision for future management of improvement. *Warwick County v. Newport News*, 120 Va. 177, 90 S. E. 644, 650.

<sup>66</sup> *State ex rel. v. Hutchinson* (Kan. 1918), 175 Pac. 147.

**Quo warranto** by state is proper proceeding. *People ex rel. v. Jones*, 277 Ill. 523, 115 N. E. 523; *People ex rel. v. McKinnie*, 277 Ill. 342, 115 N. E. 526; *People v. Monterey Park* (Cal. App. 1919), 181 Pac. 825; *Coe v. Los Angeles* (Cal. App. 1919), 183 Pac. 822.

**Quo warranto**, extending corporate limits. *State ex rel. v. West Plains*, 163 Mo. App. 166, 147 S. W. 163.

**Quo warranto** in consolidation of school districts. *State ex rel. v. Smith*, 271 Mo. 168, 177, 196 S. W. 17.

**Certiorari.** *Lehigh Sewer P. & T. Co. v. Lehigh*, 156 Ia. 386, 136 N. W. 934; *Rafferty v. Clermont*, 180 Ia. 1391, 164 N. W. 199.

<sup>67</sup> *Red River Valley Brick Co. v.*

*Grand Forks*, 27 N. D. 8, 145 N. W. 725, 729, approving § 288, vol. 1, ante.

**Injunction** to determine validity of proceedings in detaching portion of a village school district and attaching it to a county school district under Missouri statute, authorizing injunction where an adequate remedy cannot be afforded by an action for damages. *School District v. McFarland*, 154 Mo. App. 411, 419, following *Towne v. Bowers*, 81 Mo. 496, and *Jones v. Williams*, 139 Mo. 37, 39 S. W. 486, 40 S. W. 353.

<sup>68</sup> Section 290, vol. 1, ante.

**Laches** arises after period of forty years. *State ex rel. v. Carterville* (Mo. App.), 183 S. W. 1093.

An objection that city limits were not legally extended to embrace lands to be taxed for the cost of construction and maintenance of a sewer because of the absence of notice of the election will not be considered, after a lapse of fifteen years from the date of the extension. *Whitsett*

## § 290. Same—collateral attack on annexation proceedings.

After the annexation has been consummated, collateral attacks on the proceedings are generally denied,<sup>69</sup> especially after lapse of considerable time.<sup>70</sup> The prevailing rule is that the validity of annexation may be questioned only in a direct proceeding by the state.<sup>71</sup>

A suit in equity by a landowner of territory sought to be annexed in behalf of himself and all others similarly

v. Carthage, 270 Mo. 269, 193 S. W. 21.

After twelve years, the court refused to consider the question in a proceeding by quo warranto, holding the parties had slept too long on their rights, if they had any, and were therefore estopped from proceeding. *State v. Westport*, 116 Mo. 582, 22 S. W. 888.

No estoppel against state by lapse of time. *State ex rel. v. Tillamook Port*, 62 Or. 362, 124 Pac. 637, 641 Ann. Cas. 1914C, 483.

<sup>69</sup> *People v. Ellis*, 253 Ill. 369, 97 N. E. 697.

Collateral attack denied to one who waived right of appeal from ordinance of extension. *Adams v. Lamb-Fish Lumber Co.*, 103 Miss. 491, 60 So. 645.

In quo warranto questioning the title to the office of city judge, annexation of territory cannot be raised. *People v. Rodenberg*, 186 Ill. App. 623.

Legality of charter provision by virtue of which the annexation was effected cannot be questioned in action to enjoin issuance of bonds, after the city has taken governmental control over same. *Cohen v. Houston* (Tex. Civ. App.), 176 S. W. 809.

<sup>70</sup> Six years. Exercising municipal control over annexed territory for a period of six years, precludes collateral attack on validity of the ordinance authorizing such annexation in a suit to enjoin the collection of taxes. *Gorby v. Gayman* (Okla.), 157 Pac. 939.

After nine years collateral attack denied. *Blackwell v. Newkirk*, 31 Okla. 304, 121 Pac. 260, 270.

Ten years, denied. *People ex rel. v. Jones*, 277 Ill. 523, 115 N. E. 523.

Fifteen years. *Whitsett v. Carthage*, 270 Mo. 269, 286, 193 S. W. 21.

<sup>71</sup> *Mason v. Kansas City* (Kan. 1918), 173 Pac. 535, following *Chaves v. Atchison*, 77 Kan. 176, 93 Pac. 624; *Horner v. Atchison*, 93 Kan. 557, 144 Pac. 1010; *State ex rel. v. Hutchison*, 102 Kan. 325, 169 Pac. 1140.

Cannot be attacked in action for special assessments. "Such a question can only be tried in a proceeding by quo warranto in the name of the people in which a judgment will be conclusive and binding upon all." *People ex rel. v. McKinnie*, 277 Ill. 342, 115 N. E. 526.

situated asking that such lands be declared to be beyond the city limits and to enjoin the city from taking jurisdiction of the property and persons in such territory was held not to be a collateral attack on the annexation proceedings. In the case determined it was sought to annex "unplatted lands," in violation of the express provision of the controlling statute, and as the landowner had no adequate remedy at law the action was allowed. "It may be that as a matter of public policy a private citizen will not be heard to call in question the city's proceedings for minor irregularities or informalities; but where such proceedings are void *ab initio* for want of jurisdiction of the subject-matter, as here, equity will afford relief to the property owner whose taxes would be increased, if his property were included within the city's limits." <sup>72</sup>

### § 291. Same—review.<sup>73</sup>

<sup>72</sup>Sharkey v. Butte, 52 Mont. 16, 155 Pac. 266, approving the principle declared in Barnard Realty Co. v. Butte, 50 Mont. 159, 145 Pac. 946.

In proceeding to secure judgment against property annexed for municipal taxes, the question whether such property was legally annexed may be contested. People v. Hansen, 276 Ill. 204, 114 N. E. 596.

<sup>73</sup>Thomas v. Long Beach, 111 Miss. 329, 71 So. 570; Gregory v. Amory (Miss. 1917), 73 So. 614.

Appeal allowed. Patterson v. Ft. Branch (Ind. App.) 113 N. E. 319.

Proceedings to sever territory are not civil action appealable under Ohio Code. Bay v. Sylvania, 32 Ohio Cir. Ct. R. 590.

Action of trustees in passing on sufficiency of petition for annexation, held judicial and reviewable by writ of review. Capuchino

Land Co. v. San Bruno (Cal. App. 1917), 167 Pac. 178.

Action of city council on petition to exclude territory is not legislative and may be reviewed by the courts. Heineman v. Alexandria, 32 S. D. 365, 143 N. W. 291, following Wickhem v. Alexandria, 23 S. D. 556, 122 N. W. 597.

Under law giving right of review to persons aggrieved by judgment severing territory, persons not residents and owning property in the district detached are not such. Thornton v. Charleston (Miss.), 68 So. 856.

Unless an important mistake of fact or an erroneous inference of law occurred in the trial court, the judgment detaching territory will not be disturbed by the appellate court. Joerger v. Bethany Heights, 97 Neb. 675, 678, 151 N. W. 236; Chapin v. College View, 88 Neb. 229, 129 N. W. 297; Mac-

### § 292. Defects may be cured.

Legislative curative acts may validate defective or illegal annexation or detachment proceedings.<sup>74</sup> As the legislature may in the first instance authorize annexation, it may cure defects or ratify an annexation ordinance after passage thereof.<sup>75</sup>

### § 293. Effect of change of limits in general—illustrative cases.

When territory is lawfully annexed, the new area becomes, *ipso facto*, a part of the municipality for all urban purposes, and such new area becomes at once subject to municipal supervision and control.<sup>76</sup>

Gowan v. Gibbon, 94 Neb. 772, 144 N. W. 808, following Bisenius v. Randolph, 82 Neb. 520, 118 N. W. 127.

<sup>74</sup> People ex rel. v. Rock Island, 271 Ill. 412, 111 N. E. 291.

The legislature may ratify and confirm any act which it might lawfully have authorized in the first instance, where the defect arises out of neglect of some legal formality and the curative act interferes with no vested right. Steger v. Traveling Men's Building Assn., 208 Ill. 236, 242; United States Mtg. Co. v. Gross, 93 Ill. 483.

Legislative act validating charters of municipalities adopting the commission form of government, held to validate municipal boundaries, including, of course, annexation of territory. State ex rel. v. Polytechnic (Tex. Civ. App.), 194 S. W. 1136, 1140.

<sup>75</sup> Mason v. Kansas City (Kan. 1918), 173 Pac. 535, citing § 707, vol. 2, ante.

<sup>76</sup> Laws prescribe that outside territory when annexed "shall

thereupon become a part of such city and subject to all its laws and ordinances then and thereafter in force." Ettor v. Tacoma, 77 Wash. 267, 273, 137 Pac. 820.

Any change, constitutes amendment of charter. Park v. Chicago, 255 Ill. 190, 99 N. E. 388; Cooke v. Portland, 69 Or. 572, 139 Pac. 1095.

Town annexed to city resulted in repealing charter of town, and the town ceased to exist, and the city assumed jurisdiction of its entire territory. Marks v. Rome, 145 Ga. 399, 89 S. E. 324; Walker v. East Rome, 145 Ga. 294, 89 S. E. 204; Cartersville v. McGinnis, 142 Ga. 71, 82 S. E. 487, Ann. Cas. 1915D, 1067.

Alteration and creation of new municipality, officers in particular provisions. Aichele v. Denver, 52 Colo. 183, 120 Pac. 149.

When jurisdiction of city court may not extend to territory annexed in another county. People ex rel. v. Rodenberg, 254 Ill. 336, 98 N. E. 764.

Land owner whose land is in-

All public highways therein become streets of the municipality.<sup>77</sup> On change of municipal limits the control over highways passes by virtue of law from one political subdivision of the state to the other accordingly as the highways are in the one or the other. Thus where corporate limits are extended to embrace territory in which there is a public highway formerly under the jurisdiction of a county, its control passed to the municipal corporation.<sup>78</sup> "The city does not merely succeed to the rights of the county in the highway, but it holds the highway under the authority of the state just as it holds any other street and with all the powers over it and rights in it which it may exercise as to its other streets."<sup>79</sup>

The vesting of such new municipal jurisdiction includes contract ordinances between a railway and a township annexed as to conditions for running cars thereon, and since the township has no control thereafter, the city and railway may make alterations as to the conditions, and enter into an entirely new contract.<sup>80</sup>

cluded in the corporate area is chargeable with notice thereof. *State v. Carterville* (Mo. App.), 183 S. W. 1093.

Tax liens are not impaired by severance of territory from municipality. *Hendricks v. Julesburg*, 55 Colo. 59, 132 Pac. 61.

City annexing territory of another city may issue tax bills to pay for improvements authorized prior to annexation by annexed city. *Barber Asphalt Pav. Co. v. Hayward*, 248 Mo. 280, 154 S. W. 140.

As to annexed territory, city may exercise all political and governmental powers with which it is invested. *Blount v. MacDonald*, 18 Ariz. 1, 155 Pac. 736.

<sup>77</sup> *Gernert v. Louisville*, 155 Ky. 589, 159 S. W. 1163; *Louisville v. Hall*, 28 Ky. L. Rep. 1064, 91 S.

W. 1133; *Columbus v. Ogletree*, 102 Ga. 293, 29 S. E. 749.

<sup>78</sup> The powers and duties of the city over such new area become the same as over the old, including the removal of street obstructions. *Hendricks v. Carter*, 21 Ga. App. 527, 94 S. E. 807.

The existence of such obstruction prior to annexation is of no significance. *Macon v. Morris*, 10 Ga. App. 298, 73 S. E. 539.

<sup>79</sup> *Duckworth v. Springfield*, 194 Mo. App. 51, 54, 194 S. W. 476; *Kurtz v. Knapp*, 127 Mo. App. 608, 106 S. W. 537; *State v. Franklin*, 133 Mo. App. 486, 113 S. W. 652.

<sup>80</sup> *Gernert v. Louisville*, 155 Ky. 589, 159 S. W. 1163; *Danville v. Boyle County Fiscal Court*, 106 Ky. 608, 51 S. W. 157, 21 Ky. L. Rep. 196.

<sup>81</sup> *People ex rel. v. Chicago Rys.*

On annexation the city may acquiesce in an unexecuted contract made by the authorities of the new territory, e. g., street grading, where it was not *ultra vires* and might have been made by the city; and such contract will be deemed ratified by the city and the improvement adopted, although not recognized by affirmative vote of the legislative body, where the improvement was suffered to proceed under the supervision of the city engineer, and with knowledge of the commissioner of public works and the street committee of the legislative body.<sup>81</sup>

It is a general rule that an ordinance designed for the city at large operates throughout its boundaries whatever changes may be made in them,<sup>82</sup> and that grants by such ordinances though accepted and amounting to contracts are to be construed as made and accepted in contemplation of, and subject to, such rules unless the contrary is clearly expressed.<sup>83</sup>

Co., 270 Ill. 278, 110 N. E. 394, 397, following *People v. Chicago Telephone Co.*, 245 Ill. 121, 91 N. E. 1065.

<sup>81</sup> *Ettor v. Tacoma*, 77 Wash. 267, 274, 275, 137 Pac. 820.

On the annexation of territory to a city a contract by the county for street grading in the annexed territory, not then executed, held to be extinguished where its execution would tend to defeat the rights of the city, and where the contract did not come within some guarantee of the constitution, unless it was acquiesced in and acted upon by the city. "It would necessarily follow that contracts therefore entered into by the legislative or administrative body having jurisdiction over the new territory, and not then executed, or if of such a character that their execution would be inconsistent with or tend to defeat the contracts, rights, powers and duties

of the annexing municipality, and not coming within some guarantee of the constitution, should be held to be extinguished by the act of annexation." *Ettor v. Tacoma*, 77 Wash. 267, 273, 137 Pac. 820.

Contracts as to territory attached held binding on consolidated city. *State v. Dahlman*, 100 Neb. 416, 160 N. W. 117.

<sup>82</sup> Section 657, vol. 2, ante; section 657, ante. As to ordinance fixing water rates, see *State ex rel. v. Geiger*, 246 Mo. 74, 84, 154 S. W. 486; *L. R. A.* 1916A, 1060.

<sup>83</sup> *Detroit v. Detroit United Ry.*, 173 Mich. 314, 139 N. W. 56, 60, approving *People v. Detroit United Ry.*, 162 Mich. 460, 125 N. W. 700, 127 N. W. 748, 139 Am. St. Rep. 582; *Indiana Ry. v. Hoffman*, 161 Ind. 593, 69 N. E. 399; *Peterson v. Tacoma Ry. & Power Co.*, 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936.



Where the limits of a city were extended so as to take in a part of a street railway then being operated through the city and upon a public road beyond the city limits under a franchise from the county, it was held the franchise was abrogated by the annexation and that the railway company was bound to carry passengers within the limits of the city as extended for one fare of five cents, as then provided in its contract with the city and as evidenced by an ordinance.<sup>84</sup>

**§ 294. Condition of public property and debts after change—apportionment.<sup>85</sup>**

Without express statutory authorization, it has been held, that a municipality annexing a road district has no power to tax the property in such road district to redeem its bonds.<sup>86</sup>

<sup>84</sup> *Peterson v. Tacoma R. & P. Co.*, 60 Wash. 406, 111 Pac. 338, 140 Am. St. Rep. 936.

<sup>85</sup> *State ex rel. v. Hackmann*, 277 Mo. 56, 67, 209 S. W. 92, citing § 294, vol. 2, ante; *Corby v. Detroit*, 180 Mich. 208, 146 N. W. 670; *Wilson v. King's Lake Drainage & Levee Dist.*, 257 Mo. 266, 165 S. W. 734, affirming 158 S. W. 931.

**Contracts.** In dividing, annexing or consolidating territory of public corporations the obligation of contracts must not be impaired. *Warwick v. Rhode Island Hospital T. Co.*, 38 B. I. 517, 96 Atl. 508, 510.

**Valid tax liens** on lands continue after severed from the municipality. *Hendricks v. Julesburg*, 55 Colo. 59, 132 Pac. 61, 63.

**When territory is illegally annexed**, the city is not liable for the debts of such territory. *Fabric Fire Hose Co. v. Vicksburg* (Miss. 1918), 77 So. 911.

**Employment as an attorney** by village subsequently annexed to city, terminated, so that no recovery can be had thereon against the city. *Fisher v. Mechanicville*, 158 N. Y. S. 908, reversing 157 N. Y. S. 518, 94 Misc. Rep. 134.

**Contract of teacher with a school district** which subsequently became a separate school district by division of township in which situate, is not binding on the new district, since in the absence of legislation the old school district remains liable for pre-existing obligations. *Flemington Borough Board of Education v. State Board of Education*, 81 N. J. L. 211, 81 Atl. 163.

<sup>86</sup> By statute the city was authorized to exercise over property and inhabitants of annexed territory "all the political and governmental powers delegated to it by the law to be exercised over any and all parts of its political domain." "The right to issue

"The power of the legislature to provide for a fair and equitable disposition or division of public property in the case of the division or annexation of territory is unquestioned."<sup>87</sup>

A statute provided that if extensions include incorporated city or town or village the public corporation so included shall, *ipso facto*, cease, and all its property and rights of every kind shall, by operation of law, at once pass to and vest in the municipal corporation making such extension, and such city shall also, by operation of law, become liable to pay all debts and liabilities of the absorbed public corporation. It was held that by force of such legislation, the consolidated city had power to issue tax bills to pay for street pavement begun by the absorbed city prior to the time of the merger and completed after the merger, where the absorbed city had such power, since "rights" include "powers."<sup>88</sup>

### § 295. Taxation and exemptions on change of limits.<sup>89</sup>

bonds of a designated district and territory is neither a political nor governmental power, but a private corporate power conferred for local purposes." By the annexation, the city "acquired no rights or assumed no liabilities of the road district not of a political or governmental character." *Blount v. MacDonald*, 18 Ariz. 1, 155 Pac. 736, 738, 739, following *Laramie County v. Albany Co.*, 92 U. S. 307, 23 L. ed. 552.

**Taxing property** of absorbed city to pay its indebtedness by statute. *Forsyth v. Seattle*, 73 Wash. 515, 132 Pac. 224.

<sup>87</sup> *State ex rel. v. Schriner*, 151 Wis. 162, 138 N. W. 633, 635; *Princeton v. Maik*, 113 Wis. 239, 89 N. W. 183; *Bloomington v. Bloomington*, 185 Ill. App. 70.

Law provided that upon annexa-

tion, the city shall assume tax burdens, etc. *Covington v. Busart*, 149 Ky. 288, 148 S. W. 68.

**Power of court of equity** to adjust debts, by statute. *Valley Tp. v. Coatesville Borough*, 51 Pa. Super. Ct. 186.

**Apportionment of insurance money** on school buildings in annexed territory under statute. *People ex rel. v. Dunn*, 154 N. Y. S. 346, 168 App. Div. 678.

**Debts of constituent units** of consolidated municipal corporation, with and without consent of the electors, how treated under particular statutes. *Troop v. Pittsburgh*, 254 Pa. 172, 98 Atl. 1034.

<sup>88</sup> *Barber Asphalt Paving Co. v. Hayward*, 248 Mo. 280, 286-289, 154 S. W. 140.

<sup>89</sup> Village separated from town-

**§ 296. Municipal subdivisions or wards.<sup>90</sup>**

Where the constitution does not require that a city shall be divided into wards of equal population, or divided according to population, the division is a legislative question, and a division by ordinance varying from nine thousand to nineteen thousand will not be set aside by the court.<sup>91</sup>

A city council in dividing the city into wards acting pursuant to a legislative act that it should make a new division of the city into not less, nor more, than a specified number of wards, with their boundaries so adjusted that the wards should contain, as nearly as could be ascertained and as might be consistent with well defined limits

ship. *Ingersoll v. Spang*, 125 Minn. 452, 147 N. W. 439.

**Law exempting city from liability** for specified school district bonds, where part of district is annexed, held constitutional. *People ex rel. v. Dunn*, 154 N. Y. S. 346, 168 App. Div. 678.

<sup>90</sup> **Validation by legislature** of action of city in constituting wards authorized. *State v. Milwaukee*, 150 Wis. 616, 138 N. W. 76.

**Notice of filing of petition** to create a ward of an election district. *State v. Madison* (Wis. 1919), 174 N. W. 471.

**As the Kentucky Constitution** does not require cities to be divided into wards and hence officers may be selected from the city at large, e. g., under commission form of municipal government. However, by the constitution, they may be and when so divided, members of the legislative boards shall be elected at large by the qualified voters of the city, but so selected that an equal proportion thereof shall reside in each

of the wards or districts. When two legislative boards exist in any city, the less numerous shall be selected from and elected by the voters at large of such city. *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884.

**Borough.** The Constitution of California recognizes the principle of municipal government through a system of units or divisions, known as boroughs, composing a fraction of the corporate area, and having certain powers relating to local affairs. Borough government when established, under this constitution, shall extend over all, and shall not be applied to a part only of a municipality. *Cruse v. Los Angeles*, 175 Cal. 774, 167 Pac. 386.

**Power of court to open decree** confirming division of borough into wards made by commissioners, and correct manifest errors therein affirmed. *Farrell Borough Division*, 67 Pa. Super. Ct. 332.

<sup>91</sup> *State ex rel. v. Milwaukee*, 150 Wis. 616, 138 N. W. 76.

to each ward, an equal number of voters, was held to be the exercise of administrative or political power, and not judicial or quasi-judicial in character, hence, not subject to review by certiorari.<sup>92</sup>

Under a statute providing for new plan of ward lines, and changing ward lines and creating new wards, it was held that officers representing the old wards would continue to represent the same areas until their terms expired.<sup>93</sup>

In redivision of a borough into wards, in Pennsylvania, the court may provide for the election of new officers to conform to the new subdivisions, although it may result in ousting certain old officers.<sup>94</sup>

<sup>92</sup> *Fitzgerald v. Boston*, 220 Mass. 503, 506, 108 N. E. 355, distinguishing *Kingman*, petitioner, 153 Mass. 566, and like decisions.

<sup>93</sup> *Wood v. Bassett*, 85 N. J. L. 113, 88 Atl. 853.

<sup>94</sup> *Re Summit Hill Borough*, 240

Pa. 396, 87 Atl. 857, 50 Pa. Super. Ct. 117.

**Charter amendment** changing ward lines may oust officers, elected by old subdivisions from office. *Cotteral v. Barker*, 34 Okl. 533, 126 Pac. 211.

## CHAPTER 8.

### DISSOLUTION AND REORGANIZATION OF MUNICIPAL CORPORATIONS.

#### I. GROUNDS FOR DISSOLUTION AND HOW ACCOMPLISHED.

#### II. EFFECT OF DISSOLUTION AND REORGANIZATION.

##### I. GROUNDS FOR DISSOLUTION AND HOW ACCOMPLISHED.

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|---|---|
| § 299. Annexation or consolidation destroys.        | § 304. May be dissolved only by state—method. |
| § 301. Inhabitants may not dissolve—nonuser.        | § 307. Statutes providing for dissolution.    |
| § 302. Failure to elect officers will not dissolve. |   |

##### II. EFFECT OF DISSOLUTION AND REORGANIZATION.

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|---|---|
| § 310. Rights of creditors of extinct corporation protected.                      | § 315. Dissolution and reincorporation—new as successor of old, when. |
| § 312. Extinguishing by dividing—legislative apportionment of property and debts. | § 316. Same—suspension of governmental functions—revival.             |
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|   | § 317a. Military occupation and transfer of sovereignty.              |

#### I. GROUNDS FOR DISSOLUTION AND HOW ACCOMPLISHED.

#### § 299. Annexation or consolidation destroys.<sup>1</sup>

<sup>1</sup>Laws allow two or more contiguous municipal corporations to consolidate into one. Constitutional provisions that municipal corporations can be created by general law only, that the legislature shall not enact, amend or re-

peal a municipal charter, but that the legal voters of any city only may enact or amend their charter, held not to prevent the legislature from enacting general laws for the creation of corporations, but precludes legislative action

§ 301. Inhabitants may not dissolve—nonuser.<sup>2</sup>

§ 302. Failure to elect officers will not dissolve.<sup>3</sup>

§ 304. May be dissolved only by state—method.<sup>4</sup>

§ 307. Statutes providing for dissolution.<sup>5</sup>

against a particular municipality. *State ex rel. v. Gilbert*, 66 Or. 434, 134 Pac. 1038.

Fact that the consolidation of municipal corporations results in the increase in debt burden of certain taxpayers, held not to invalidate legislative authorization. *People ex rel. v. Brown*, 216 N. Y. 674, 110 N. E. 171, affirming 155 N. Y. S. 564, 169 App. Div.

<sup>2</sup> A municipality may be dissolved only by the legislature or other mode prescribed by law. *Pence v. Cobb* (Tex. Civ. App.), 155 S. W. 608.

**Nonuser of corporate powers** will not dissolve, in absence of legislation. Laws may so provide, e. g., in Texas, municipalities incorporated under special act. *Ringling v. Hempstead*, 193 Fed. 596, 113 C. C. A. 464.

After the passage of two ordinances, the officers voluntarily ceased to perform their official duties, held corporate existence was not terminated. *Sell v. Turner*, 138 Ga. 106, 74 S. E. 783.

<sup>3</sup> *Pence v. Cobb* (Tex. Civ. App.), 155 S. W. 608; *Ringling v. Hempstead*, 193 Fed. 596, 113 C. C. A. 464.

<sup>4</sup> *Hammar v. Narverud*, 142 Minn. 199, 171 N. W. 770, citing § 304 vol. 1, ante; *Ringling v. Hempstead*, 193 Fed. 596, 113 C. C. A. 464; *Rylands v. Clark*, 278 Ill. 39, 115 N. E. 829.

Only by attorney-general in the name of the commonwealth on direction of the legislature. *Vanover v. Dunlap*, 172 Ky. 679, 189 S. W. 915.

<sup>5</sup> Proceedings to dissolve under unconstitutional law, held mere nullity. *Ringling v. Hempstead*, 193 Fed. 596, 113 C. C. A. 464.

Statutes provide for method of settlement of debts on dissolved. Without provisions for payment of debts of dissolved corporations there can be no constitutional method of disincorporation. The result of an incomplete system of disincorporation would be to impair the obligation of the contracts of the corporation by destroying the remedy for their enforcement or collection. *Ibid*.

By repeal of law, e. g., allowing the incorporation of road districts, or by law providing for dissolution of road districts. By general law, providing for dissolution. *Shoshone Highway District v. Anderson*, 22 Idaho 109, 125 Pac. 219, 225.

Question of dissolution of village, submitted to electors. *Highland Grove Tp. v. Winnipeg Junction*, 125 Minn. 280, 148 N. W. 974.

Where after hearing as provided by statute, a county court in Missouri orders the disincorporation of a town, no appeal lies to the circuit court on behalf of objecting

## II. EFFECT OF DISSOLUTION AND REORGANIZATION.

§ 310. Rights of creditors of extinct corporation protected.<sup>6</sup>

§ 312. Extinguishing by dividing—legislative apportionment of property and debts.<sup>7</sup>

§ 314. Absorption by annexation or consolidation.<sup>8</sup>

The repeal of the charter of a municipal corporation and a transfer of its territory, etc., with all of its liabilities works a dissolution.<sup>9</sup>

On the merging of one municipality into another by an act providing that the latter shall be liable for the debts

citizens and taxpayers. *Collins v. Arcadia* (Mo. App.), 201 S. W. 359.

<sup>6</sup> Statutes provide for adjustment, hearing and trial, etc., of claims against dissolved municipal corporations. *Nielson v. Utah Nat. Bank* (Utah), 120 Pac. 211.

<sup>7</sup> New school district erected out of part of the territory of another need not assume a teacher's contract; the old is liable, and hence, there is no impairment of the obligation of contract. *Flemington Borough Board of Education v. State Board of Education*, 81 N. J. L. 211, 81 Atl. 163.

<sup>8</sup> Act to enable adjoining municipalities, other than cities, lying in the same county, to consolidate and form a city. *State v. Wildwood*, 83 N. J. L. 188, 84 Atl. 274.

Adjustment by statute. *State v. McMahon*, 88 Conn. 461, 91 Atl. 445.

<sup>9</sup> Legislative act provided for repeal of municipal charter, but before it should become operative it should be submitted to electors of municipality, carried. The charter was repealed and all its terri-

tory, and corporate property transferred, with all its liabilities to another municipality. Thereafter there could be no theoretical continuance of the existence of the old municipality as to existing creditors to enable them to collect their debts. The old corporation went out of existence as to creditors and all other persons. *Walker v. East Rome*, 145 Ga. 294, 297, 89 S. E. 204, 206 (citing § 314, vol. 1, ante); *Marks v. Rome*, 145 Ga. 399, 89 S. E. 324; *White v. Atlanta*, 134 Ga. 532, 68 S. E. 103; *Stroud v. Stevens Point*, 37 Wis. 367.

By the consolidation of school districts all existing school districts whose territory is embraced within the new boundaries are abolished and the directors of the old cannot exercise any school functions. *State ex rel. v. Smith*, 271 Mo. 168, 177, 196 S. W. 17.

De facto corporation as to a municipality sought to be annexed where a question as to legality is raised. *Coe v. Los Angeles* (Cal. App. 1919), 183 Pac. 822.

of the former, the latter is liable in an action for damages which accrued against the former prior to the merger.<sup>10</sup>

If the absorbed municipality had previously authorized street paving by special taxation, the consolidated city may issue tax bills therefor.<sup>11</sup>

When two cities merge by statute authority, the consolidated city, in the absence of statutory regulation, may levy a tax on property of the merged city to pay such city's former debts, without applying the property of the merged city to this end, since the consolidated city on the consummation of the merger became vested with an absolute title to all the property of the merged city, subject to no trust or condition whatever, and the courts are without power to impress a trust upon it, to direct that it be applied to any particular purpose.<sup>12</sup>

### § 315. Dissolution and reincorporation—new as successor of old, when.

If a new form and charter of a municipal government is adopted legally,<sup>13</sup> as by the electors,<sup>14</sup> the new organization becomes the successor of the old,<sup>15</sup> e. g., the adop-

<sup>10</sup> *Birmingham v. Darden*, 1 Ala. App. 479, 55 So. 1014; *Dallas v. Beeman*, 23 Tex. Civ. App. 315, 55 S. W. 762.

<sup>11</sup> *Barber Asphalt Paving Co. v. Hayward*, 248 Mo. 280, 154 S. W. 140.

<sup>12</sup> *Forsyth v. Seattle*, 73 Wash. 515, 132 Pac. 224.

**On the separation of a city from a county and the creation thereof of an independent municipality,** the interest of the county in public roads and highways, within the limits of the municipality, vests in the latter. *Laclede-Christy Clay Products Co. v. St. Louis*, 246 Mo. 446, 460, 151 S. W. 460; *Wright v. Doniphan*, 169 Mo. 606; 70 S. W. 146.

<sup>13</sup> **Consolidation of governments**

of city and county of Denver; special provisions. *Lindsley v. Denver* (Colo. 1918), 172 Pac. 707.

<sup>14</sup> *Cunningham v. Cambridge*, 222 Mass. 574, 111 N. E. 409.

<sup>15</sup> **Successor of illegally organized municipal corporation,** held not liable on bonds issued by the unlawful predecessor under the circumstances of the case, that the bonds had been judicially declared invalid, and there was no distinct and unmistakable purpose by the statute to validate such bonds. *Beyer v. Athens* (U. S. C. C.), 249 Fed. 849, relying on *Hays v. Holly Springs*, 114 U. S. 120, 126, 5 Sup. Ct. 785, 788, 29 L. ed. 81.

**A new levee district,** covering the same territory and inhabitants, and exercising the same powers as



tion of a commission form.<sup>16</sup> This is the general rule.

On the dissolution of a village by the legislature substituting a city organization therefor, the employment of an attorney of the village, it was held, ceased; the legislative act repealing the village charter, and creating the city terminated the employment, precluding the attorney from holding the city successor liable.<sup>17</sup>

### § 316. Same—suspension of governmental functions—revival.<sup>18</sup>

an old which ceased its functions, which took over without compensation, all the property of the old, will be treated as a continuation of the old, although the old was never formally dissolved. "The principle is eminently just and should be extended to every case where the new corporation comes into existence and includes the same territory and the same inhabitants for the same purpose as the old one and appropriates the property of the prior corporation to the uses of the inhabitants for which the corporation was erected to serve." *Winkleman v. Des Moines & Mississippi Levee Dist.*, 171 Mo. App. 49, 56, 153 S. W. 539.

Where it is sought to organize a drainage district and the tribunal having jurisdiction granted an order of incorporation from which an appeal was taken and the appellate court reversed the order and remanded the cause, reserving to the petitioners the right to proceed on the original petition and have the same territory and the same inhabitants incorporated, and the subsequent proceedings resulted in an order of legal incorporation, it was held that the latter corporation was the successor

of the former de facto corporation. *Wilson v. King's Lake Drainage & Levee Dist.*, 176 Mo. App. 470, 158 S. W. 931.

<sup>16</sup> *Jones v. Cassidy*, 154 Ky. 748, 159 S. W. 562.

**Adoption of commission form** generally does not alter general laws or charter provisions relating to city government except where inconsistent. *Salter v. Burk*, 83 N. J. L. 152, 156, 83 Atl. 973.

On adoption of commission form, statutes often provides that on the organizing of the commissioners all bodies and offices theretofore governing in such city shall be ipso facto abolished. *Istvan v. Naar*, 84 N. J. L. 113, 85 Atl. 1012; *Loudenslager v. Heston*, 86 N. J. L. 382, 92 Atl. 54.

Charter office of recorder, held not abolished in Atlantic City. *Keffer v. Gaskill*, 88 N. J. L. 77, 95 Atl. 629.

<sup>17</sup> *Fisher v. Mechanicville*, 158 N. Y. S. 908, reversing 157 N. Y. S. 518, 94 Misc. Rep. 134.

<sup>18</sup> "The Pueblos of San Francisco and Los Angeles, which existed as municipal organizations prior to the cession of California by Mexico, continued to exist with their community property rights intact." *Vilas v. Manila*, 220 U.

### § 317. Dissolution without substitution.<sup>19</sup>

#### § 317a. Military occupation and transfer of sovereignty.

The legal entity of Manila, in the Philippine Islands, it has been held by the Supreme Court of the United States, survived both its military occupation by, and its cession to, the United States. "The juristic identity of the corporation," declared the court, "has been in no wise affected, and in law the present city is in every legal sense the successor of the old, and as such is entitled to the property and property rights of the predecessor corporation, and is in law subject to all its liabilities."<sup>20</sup>

S. 245, 360, 31 Sup. Ct. 416, 55 L. ed. 491, citing *Cohas v. Raisin*, 3 Cal. 443; *Hart v. Burnett*, 15 Cal. 530; *Townsend v. Greeley*, 5 Wall. (U. S.) 326; *Merryman v. Bourne* 9 Wall. (U. S.) 592, 602; *More v. Steinbach*, 127 U. S. 70; *Los Angeles Milling Co. v. Los Angeles*, 217 U. S. 217.

19 When a village is dissolved the township in which it is located does not become its successor, in the absence of a statute so providing. *Highland Grove Tp. v. Winnipeg Junction*, 125 Minn. 280, 146 N. W. 974.

20 "In view of the dual character of municipal corporations there is no public reason for presuming their total dissolution as a mere consequence of military occupation or territorial cession. The suspension of such governmental functions as are obviously incompatible with the new political relations thus brought about may be presumed. But no implication may be reasonably indulged beyond that result. Such conclusion is in harmony with the settled principles of public law as declared by this and other courts and ex-

pounded by text books upon the laws of war and international law." (Taylor International Public Law Section 578).

"That there is a total abrogation of the former political relations of the inhabitants of the ceded region is obvious. That all laws theretofore in force which are in conflict with the political character, constitution or institutions of the substituted sovereign lose their force, is also plain. (*Alvarez v. United States*, 216 U. S. 167.) But it is equally settled in the same public law that that great body of municipal law which regulates private and domestic rights continues in force until abrogated or changed by the new ruler." (*Chicago, Rock Island & Pac. Ry Co. v. McGinn*, 114 U. S. 542, 546; *Downes v. Bidwell*, 182 U. S. 244, 298.) The court conceded that the United States could have extinguished every municipality in the Philippine Islands, including Manila, but stated that "in view of the practice of nations to the contrary" this "is not to be presumed, and can only be established by cogent

evidence." "That during military occupation the affairs of the city were in a large part administered by officials put in place by military order did not operate to dissolve the corporation or relieve it from liability upon obligations incurred before the occupation nor those created for municipal purposes by the administrators of its affairs while its old officials were displaced. (New Orleans v. Steamship Co., 20 Wall. (U. S.) 387, 394.) During the occupation and military administration the

business of the city was carried on as usual. Taxes were assessed and collected and expended for local purposes, and many of the officials carrying on the government were those found in office when the city was occupied. The continuity of the corporate city was not inconsistent with military occupation or the constitution or institutions of the occupying power." *Vilas v. Manila*, 222 U. S. 345, 356, 357, 358, 31 Sup. Ct. 416, 55 L. ed. 491.

## CHAPTER 9.

### THE MUNICIPAL CHARTER.

#### I. GENERAL CONSIDERATION.

#### III. COMMISSION AND CITY MANAGER PLAN.

#### IV. PROOF, CONSTRUCTION AND AMENDMENT OF CHARTER.

##### I. GENERAL CONSIDERATION.

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| § 320. Municipal charter defined and described.  | § 323. Constitutional and legislative municipal charters. |
| § 321. Same subject—contains the municipal powers and prescribes the form of organization. | § 324. Special municipal powers in California.            |

##### III. COMMISSION AND CITY MANAGER PLAN.

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| § 340. Commission plan. | § 340a. Same — city manager or Dayton plan. |
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##### IV. PROOF, CONSTRUCTION AND AMENDMENT OF CHARTER.

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| § 342. Proof of charter—judicial notice.                    | § 348. Indirect or legislative amendment of constitutional charters. |
| § 343. Construction of charter.                             |  |
| § 345. Legislature may amend and repeal municipal charters. | § 349. Amendments forbidden by special or local laws.                |
| § 346. Direct amendment of constitutional charter.          |  |

##### I. GENERAL CONSIDERATION.

#### § 320. Municipal charter defined and described.<sup>1</sup>

<sup>1</sup>Fitzgerald v. Cleveland, 88 Ohio St. 338, 343, 103 N. E. 512, quoting with approval part of § 320, vol. 1, ante.

“The city is a miniature state, the council is its legislature, the

charter is its constitution.” Paulsen v. Portland, 149 U. S. 30, 38, 13 Sup. Ct. 750, 37 L. ed. 637.

Charters “are legislative enactments conferring the governmental powers of the state upon its local

**§ 321. Same subject—contains the municipal powers and prescribes the form of organization.<sup>2</sup>**

agencies." State ex rel. v. Thompson, 193 Ala. 561, 69 So. 461, 465.

"Its charter is the definition of its rights and obligations as a municipal entity, so far as they are not otherwise legally granted or imposed." Gallup v. Saginaw, 170 Mich. 195, 135 N. W. 1060, 1062, quoting from Jackson Common Council v. Harrington, 160 Mich. 550, 125 N. W. 383.

Provision of, granted by legislature, have the force and effect of state laws. Cawthon v. Houston (Tex. Civ. App. 1919), 212 S. W. 796, 800.

The District of Columbia has no formal municipal charter. It exercises such powers as may be conferred from time to time through commissioners appointed. These commissioners are ministerial officers. District of Columbia v. Tyrrell, 41 App. D. C. 463, 472.

<sup>2</sup> The charter of the city is "its fundamental law." Memphis Ry. Co. v. Rapid Transit Co., 138 Tenn. 594, 198 S. W. 890, 891.

When adopted, the charter becomes the "organic law of such city." Schultz v. Phoenix, 18 Ariz. 35, 156 Pac. 75.

"Organic law," as used in statutes relating to municipal corporations means legislative acts governing and regulating cities, towns and villages of the several kinds or classes. Mullins v. Kansas City, 268 Mo. 444, 188 S. W. 193.

Legislative and executive functions may be vested in municipal

officers. Bryan v. Voss, 143 Ky. 422, 136 S. W. 884.

Usually a municipal charter deals with purely local or municipal affairs only, and generally supersedes all state laws in conflict relating to municipal matter, but, of course, does not supersede general state laws. State ex rel. v. Linn, 49 Okl. 526, 153 Pac. 826.

The city may legislate on matters of purely local and municipal concern, but cannot legislate with respect to state government. Ruth v. Merrill, 43 Okl. 764, 144 Pac. 371.

Under the Idaho Constitution, the legislature cannot give municipal corporations power to prohibit and punish indictable offenses. State v. Frederic, 28 Idaho 709, 155 Pac. 977.

Charters often provide for a system of education. Bonner v. Belsterling (Tex. Civ. App.), 137 S. W. 1154.

Charter may provide for compensation of school director. Stern v. Berkeley, 25 Cal. App. 685, 145 Pac. 167.

Charter may contain initiative provisions. Southwestern Tel. & Tel. Co. v. Dallas, 104 Tex. 114, 134 S. W. 321.

Such provision does not contravene that clause of the constitution which declares that the charter of such a city "shall be in harmony with and subject to the constitution and laws of the state, and shall provide, among other things, for a chief executive and at least one house of legislation to be elected by general ticket."

**§ 323. Constitutional and legislative municipal charters.**

A constitutional charter and amendments thereof must be framed subject to the constitution and general laws of the state.<sup>3</sup>

A municipal charter enacted by the voters of the municipality is as much a law as if it were enacted by the legislature.<sup>4</sup> In California the rule is that a charter framed and adopted pursuant to the constitutional provisions is not a law passed by a municipality. It is a law of the state having the same force and effect as a law directly enacted by the legislature.<sup>5</sup>

The charter must be in harmony with the constitution and state laws. This means not only the statute law but the common law found in the court decisions. Thus the charter may not "abrogate the common law rule of estoppel, or other settled equitable doctrines in the conduct of

*Pitman v. Drabelle*, 267 Mo. 78, 84 et seq., 183 S. W. 1055.

Initiative and referendum, held not an exercise of delegated legislative power. *State ex rel. v. Summers*, 33 S. D. 40, 144 N. W. 730.

Referendum provision, unlimited, held unconstitutional. *Meade v. Dane County*, 155 Wis. 632, 145 N. W. 239.

Recall provisions in municipal charters, held constitutional. *Re Pfahler*, 150 Cal. 71, 88 Pac. 271, 11 L. R. A. (N. S.) 1092; *Eckerson v. Des Moines*, 137 Iowa 452, 115 N. W. 177; *Kadderly v. Portland*, 44 Or. 118, 74 Pac. 710, 75 Pac. 222.

Municipal charter may provide for recall. It does not impair the obligation of contracts, as incumbent does not hold by contract, etc. Nor is it in contravention of a republican form of government guaranteed in the constitu-

tion, as that provision relates to the state and not to municipalities. Nor does it deprive one of his property without due course of law. *Bonner v. Belsterling* (Tex. Civ. App.), 137 S. W. 1154, 138 S. W. 571.

<sup>3</sup> *Maher v. Jackson*, 191 Mich. 266, 157 N. W. 561; *Peterson v. C. & A. Ry. Co.*, 265 Mo. 462, 178 S. W. 182.

If a charter as a whole is germane to the purpose of its creation, in harmony with the constitution and general laws of the state, it is valid. *Stern v. Berkeley*, 25 Cal. App. 685, 145 Pac. 167.

<sup>4</sup> *State v. Portland*, 65 Or. 273, 284, 133 Pac. 62, 66; *Schultz v. Phoenix*, 18 Ariz. 35, 156 Pac. 75, 77.

<sup>5</sup> *Stern v. Berkeley*, 25 Cal. App. 685, 145 Pac. 167; *Ex parte Sparks*, 120 Cal. 395, 399, 52 Pac. 715, 716, 717.

the quasi-municipal enterprise into which it may embark."<sup>6</sup>

The adoption of a home rule charter, it has been held in Minnesota, is legislation. The authority it furnishes to city officers is legislative authority. The people of the city in adopting a charter have not power to legislate upon all subjects, but as to matters of municipal concern they have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld.<sup>7</sup> The Minnesota constitution permitting cities to make their own charters, it is said, "fairly implies that the charter adopted by the citizens of the city may embrace all appropriate subjects of municipal legislation and constitute an effective municipal code of equal force as a charter granted by direct act of the legislature."<sup>8</sup> Under the Constitution and statute of that state, permitting a city "to frame a charter for its own government as a city consistent with and subject to the laws of the state," and forbidding a change of boundaries, a charter section providing by ordinance for the regulation or prohibition of the storage, receipt, transportation, dealing in and use of gunpowder, naphtha, gasoline and other combustibles, within the municipal area or within one mile from the limits thereof, was held invalid.<sup>9</sup>

The Ohio Constitution, as amended in 1912, grants to

<sup>6</sup> *Laird Norton Yards v. Rochester*, 117 Minn. 114, 134 N. W. 644, 647.

<sup>7</sup> *Park v. Duluth*, 134 Minn. 296, 159 N. W. 627.

<sup>8</sup> *Grant v. Berrisford*, 94 Minn. 45, 101 N. W. 940, 1133; *State v. District Court*, 90 Minn. 457, 97 N. W. 132; *State v. District Court*, 87 Minn. 146, 91 N. W. 300; *State v. O'Connor*, 81 Minn. 79, 83 N. W. 498.

<sup>9</sup> "The right given to the people within prescribed territorial limits to adopt a complete municipal code does not warrant the assump-

tion by them of power over territory and people beyond these limits, even though the control of such territory and people would be convenient and gratifying to the people within the city. The practical difficulties involved in the assumption by cities of such power are apparent. Innumerable conflicts in authority would inevitably follow. Such a result is not reasonable within the purview of the constitutional amendment." *Duluth v. Orr*, 115 Minn. 267, 132 N. W. 265, 266.

municipalities authority to frame and adopt or amend their charters for their government, and may, subject to the constitution, exercise thereunder "all the powers of local self-government," and adopt and enforce within their limits such local police, sanitary, and other similar regulations as are not in conflict with the general law. Accordingly, a municipality of that state may prescribe the form of its government and define the powers and duties of the several departments, within the limitations of various provisions of the constitution relating to the subjects,<sup>10</sup> including a provision that the appointments and promotions in the civil service of the several cities shall be made according to merit and fitness, to be ascertained as far as practicable by competitive examination.<sup>11</sup>

A home rule charter, it has been held, does not extend the authority of the city over subjects not properly municipal and germane to the purposes for which municipal corporations are formed.<sup>12</sup>

In Oregon, it has been said that "certain attributes of the sovereignty of the state may be delegated to such corporations." This necessarily must be true, as a municipal corporation is established to share in the civil government of the state, as well as to regulate and administer local affairs, e. g., power to build a railroad, since

<sup>10</sup> *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 103 N. E. 512.

<sup>11</sup> *State ex rel. Lentz v. Edwards*, 90 Ohio St. 305, 107 N. E. 768.

<sup>12</sup> *Woodburn v. Pub. Ser. Com.*, 82 Oregon 114, 161 Pac. 391.

Charter can contain only provisions essential to city government. *State ex rel. v. Gates*, 190 Mo. 540, 548, 89 S. W. 881.

Can legislate only on purely municipal matters. *Morrow v. Kansas City*, 186 Mo. 675, 85 S. W. 572.

Charter may authorize legislative body of city to compel at-

tendance of witnesses and production of books, etc. *Re Dunn*, 9 Mo. App. 255.

In California, freeholder's charter may limit exercise of police powers conferred upon the city by the constitution. *John Rapp & Son v. Kiel* (Cal. 1911), 115 Pac. 651, 654; *Re Pfahler*, 150 Cal. 71, 81, 88 Pac. 270, 11 L. R. A. (N. S.) 1092.

A freeholder's charter cannot adopt a provision contrary to a general state law, e. g., relating to school system. *Vallejo High School Dist. v. White* (Cal. App. 1919), 185 Pac. 302.



this is a public purpose, that is, for the general welfare, convenience, health or comfort of its citizens.<sup>13</sup>

Aside from constitutional restrictions, "it is within the legislative (state) province to direct in what way, through what board of municipal officers or agents, or by what municipal officers the powers given shall be exercised." It may also delegate to cities the power to regulate assessments, public safety, health, charity and plumbers' licenses, although in a certain sense state powers.<sup>14</sup>

### § 324. Special municipal powers in California.

By constitution in California the municipal area may be divided into boroughs or districts, and each such division may exercise such general or special municipal powers, and be administered in such manner, as may be provided for each such unit in the municipal charter.<sup>15</sup>

## III. COMMISSION AND CITY MANAGER PLAN.

### § 340. Commission plan.

During recent years the commission plan of municipal government has been quite generally adopted and legislative acts and charters providing therefor are uniformly sustained as valid and constitutional.<sup>16</sup> Municipali-

<sup>13</sup> Churchill v. Grants Pass, 70 Or. 283, 141 Pac. 164.

<sup>14</sup> Cleveland v. Watertown, 222 N. Y. 159, 118 N. E. 500.

<sup>15</sup> "A borough is one of the units composing a territorial fraction of a city and vested with certain powers having reference to local concerns." California recognized the principle of municipal government through a system of boroughs, not to part, but to the whole municipal territory. Hence, when the system is adopted it must extend not to part, but to all. Crose v. Los Angeles, 175 Cal. 774, 167 Pac. 386.

<sup>16</sup> Cleveland v. Watertown, 222 N. Y. 159, 118 N. E. 500; Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244.

As to constitutionality and validity of, see notes L. R. A. 1917A, 1260.

Adopting commission form. State v. Lane, 181 Ala. 646, 62 So. 31.

Scope of commission plan. State ex rel. v. Thompson, 193 Ala. 561, 69 So. 461.

Commission plan consisting in the main of a council composed of a mayor and two members, each of whom is also called a "commissioner," and to each of whom

ties which have adopted such form are not in any sense sovereignties, and hence, do not fall within the provisions of the constitutions which apportion the powers of sovereign states.<sup>17</sup>

is assigned a certain department of government. *Powell v. Hart*, 132 La. 287, 61 So. 233.

Charter vesting all executive, legislative and judicial powers in a council consisting of the mayor and four councilmen, held constitutional. *Eckerson v. Des Moines*, 137 Iowa 452, 115 N. W. 177; *Bryan v. Voss*, 143 Ky. 422, 136 S. W. 884.

Commission plan with five commissioners with all power, legislative and executive, wherein one commissioner is mayor. All commissioners are subject to direction of the people at all times by the initiative, referendum and recall provisions. Each commissioner has a vote, mayor has not veto power. Executive and administrative powers, not otherwise provided for, shall be distributed among five departments: public affairs, finance, public safety, public works, public utilities—may be made and changed by ordinance. Powers of officers and employees to be prescribed by the council. The charter merged executive and legislative powers, as the law contained no restriction in this respect. It was held that the charter did not go beyond the "realm of local affairs, or municipal business." Distribution of powers, as constitution requires, held only applies to state, not municipal corporations. *Greenville v. Pridmore*, 86 S. C. 442, 68 S. E. 636; *Spartanburg v. Parris*, 85 S. C. 227, 67 S. E. 246; *Graham v. Roberts*, 200 Mass. 152,

85 N. E. 1009; *Baltimore & Ohio R. Co. v. Whiting*, 161 Ind. 223, 68 N. E. 266; *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775, 780.

**Bipartisan Commission** consisting of four members styled "Board of Affairs of the City of Hinton," and a commission council consisting of two members to be elected from each ward. *State ex rel. v. Hinton*, 76 W. Va. 610, 87 S. E. 358.

17 "The cases cited above from other jurisdictions and the terms of the act under review and those of a similar act passed in 1913 and applicable to cities of the second class (laws 1913, p. 453, § 49) demonstrate that the State of Missouri is only following the trend of those measures of reform previously enacted in the leading states of the middle west and in other portions of the country for the eradication of inefficiency in the working of their governmental agencies. The object of this and similar legislation is to give the cities of the state an opportunity to adopt what is termed the commission form of government, the chief excellence of which is the concentration of municipal power into the hands of a few men or responsible agents who are usually put at the head of the several departments necessary to the conduct of the business of cities. The general plan was early put into operation at Galveston, Texas (after the storm of 1900), and has spread over the country with remarkable

A constitutional requirement that a home rule charter shall provide for a "mayor, or other chief magistrate, and a legislative body," has been held, not to preclude the adoption of the commission form, and a charter so providing may vest executive as well as legislative power in the legislative body, and constitute the mayor a member thereof.<sup>18</sup>

**§ 340a. Same—city manager or Dayton plan.**

The following is a summary of the Kansas Act: Governing board consists of a number of commissioners, and "no distinction shall be made in titles or duties among the commissioners except as the board shall organize itself for business." A chairman is chosen by the board and takes the title of "mayor" during the year and becomes the head of the city "on formal occasions." Each commissioner draws a nominal salary, in no case to exceed \$100 a year. The commission is empowered to pass all ordinances and to provide for such offices as are necessary to carry out the provisions of the act and to fix the salaries thereof. The commission is required to appoint a city manager in whose hands the administration of the business is placed. He holds office "at the pleasure of the board," is chosen "solely on the basis of administrative ability," without reference to residence qualifications, and is held responsible to the board for the administration of city affairs. Departments of law, service,

rapidity. Up to the present time the agents have not exceeded five and are termed commissioners. They are selected by means of a short ballot and are usually subject to a recall. The union in their hands of quasi-judicial as well as administrative authority does not violate the constitutions of the various states, since it has been uniformly held that the municipalities so governed are not in any sense sovereignties and hence do not fall within the provisions of

the constitutions which apportion the powers of the sovereign states. The salutary measures enacted by the legislature of this state on this subject reflect credit on that body and must result in the protection of urban life and the promotion of civic betterment." *Barnes v. Kirksville*, 266 Mo. 270, 282, 283, 180 S. W. 545.

<sup>18</sup> *State ex rel. v. Mankato*, 117 Minn. 458, 136 N. W. 264, 41 L. R. A. (N. S.) 111.

public welfare, safety and finance are created. All appointments "except department heads" are made by the manager, and "department heads" are to report to him. The "budget system" of accounts and expenditures is also included.<sup>19</sup>

#### IV. PROOF, CONSTRUCTION AND AMENDMENT OF CHARTER.

### § 342. Proof of charter—judicial notice.

Courts take judicial notice of general incorporation acts for municipalities and of the powers of cities and towns organized thereunder,<sup>20</sup> of municipal charters which by their terms are made public acts,<sup>21</sup> and of such charters when so provided by law,<sup>22</sup> but without such provision, judicial notice will not be taken of charters enacted by the electors of municipalities. Accordingly in the absence of express provision, court will not take judicial notice, it has been held in Oregon, of municipal charters initiated by the people of a community, but will of those passed by the legislature.<sup>23</sup>

<sup>19</sup> State ex rel. v. Bentley, 100 Kan. 399, 164 Pac. 290.

City manager plan. McClendon v. Hot Springs Board of Health (Ark. 1919), 216 S. W. 489.

<sup>20</sup> Depue v. Banschbach, 273 Ill. 574, 113 N. E. 156; Miles v. Montgomery (Ala. App. 1919), 81 So. 351.

<sup>21</sup> Mosher v. Elmira, 145 N. Y. S. 964, 83 Misc. Rep. 328; Cawthon v. Houston (Tex. Civ. App. 1919), 212 S. W. 796, 800.

<sup>22</sup> By statute, courts are required to take notice of a city charter, upon the filing of a certified copy with the supreme court librarian. Crowe v. Albee, 87 Or. 148, 169 Pac. 785.

<sup>23</sup> General law that courts assume knowledge of "public and private official acts of the legis-

lative, executive and judicial departments of this state, and of the United States," held did not require such notice. Court expressed the opinion that "under present regime it would be impracticable for any court to take judicial notice of all the initiative measures adopted by every municipality from the metropolis to the smallest crossroads village in the state." Chan Sing v. Astoria, 79 Or. 411, 155 Pac. 378.

"A municipal charter enacted by the legal voters of a city may be termed the result of a special local election, and, unless pleaded, courts of record cannot take judicial notice thereof in the absence of statutory authority so to do." Birnie v. La Grande, 78 Or. 531, 153 Pac. 415; Mayhew v. Eugene,

**§ 343. Construction of charter.<sup>24</sup>**

The powers given by a charter is a matter of reasonable construction.<sup>25</sup> The statute by virtue of which a municipal corporation is organized and created is its organic act and the corporation can do no act or make any contract not authorized thereby. All acts beyond the scope of the powers granted are void.<sup>26</sup>

As a municipal corporation possesses no powers not derived from its charter, general terms, as "full powers of self-government," and "all powers of municipal government not prohibited by this charter," add nothing to the terms of the charter. The charter must still be the measure of the authority to sustain an act done by the corporation.<sup>27</sup> Where the mode of contracting, for ex-

56 Or. 100, 104 Pac. 727, Ann. Cas. 1912C, 33.

<sup>24</sup>Portland v. Portland Ry. Light & Power Co., 80 Or. 271, 156 Pac. 1058, citing § 343, p. 762, vol. 1, ante.

Strict construction as to powers adopted. Ex parte Rowe 4 Ala. App. 254, 59 So. 69; Caldwell v. Bauer, 179 Ind. 146, 99 N. E. 117; Douglas v. Greenville, 92 S. C. 374, 75 S. E. 687.

When words and phrases, such as "lowest and best bidder," "lowest responsible bidder," etc., have been given by the courts a particular meaning; and in construction such meaning will be presumed to have been in view in the framing of municipal charters and the enactment of ordinances. West v. Oakland, 30 Cal. App. 556, 560, 159 Pac. 202.

"To construe a constitution for the purpose of ascertaining whether under it a power can be granted is not the same thing as

construing a charter when it is conceded a power can be constitutionally conferred, and the only inquiry is whether it has in fact been granted." Rose v. Portland, 82 Or. 541, 162 Pac. 498, 501.

"The enumeration of particular powers by this charter shall not be held or deemed to be exclusive but in addition to the powers enumerated herein, implied thereby or appropriated to the exercise thereof; the city shall have and may exercise all other power which, under the constitution and laws of Ohio it would be competent for this charter specifically to enumerate." State ex rel. v. Davis, 96 Ohio 301, 117 N. E. 358.

<sup>25</sup>Brenham v. Holle & Seelhorst (Tex. Civ. App.), 153 S. W. 345, 347.

<sup>26</sup>Tharp v. Blake (Tex. Civ. App.), 171 S. W. 549.

<sup>27</sup>Southwestern Tel. & Tel. Co. v. Dallas, 104 Tex. 114, 134 S. W. 321.

ample, is prescribed and limited by the charter, this mode is exclusive.<sup>28</sup>

A municipal charter is a grant and not a limitation of power, and therefore, power to pass an ordinance must be found in the charter in express language or arise by necessary implication. If the charter "does not explicitly or inferentially contain such grant," the ordinance is not authorized.<sup>29</sup>

"The scheme or framework of government is to be ascertained from all the provisions of the charter."<sup>30</sup> All laws bearing on subject must be read together, in construing a charter provision.<sup>31</sup> Thus where charter powers spring from the constitution all provisions of the constitution bearing on the subject should be construed together.<sup>32</sup>

In the construction of charters, statutory rules of construction are applied.<sup>33</sup>

Charters will usually be construed as intended to confer powers relating to matters of purely local government only as distinguished from those of state concern,

<sup>28</sup> *Fisk v. Worcester*, 219 Mass. 428, 106 N. E. 1025.

<sup>29</sup> *Baggage & Omnibus Transfer Co. v. Portland*, 84 Or. 343, 164 Pac. 570, holding an ordinance forbidding carriers from granting exclusive privileges to transfer companies void because of want of charter power.

<sup>30</sup> *Fisk v. Worcester*, 219 Mass. 428, 106 N. E. 1025.

The "charter in its entirety," should be considered, e. g., general language and specific provisions. *Lansing v. Jenison* (Mich. 1918), 167 N. W. 947.

All of a charter is to be considered in arriving at the meaning of any part of it, whenever it appears that the context aids or controls such meaning. *Hayne v.*

*San Francisco*, 174 Cal. 185, 162 Pac. 625.

Powers expressly reserved to the city, e. g., "all powers that now are or hereafter may be granted to municipalities by the constitution or laws of Ohio." "The enumeration of particular powers by this charter shall not be held or deemed to be exclusive." All provisions of charter, to be construed with these in view. *State ex rel v. Otis*, 98 Ohio 83, 120 N. E. 313.

<sup>31</sup> *Redmond v. Sulphur*, 32 Okl. 201, 120 Pac. 262.

<sup>32</sup> *State ex rel v. Astoria Port*, 79 Or. 1, 154 Pac. 399.

<sup>33</sup> *Duncan v. Dryer*, 71 Or. 548, 143 Pac. 644.

e. g., the construction, operation, charges and facilities of a public utility.<sup>34</sup>

In order to arrive at the intent of the framers of the charter, "it is proper to consider the objects they sought to accomplish, and the practical situation they are attempting to provide for." The fact that a certain construction of the city charter has been usually recognized by the municipal authorities, the bar and the people at large, while it does not establish its validity, "still such fact is not without some persuasive force in favor of such construction."<sup>35</sup>

The charter of a municipal corporation or a state statute will not be held to violate the constitution if any other rational interpretation or construction can be given to it.<sup>36</sup>

<sup>34</sup>State ex rel. U. Ry. Cos. v. Public Service Com., 270 Mo. 429, 192 S. W. 958.

Where charter makes state law relating to holding elections applicable to city elections, it does not make applicable also provisions as to contesting elections. *Livesley v. Landon*, 69 Or. 275, 138 Pac. 853.

<sup>35</sup>*Morey Engineering & Const. Co. v. St. Louis Artificial Ice Rink Co.*, 242 Mo. 241, 146 S. W. 1142.

<sup>36</sup>State ex rel. v. Kirby, 260 Mo. 120, 127, 168 S. W. 746.

"This maxim is particularly applicable to the framework of our state government, for the constitution of Missouri is only limitative of the plenary power to legislate reserved to the people of the state who may exercise it through the law-making body, or its auxiliaries in government, or by the initiative except to the extent they have restrained themselves by the prohibitions of the constitution.

\* \* \* The same principle gov-

erns the action of a municipal corporation which in its public capacity as an agent of the state government may amend its charter in any manner or enact ordinances for any purpose not in conflict with the constitution and the laws, state and federal." *Pitman v. Drabelle*, 267 Mo. 78, 84, 85, 183 S. W. 1055.

Courts "approach the constitutionality of a law with a strong, even a violent presumption it is valid. Its invalidity must be made to appear beyond a reasonable doubt and every allowable art, part and act of judicial power should be exercised in so interpreting the law, if possible in reason, that none of it perish by construction." *State ex rel. v. St. Louis*, 241 Mo. 231, 247, 145 S. W. 801, per Lamm, J.

"Courts do not go out of their way to declare a statute unconstitutional. When called upon to pronounce invalid an act of legislation which has been passed with

### § 345. Legislature may amend and repeal municipal charters.<sup>37</sup>

Unless restricted by the constitution the legislature has plenary power to amend and repeal municipal charters.<sup>38</sup>

all the forms and solemnities requisite to give it force of law, the question becomes one of high delicacy and discriminating use of judicial power." *State ex rel. v. McIntosh*, 205 Mo. 589, 602.

"Before any provision of a statute may be declared unconstitutional the courts should allow full play to all wise rules and maxims on construction and interpretation—inter alia, that its unconstitutionality should be so palpable and obvious as to leave no room for reasonable doubts in the court's mind. Another unbending rule is that a state legislature (in contrast to the Federal Congress) has all legislative power not prohibited to it by the state or Federal constitution." *State ex rel. v. Warner*, 197 Mo. 650, 656.

The court "must keep in view the familiar principle that, if there be a reasonable doubt existing as to the constitutionality of the act, such doubt must be resolved in favor of its validity. This principle is so well recognized that the mere statement of it is sufficient." *Ex parte Loving*, 178 Mo. 194, 203.

"When the validity of a statute is drawn in question the court approaches the subject as one involving the greatest responsibility, and to be considered with the greatest caution. The general assembly is presumed to have been

as careful to observe the requirements of the constitution in enacting the statute as the court in applying it. Every presumption is to be indulged in favor of the validity of the act, and that presumption is to continue until its invalidity is made to appear beyond a doubt." *State ex rel. v. Aloe*, 152 Mo. 466, 477, 54 S. W. 494.

"It is our duty to uphold the act unless it plainly and clearly violates the fundamental law of the state, and if its language is susceptible of a meaning that will remove the objection to its validity such interpretation should be adopted." *State ex rel. v. Pike County*, 144 Mo. 277.

<sup>37</sup> See §§ 194, 216, vol. 1, ante.

<sup>38</sup> *State v. Lane*, 181 Ala. 646, 62 So. 31; *Carville v. Childress* (Tex. Civ. App. 1919), 213 S. W. 308; *Dolan v. Puget Sound Traction L. & P. Co.*, 72 Wash. 343, 130 Pac. 355; *State v. Thompson*, 149 Wis. 488, 137 N. W. 20.

Legislature may amend special charter, although voters decided by vote to retain old provisions (as to schools). *People ex rel. v. Crawley*, 274 Ill. 139, 146, 113 N. E. 119, holding that it is solely within the discretion of the legislature to decide whether they shall first obtain the consent of the people of the locality to be affected or act directly themselves.

Amendment under particular



The constitution of Oregon reserves the initiative and referendum to the electors of the city or town as to municipal legislation, and provides that the legislature "shall not enact, amend or repeal any charter or act of incorporation of any municipality, city or town. The legal voters of every city or town are hereby granted power to enact and amend their municipal charters, subject to the constitution and criminal laws of the state."<sup>39</sup>

law. *Attorney-General v. Detroit*, 164 Mich. 369, 128 N. W. 879, 17 Detroit Leg. N. 1136.

When amendment takes effect. *State v. Superior Court of Whitman County*, 92 Wash. 360, 159 Pac. 383.

In *Alabama*, the legislature may alter or amend charters by general law, or repeal charters by general or local law. *State ex rel. v. Thompson*, 193 Ala. 561, 69 So. 461; *Ensley v. Simpson*, 166 Ala. 366, 377, 52 So. 61.

In *Tennessee*, the legislature may amend a charter by increasing salaries of employees of fire department, as this is held a governmental function. Power to abolish municipal charters, includes power to amend. *Smiddy v. Memphis* (Tenn. 1918), 203 S. W. 512.

**Annexation of territory** constitutes an amendment to charter. *Morgan Park v. Chicago*, 255 Ill. 190, 99 N. E. 388; *People v. Ellis*, 253 Ill. 369, 97 N. E. 697; *Cohen v. Houston* (Tex. Civ. App.), 205 S. W. 757.

<sup>39</sup> Held, motor law, general for state, did not supersede ordinance regulation; that law was unconstitutional as an attempt to amend city charter. *Kalich v. Knapp*, 73 Or. 558, 145 Pac. 22, 142 Pac. 594, distinguishing *Straw v. Harris*, 54 Or. 424, 103 Pac. 777.

Legislature cannot amend municipal charters either by general or special law. This includes subjects "that are purely local and municipal in character." *Woodburn v. Public Serv. Com.*, 82 Oregon 114, 161 Pac. 391; *Kalich v. Knapp*, 73 Oregon 558, 142 Pac. 594, 145 Pac. 22.

The authority of cities is not extended "over subjects that are not properly municipal and germane to the purposes for which municipal corporations are formed. We use the word municipal as signifying what belongs to a city." *Branch v. Albee*, 71 Oregon 188, 205, 142 Pac. 598.

Oregon constitution forbidding does not apply to municipal corporations already chartered. *Grants Pass v. Rogue River Pub. Service Corp.*, 87 Or. 637, 171 Pac. 400.

Amendments, art. 4, section 1A and art. 11, section 2 of the Oregon Constitution, "have not shorn the legislature of power to enact general laws concerning cities and towns." *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 502; *Rose v. Portland Port*, 82 Or. 541, 162 Pac. 498.

In Oregon, legislature cannot amend municipal charters either by general or special act, but the qualified electors of a municipality, by the initiative and referendum,

### § 346. Direct amendment of constitutional charters.<sup>40</sup>

Certain classes of municipal corporations only are empowered to enact or amend their charter. As a rule, it is limited to the so-called constitutional or home rule class.<sup>41</sup>

Under general laws enacted pursuant to constitutional mandate, the constitution of Michigan provides that "the electors of each city and village shall have power and authority to frame, adopt and amend its charters, and to amend any existing charter of the city or village heretofore granted."<sup>42</sup>

have this exclusive right, to amend, subject to the constitution and criminal laws of state. General law applying to one city only changing the police pension plan provided for by the charter, is a charter amendment, and void and unconstitutional. *Branch v. Albee*, 71 Or. 188, 142 Pac. 598.

See *Coleman v. La Grande*, 73 Oregon 521, 525, 144 Pac. 468, 470.

<sup>40</sup> *Attorney General v. Detroit Common Council*, 164 Mich. 369, 129 N. W. 879; *Gallup v. Saginaw*, 170 Mich. 195, 135 N. W. 1060.

**Option law.** Cities may adopt certain general laws, conferring specified powers on cities accepting them in the manner prescribed, e. g., by vote of the electors, which, of course, constitute amendments to their charters. *Holt Lumber Co. v. Oconto*, 145 Wis. 500, 130 N. W. 709.

See sections 124A, 212, ante.

Attempted amendment by adopting part of general state law, involving later repeal of state law. *Ransome-Crummey Co. v. Bennett* (Cal. 1918), 171 Pac. 304.

Congruous and incongruous propositions in charter amendment.

*Turner v. Ramsey* (Okl. 1917), 163 Pac. 712.

Enlargement of municipal area is amendment to charter. *Cooke v. Portland*, 69 Or. 572, 139 Pac. 1095.

Cannot by charter amendment compel county in which city is located, to pay over to it road taxes levied on property within its area. *West Linn v. Tufts*, 75 Or. 304, 146 Pac. 986.

<sup>41</sup> *People v. Perkins*, 56 Colo. 17, 137 Pac. 55.

<sup>42</sup> *Grobbe v. Detroit Water Commissioners*, 181 Mich. 364, 370, 149 N. W. 675.

In Michigan by constitution piecemeal amendment of existing municipal charter are authorized, without previous revision, including those "theretofore granted or passed by the legislature for the government" of cities, and the legislative act pursuant to constitutional mandate. *Detroit v. Engel*, 187 Mich. 88, 153 N. W. 537; *Attorney General v. Lindsay*, 178 Mich. 524, 145 N. W. 98.

In Michigan, prior to the constitutional amendment of Nov. 5, 1912, a legislative act authorizing

Under a constitution, authorizing specified cities to adopt or amend their charters, "subject to such limitations as may be prescribed by the legislature," and to be consistent with the constitution and the general laws of the state, it was held that the power of one of such cities to adopt or amend a charter or to enact a by-law or ordinance did not emanate from legislative grant, but was restricted only by legislative limitations.<sup>43</sup>

As the method of amendment prescribed is exclusive it must be observed in substance.<sup>44</sup> In brief, amendments

the amendment by the electors of a city of any existing municipal charter without revising it, whether enacted by the people or the legislature was held unconstitutional. In that state the legislature shall enact a general law for the incorporation of cities and villages, and by constitution "under such general laws the electors of each city and village shall have power and authority to frame, adopt and amend its charter," etc. That is, the province of the legislature aside from imposing certain constitutional restrictions, is to provide for the method in pursuance whereof the electors of each city shall amend their charter. In a prior case it was held that a general revision of an old charter may be treated as equivalent to the framing of a new charter. Necessarily, the revising of an old charter under the new general law would be in conformity with such general law and would follow its mandates and inhibitions to the same extent as in the framing of a new charter. (*Jackson v. Harrington*, 160 Mich. 550, 125 N. W. 383.) "Not so in case of mere amendments to specific sections which might leave the charter

repugnant to the general law adopted under art. 8, § 20 of the Constitution, so that cities claiming to operate under a general law intended to operate uniformly upon the local legislatures of all cities would be subject to such limitations as they should choose to accept and might adopt such provisions as they deemed beneficial. Such a construction, in our opinion, is in contravention of the constitutional provision as interpreted by this court in *Attorney General v. Detroit*, 164 Mich. 369, 388, 129 N. W. 879." *Attorney General v. Detroit*, 268 Mich. 249, 252, 133 N. W. 1090.

<sup>43</sup> *Le Gois v. State*, 80 Tex. Cr. Crim. App. 356, 190 S. W. 724.

<sup>44</sup> *Denver v. New York Trust Co.*, 229 U. S. 123, 144, 145, 33 Sup. Ct. 657, 57 L. ed. 1101.

Municipality may amend its charter only as provided by the charter. *Portland v. Portland Gas & Coke Co.*, 80 Oregon 194, 156 Pac. 1070.

Methods, as to notice of amendment, etc. Proposal by resolution or ordinance, etc. *State v. Andresen*, 75 Or. 509, 147 Pac. 526.

Title. "The people of Dalles City do ordain as follows," held

must be enacted with all the formalities prescribed by law.<sup>45</sup>

The approval of charter amendments by the legislature,<sup>46</sup> or by the governor,<sup>47</sup> is required in some jurisdictions, and after the approval of the latter the amendments shall be recorded upon the records of the legislative body of the municipality, and omission so to record an amendment, it has been held, will not give it the force and effect of law.<sup>48</sup>

“ordain” equivalent to “be it enacted.” *State v. Dalles City*, 72 Or. 337, 143 Pac. 1127.

“An act to amend the charter of the city of La Grande in Union County, State of Oregon,” held sufficient amendment related to assessments for street improvements. The provisions of the constitution and the subject of titles and styles of acts, held to have no application. *Wagoner v. La Grande* (Or. 1918), 173 Pac. 305, 307; *Colby v. Medford*, 85 Or. 485, 167 Pac. 487.

Can make provision for re-assessment retroactive. *Ibid.*

Construction of amendment. *Ibid.*

The constitutional requirement that a “law” shall not be revised or amended by a mere reference to its title and providing the amendment or revision of a law to be set forth and published in full is applicable to a charter adopted by the voters of a municipality, since such charter is as much a law as if enacted by the state legislature. *Schultz v. Phoenix*, 18 Ariz. 35, 156 Pac. 75, 77.

Ballot title. “Shall the proposed amendment of the charter of the city of La Grande, Oregon, including the amendment of said charter providing for reassessment

of street improvements already made, be adopted?” *Wagoner v. La Grande* (Or. 1918), 173 Pac. 305, 307.

<sup>45</sup> *State ex rel. v. Zorth*, 84 Or. 372, 164 Pac. 958; *Duncan v. Dryer*, 71 Or. 548, 143 Pac. 644; *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806.

Upon initiative petition an ordinance to amend a city charter was passed, authorizing a special election therefor and providing for notice to the electors. Failure to follow the law as to posting notice held invalidated it, although notice was given by newspaper publication. *Wright v. McMinneville*, 59 Or. 397, 117 Pac. 298.

<sup>46</sup> Legislature must approve amendments in California. *Apple v. Zemansky*, 166 Cal. 83, 134 Pac. 1149.

<sup>47</sup> *Williams v. Vicksburg*, 116 Miss. 79, 76 So. 838; *Sick v. Bay St. Louis*, 113 Miss. 175, 188, 74 So. 272.

<sup>48</sup> Law providing that when amendments to municipal charters have been approved by the governor they shall be recorded upon the records of the mayor and board of aldermen “and when so recorded shall have the force and effect of law,” held when it ap-

Amendment of charters by direct vote of the electors is the rule.<sup>49</sup> Amending a charter by the electors of a municipality is "municipal legislation" in Oregon.<sup>50</sup> Amendments in some jurisdictions may be initiated upon a petition of the electors,<sup>51</sup> or submitted to the voters by the legislative body, or by ordinance submitted by the electors. The method of submission of amendments laid down in the law applicable, must be followed. A disregard of mandatory provisions will nullify the amendment.<sup>52</sup>

pears that the amendment is not recorded it will not have the force and effect of law." *Williams v. Vicksburg*, 116 Miss. 79, 76 So. 838.

<sup>49</sup> *Kessler v. Fritchman*, 21 Idaho 30, 119 Pac. 692, 697; *Powell v. Hart*, 132 La. 287, 61 So. 233; *State ex rel. Lentz v. Edwards*, 90 Ohio St. 305, 107 N. E. 768; *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 343, 103 N. E. 512, (quoting with approval part of § 320, vol. 1, ante.); *Attorney General v. Detroit*, 168 Mich. 249, 133 N. W. 1090; *Jackson v. Harrington*, 160 Mich. 550, 125 N. W. 383; *Gallup v. Saginaw*, 170 Mich. 195, 135 N. W. 1060; *State ex rel. v. Zorth*, 84 Or. 372, 164 Pac. 958.

In Oregon, by express constitutional mandate, the legal voters of a city or town, may amend their own charter, subject to the constitution and criminal laws of the state, and subject also to the right of the voters of the state to amend charters or enact supervisory legislation by use of the initiative. *State ex rel. v. Port of Astoria*, 79 Or. 1, 154 Pac. 399, 405; *Robertson v. Portland*, 77 Or. 121, 149 Pac. 545, 547.

But no other corporation can, e.

g., port. *Rose v. Portland Port*, 82 Or. 541, 162 Pac. 498; *Stevenson v. Portland Port*, 82 Or. 576, 162 Pac. 509.

<sup>50</sup> *Acme Dairy Co. v. Astoria*, 49 Or. 520, 90 Pac. 153.

<sup>51</sup> On initiative by council or by petition of electors. *Jackson v. Harrington*, 160 Mich. 550, 125 N. W. 383.

<sup>52</sup> Constitutional authority to exercise the manner of initiative and referendum, gives power to provide by ordinance the mode for holding elections to amend the charter. *Pearce v. Roseburg*, 77 Or. 195, 150 Pac. 855.

Or to enact a new charter. *Duncan v. Dryer*, 71 Or. 548, 143 Pac. 644.

Law, employing a comprehensive term and directing that "all measures" submitted to the people shall contain the prescribed enacting clause, held to include charter amendments as well as mere ordinances so submitted, whether initiated by the people or submitted by the council. An ordinance submitting a charter amendment containing no enacting clause, amended so as to render an enacting clause unnecessary the day before the election, endorsed

Laws permit alternate articles or propositions to be voted on separately.<sup>54</sup>

Charter amendments must conform to the constitution, and unless exceptions are contained in the constitution, they must not be inconsistent with the general laws of the state, or as in Oregon, with the criminal laws of the state.<sup>55</sup>

The scope of the amendments must depend upon the powers of the particular municipality.<sup>56</sup> By amendments of its charter a city or town cannot exceed its powers. Thus a city may not amend its charter interfering with the incidental powers of a state court, in so far as it relates to matters of state concern, e. g., the power of appointment of necessary clerks of the court.<sup>57</sup> Amendments are to be restricted to municipal or local affairs as distinguished from those of general or state concern unless the municipality has been given exclusive

by the voters, make charter amendment valid. *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 495.

By electors after publication and approval of charter amendment by the governor, it need not be readopted and entered on the minutes of the board of mayor and aldermen. Its first adoption by the board with its publication and approval by the electors give it life and its recordation on the city ordinance book after its approval by the governor is all that is necessary. *Sick v. Bay St. Louis*, 113 Miss. 175, 188, 74 So. 272.

<sup>54</sup> *Apple v. Zemansky*, 166 Cal. 83, 134 Pac. 1149.

"There may be submitted with any charter or an amendment to a charter independent sections or propositions, and such of them as receive a three-fifths vote of the electors voting thereon shall be-

come a part of such charter, or shall prevail as such amendments." *Maher v. Jackson*, 191 Mich. 266, 157 N. W. 561.

<sup>55</sup> By electors, subject to constitution and criminal laws of state. *Woodward v. Barbur*, 59 Or. 70, 116 Pac. 101; *State ex rel. v. Tillamook Port*, 62 Or. 332, 124 Pac. 637, Ann. Cas. 1914C, 483; *State ex rel. v. Portland*, 65 Or. 273, 133 Pac. 62; *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806; *Cooke v. Portland*, 69 Or. 572, 139 Pac. 1095; *Pearce v. Roseburg*, 77 Or. 195, 150 Pac. 855; *Phipps v. Medford*, 81 Or. 119, 156 Pac. 787, 158 Pac. 666.

<sup>56</sup> May amend charter, to build a railroad. *Churchill v. Grants Pass*, 70 Or. 283, 141 Pac. 164.

<sup>57</sup> *Detroit Civil Service Com. v. Engel*, 187 Mich. 83, 87, 88, 150 N. W. 1081.

jurisdiction of the subject matter, or concurrent jurisdiction of it, with the state.<sup>58</sup>

The right of cities to frame their charters, and, as a consequence to change them, is a continuing right.<sup>59</sup> Thus a municipality with the constitutional right to frame, adopt and amend its own charter, may by charter amendment change its form of government, e. g., commission form, as such was held to be "within the realm of local affairs or municipal business," in the meaning of the statute applicable.<sup>60</sup>

A new charter when duly adopted supersedes the old,<sup>61</sup> and amendments supersede amended parts.<sup>62</sup> When adopted conformably to the constitutional and charter requirements, the new or changed provisions become at once a part of the charter, thereby supplanting or modifying the original provisions to the extent of any conflict.<sup>63</sup>

<sup>58</sup> A municipality cannot amend its charter to confer upon itself power beyond what is properly municipal or governmental. *State ex rel. v. Tillamook Port*, 62 Or. 332, 124 Pac. 637; *Schubel v. Olcott*, 60 Or. 503, 120 Pac. 375.

Although the legislative power in this respect is unlimited in the absence of constitutional restriction, such powers do not extend to a municipality except as granted by the state. Constitution and statutes providing for freeholders and home rule charters do not confer such power. Usually the powers conferred are strictly local or municipal. *Riggs v. Grants Pass*, 66 Or. 266, 134 Pac. 776.

Reassessment for street improvement amendments sustained and construed in Oregon. *Portland charter*. *Wilson v. Portland*, 87 Or. 507, 169 Pac. 90, 92, 171 Pac. 201; *Terwillinger Land Co. v. Portland*, 62 Or. 101, 111, 123 Pac.

57; *Hughes v. Portland*, 53 Or. 370, 383-393, 100 Pac. 942; *Duniway v. Portland*, 47 Or. 103, 108-112, 81 Pac. 945; *Kadderly v. Portland*, 44 Or. 118, 159, 160, 74 Pac. 710, 75 Pac. 222.

*Medford charter*. *Phipps v. Medford*, 81 Or. 119, 156 Pac. 787, 158 Pac. 666.

<sup>59</sup> *Collins v. A. Jaicks Co. (Mo. 1919)*, 214 S. W. 391, 398.

Under power of initiative and referendum granted by constitution, the legal voters of a city may prescribe manner of enacting new charter. *Duncan v. Dryer*, 71 Or. 548, 143 Pac. 644.

<sup>60</sup> *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775.

<sup>61</sup> *State v. Hindley*, 67 Wash. 240, 121 Pac. 447; *Schultz v. Phoenix*, 18 Ariz. 35, 156 Pac. 75, 77.

<sup>62</sup> *Phipps v. Medford*, 81 Or. 119, 156 Pac. 787.

<sup>63</sup> *Denver v. New York Trust*

**§ 348. Indirect or legislative amendment of constitutional charters.**

The language employed by the constitution of Oregon has been the subject of much discussion in the judicial decisions of that state, "resulting in a contrariety of opinion as to whether the legislature possesses authority to enact a general law when it has the effect of amending the charters of cities and towns." Opinions which either hold or assume that the legislature is permitted to pass general laws regulating intramural authority appear in many Oregon adjudications.<sup>64</sup> The right of the legislature to amend municipal charters has been squarely denied in Oregon judicial judgments.<sup>65</sup> "The whole sum of intramural authority is set at large, and the legal voters (of cities and towns) may exercise all of that authority, or only such part of it as they may desire, subject, of course, to the constitution and criminal laws of the state, and subject also to the right of the people of the commonwealth to amend charters or enact supervisory legislation by the use of the initiative.

\* \* \* Extramural authority, however, is not available to the legal voters of cities and towns, unless the right to exercise it has first been granted either by general law enacted by the legislature or by legislation initiated by the people of the whole state."<sup>66</sup> But in that state the legislature may amend by general law powers con-

Co., 229 U. S. 123, 144, 145, 33 Sup. Ct. 657, 57 L. ed. 1101, reversing 187 Fed. 890, 110 C. C. A. 24.

If designed to embrace the whole subject matter and if it conflicts with old charter provision, the latter yields. *Phipps v. Medford*, 81 Or. 119, 158 Pac. 666.

Although not designated specifically as a part of the amendment, if the intention to make the particular amendment appears by reasonable construction of the language of the amendment, the particular amendment will be held as

having been made. *Pryzbylowski v. Detroit Poor Comrs.*, 188 Mich. 270, 154 N. W. 117.

<sup>64</sup> *State ex rel. v. Port of Astoria*, 79 Or. 1, 154 Pac. 399, 405, (per Harris, J.) containing a list of Oregon cases.

<sup>65</sup> *Branch v. Albee*, 71 Or. 183, 142 Pac. 598; *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 145 Pac. 22; *Pearce v. Roseburg*, 77 Or. 195, 150 Pac. 855, 859.

<sup>66</sup> *State ex rel v. Port of Astoria*, 79 Or. 1, 154 Pac. 399, 405.



ferred on ports, although the voters of the port have never adopted the amendment. In that state a port is a municipality, though not a city or town. "Excluding cities and towns all municipalities may be controlled, supervised and regulated by general laws passed by the legislature, provided such general laws do not impair the initiative and referendum powers concerning 'municipal legislation.' " <sup>70</sup>

**§ 349. Amendments forbidden by special or local laws.<sup>71</sup>**

<sup>70</sup> State ex rel. v. Port of Astoria, 79 Or. 1, 154 Pac. 399, 407.

<sup>71</sup> State ex rel. v. Engel (Wis. 1920), 177 N. W. 33; Attorney-General v. Thompson, 168 Mich. 511, 134 N. W. 722.

In Idaho special charter can be amended only by special act. General laws relating to purely municipal affairs do not apply to such cities, without the consent of the electors. Kessler v. Fritchman, 21 Idaho 30, 119 Pac. 692, 697;

Mix v. Nez Perce County Comrs., 18 Idaho 695, 112 Pac. 215, 32 L. R. A. (N. S.) 534; Boise City Nat. Bk. v. Boise City, 15 Idaho 792, 100 Pac. 93; Wiggin v. Lewiston, 8 Idaho 527, 69 Pac. 286.

In Oregon "by the plain provisions of the constitution the legislature is prohibited from enacting, amending or repealing a city charter by a special law." State ex rel. v. Port of Astoria, 79 Or. 1, 154 Pac. 399, 404.

## CHAPTER 10.

### THE NATURE, CONSTRUCTION AND EXERCISE OF GENERAL CORPORATE POWERS.

#### I. GENERAL CONSIDERATION.

#### II. IMPLIED OR INCIDENTAL POWERS.

#### III. EXECUTION OF POWERS.

##### I. GENERAL CONSIDERATION.

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| § 351a. Classification of powers.                                 | § 354a. Same—specific grants of power—enumeration.  |
| § 351b. Same—intramural and extramural.                           | § 355. Effect of the specific enumeration of powers illustrated in the enactment of ordinances. |
| § 351c. Same—executive distinguished from legislative—referendum. | § 356. Construction of power “to regulate.”   |
| § 352. General rule as to municipal powers stated.                |   |
| § 353. Rules of construction.                                     |   |
| § 354. Same subject—reasonable construction.                      |   |

##### II. IMPLIED OR INCIDENTAL POWERS.

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| § 357. General rules as to implied or incidental powers stated. | § 363. Appropriations as donations forbidden.         |
| § 358. Implied powers are confined to municipal affairs.        | § 366. Expenditures to obtain or oppose legislation.  |
| § 359a. Municipal power cannot be used for private purposes.    | § 367. Miscellaneous illustrations of implied powers. |
| § 360. Implied power to enact ordinances.                       |   |

##### III. EXECUTION OF POWERS.

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| § 371. Method of exercise of power.                    | § 376. Judiciary will not control the exercises of discretionary powers. |
| § 373. When ordinance necessary to exercise power.     | § 378. Limitations of rule of non-judicial interference.                 |
| § 375. Same subject—self-enforcing charter provisions. |  |

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| <p>§ 381a. Distinction between mandatory and directory powers.</p> <p>§ 382. Public powers cannot be surrendered or delegated.</p> <p>§ 383. Powers and duties imposed upon particular depart-</p> | <p>ments or officers cannot be delegated.</p> <p>§ 384. Legislative authority cannot be delegated.</p> <p>§ 387. Ministerial duties may be delegated.</p> |
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### § 351a. Classification of powers.

Powers of municipal corporations may be classified: First, public and private; second, state and local; third, intramural and extramural; fourth, executive, legislative and judicial; fifth, mandatory and directory.

As a municipal corporation has a dual capacity, being a body politic and corporate, it exercises two kinds of powers, namely, public and private; public as an instrumentality of the state in government, and public as a local governmental organ; private as a corporation, legal entity or artificial personality, in supplying community needs, comforts and conveniences. In the exercise of powers of a governmental nature either as an agent of the state or as a local public organ it acts in the capacity of a sovereign and is not subject to private action for torts, since it has always been the doctrine that negligence cannot be imputed to the sovereign. And in the exercise of such sovereign powers, in the absence of organic restrictions, the state has plenary authority.

In the exercise of its private powers the municipal corporation is treated as a private corporation or individual and is subject to all of the obligations and is entitled to all of the benefits of the private law.<sup>1</sup> The ex-

<sup>1</sup> Public or governmental. *Louisville & Southern Ind. T. Co. v. Jennings* (Ind. App. 1919), 123 N. E. 835, 837.

In its capacity as a governmental organ, the city "is charged with the duty of determining the necessity, extent and general character of all public improvements, including streets, sewers, public

buildings, lighting works, water works, and other public works, and of providing for their construction and maintenance; and on its proprietary side it lets contracts for the erection and construction of all public works and carries on many activities of a kind which in a general way resemble those of a private corporation, although

tent of legislative control in the exercise of such private powers, apart from constitutional limitations, has never been defined with precision.<sup>2</sup> The rules for the ascertainment of the existence, scope and mode of the exercise of these dual powers are substantially the same.<sup>3</sup> However, in the exercise of proprietary acts usually strict construction is not urged to the extent it is in the exercise of governmental powers.<sup>4</sup> Illustrations as to the exercise of these several kinds of powers abundantly appear throughout this work.

### § 351b. Same—intramural and extramural.

The enactment of municipal legislation which operates within the corporate limits only for the benefit of the inhabitants and upon the inhabitants and all those who are within the municipal area is sometimes termed the

everything enures to the benefit of the people. This distinction as to the different capacities in which municipal corporations act is important and so well grounded as to be a part of the law of the land." *Milwaukee v. Raulf*, 164 Wis. 172, 179, 180, 159 N. W. 819, per Rosenberry, J.

In the exercise of private powers, the municipality is a legal individual; public it is a sovereign. *Maximilian v. New York*, 62 N. Y. 160, 164, 20 Am. Rep. 468; *Brown v. District of Columbia*, 29 App. D. C. 273, 282, 25 L. R. A. (N. S.) 98; *District of Columbia v. Tyrrell*, 41 App. D. C. 463, 473; *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573.

Acts "in a proprietary and only quasi-public capacity," e. g., in administering a public utility, as a water system. *South Pasadena v. Pasadena Land Co.*, 152 Cal.

593, 93 Pac. 490; *Marin Water & Power Co. v. Sanaslito*, 168 Cal. 587, 143 Pac. 767, 771.

Stands practically as private owner in managing an electric light plant. *Dayoust v. Alameda*, 149 Cal. 70, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847.

Supply of gas. *Western Saving Fund Society v. Philadelphia*, 31 Pa. 783, 72 Am. Dec. 730.

Public, private—commercial and ministerial. *Rose v. Gypsum City* (Kan. 1919), 179 Pac. 348.

<sup>2</sup> See chapter on Legislative Control, etc., § 165 et seq., ante; § 164 et seq., vol. 1, ante.

<sup>3</sup> *Astoria v. American La France Fire Engine Co.*, 225 Fed. 21, 139 C. C. A. 80, reversing 218 Fed. 480.

<sup>4</sup> *Audit Co. v. Louisville*, 185 Fed. 349, 107 C. C. A. 467.

See §§ 353, 354, post; §§ 353, 354, vol. 1, ante.

exercise of intramural powers, as distinguished from the enactment of municipal legislation which operates upon and which is for the benefit of persons whose property is beyond the corporate limits, which is termed the exercise of extramural powers. In view of the provisions of certain state constitutions, as that of Oregon, for example, this distinction may be of practical value.<sup>5</sup>

**§ 351c. Same—executive distinguished from legislative—referendum.**

Both legislative and executive powers are possessed by municipal corporations.<sup>6</sup> Often executive powers are vested in the council or legislative body and exercised by motion, resolution or ordinance. Executive action evidenced by ordinance or resolution does not subject such action to the power of the referendum, which is restricted to legislative action as distinguished from mere administrative action. The form or name does not change the essential nature of the real step taken. The mode of effecting the action is not important. If legislative the law contemplates the people may invoke the referendum.<sup>7</sup> The referendum is usually held "applicable to all ordinances and resolutions which constitute

<sup>5</sup> State ex rel. v. Astoria Port, 71 Or. 1, 154 Pac. 399, 404.

An ordinance limited to the municipality by which enacted cannot in any event have an extramural effect. Hall v. Johnson (Or.), 169 Pac. 515.

<sup>6</sup> Section 374, vol. 1, ante.

<sup>7</sup> City council's selection of city hall site, held legislative and subject to referendum. Harbor Center Land Co. v. Richmond (Cal. App. 1918), 176 Pac. 50, following Hopping v. Richmond, 170 Cal. 605, 150 Pac. 977, 170 Cal. 618, 150 Pac. 982.

A resolution of a legislative body that a proposition of a cor-

poration offering to donate a specified sum towards the erection of a new city hall on ground given to the city by such corporation for that purpose on condition that the city appropriates at least an equal amount, that the construction of the new city hall be commenced without delay, and that when completed the building shall be occupied and used as the city hall, be accepted, provided the deed therefor should be approved by the city attorney, was held legislative in character. Hopping v. Richmond, 170 Cal. 605, 150 Pac. 977, 980, 170 Cal. 618, 150 Pac. 982.

an exercise of legislative power." That is, it was designed to be directed against "supposed evils of legislation alone." "To allow it to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of a city. In many cases it would entirely prevent the exercise of the executive power necessary to carry out the acts determined upon by the legislative department. In the absence of a very clear declaration to the contrary it must be presumed that the power of referendum was intended to apply solely to the legislative powers of the city."<sup>8</sup> An act purely executive in character, unmixed with the exercise of legislative power, is not subject to the referendum. But if the act done is essentially legislative the referendum may be invoked, irrespective of the naming of the act,<sup>9</sup> whether denominated a motion, resolution or ordinance. Of course, accurately speaking, an ordinance is the proper designation for legislative action.<sup>10</sup>

### § 352. General rule as to municipal powers stated.<sup>11</sup>

Apart from certain inherent powers which have been constantly asserted to exist by many judicial decisions,<sup>12</sup>

<sup>8</sup> *Erwin v. Jersey City*, 60 N. J. L. 145, 37 Atl. 732, 64 Am. St. Rep. 584.

Referendum is limited to legislative acts. *Hopping v. Richmond*, 170 Cal. 605, 150 Pac. 977, 979, 170 Cal. 618, 150 Pac. 982.

<sup>9</sup> The name given to an action is not material. *Creighton v. Manson*, 27 Cal. 613.

<sup>10</sup> Section 634, ante; section 634, vol. 2, ante.

<sup>11</sup> *Ballaine v. Seward*, 5 Alaska 734, 739, (quoting from § 352, vol. 1, ante.); *Best v. Birmingham* (Ala. App. 1918), 78 So. 100, 103, citing § 352, vol. 1, ante (*McQuillin, Mun. Ord. § 46*); *Bennett*

*v. Drullard*, 27 Cal. App. 180, 149 Pac. 368, (quoting part of § 352, vol. 1, ante.); *Stokes v. Montgomery* (Ala. 1919), 82 So. 663, 665; *New Orleans Board of Public Utilities v. New Orleans Ry. & Light Co.* (La. 1919), 82 So. 280; *State v. Porter* (W. Va. 1919), 99 S. E. 508; *Central Union Tel. Co. v. Indianapolis Tel. Co.* (Ind. 1920), 126 N. E. 628, 632.

<sup>12</sup> *Aurora Water Co. v. Aurora*, 129 Mo. 540, 576, 31 S. W. 946; *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

"Municipal corporations have and can exercise only their inherent powers and such as have been

(and denied by others),<sup>13</sup> resulting from the original conception of local self-government, the fact alone of incorporation, and the proprietary capacity of the municipal corporation, does not per se create in it corporate or governmental powers.<sup>14</sup> A municipal corporation, therefore, possesses no powers or faculties not conferred upon it, either expressly or by fair implication, by the law which created it, or by other laws, constitutional or statutory, applicable to it.<sup>15</sup> It is a creature of the law

conferred upon them by the legislature in express terms, or by reasonable implication." *Douglas v. Greenville*, 92 S. C. 374, 75 S. E. 687.

<sup>13</sup> Municipal corporations have no inherent powers. *Ashley v. Ashley Lumber Co.* (N. D. 1918), 169 N. W. 87; *State Public Utilities Com. v. Quincy*, 290 Ill. 360, 125 N. E. 374.

Inherent power to license denied. *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825.

No inherent police powers exist in a municipal corporation. *Catholic Bishop v. Palos Park* (Ill. 1919), 121 N. E. 561.

<sup>14</sup> See *Malone v. Quincy*, 66 Fla. 52, 62 So. 922.

<sup>15</sup> *Yeadon v. Clark*, 276 Ill. 424, 114 N. E. 1023; *Hays v. Poplar Bluff*, 263 Mo. 516, 531, 173 S. W. 676; *St. Louis v. Atlantic Quarry & Construction Co.*, 244 Mo. 479, 484, 148 S. W. 948.

Municipal powers have their origin in the state's police powers. *State ex rel. v. Merchants Exchange of St. Louis*, 269 Mo. 346, 190 S. W. 903.

Possesses such powers only as the state gives it. *Duckworth v. Springfield*, 194 Mo. App. 51, 54, 194 S. W. 476; *Webb City v. Ay-*

*lor*, 163 Mo. App. 155, 163, 147 S. W. 214.

"A city can exercise only such powers as are granted in express words, or those necessarily incident thereto, or implied in the powers expressly granted." *Richland v. Null*, 194 Mo. App. 176, 180, 185 S. W. 250.

The powers "are only those expressly granted or necessarily implied to make the grant of specific powers effective." *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573, affirming 193 Ill. App. 600.

"A city has no power not expressly given by the terms of its charter or necessarily implied therefrom." *Hayne v. San Francisco*, 174 Cal. 185, 162 Pac. 625.

"There can be no doubt that a corporation, exercising powers of the state, possesses only those powers expressly granted, or such as are necessarily implied." *State ex rel. v. Superior Court*, 93 Wash. 267, 160 Pac. 755; *L. R. A.* 1917B, 354.

"A municipal corporation is limited in its powers to those granted in express words, or to those necessarily or fairly implied in or incident to the powers expressly granted, and also to those

established for special purposes and its corporate acts must be authorized by its charter, or other laws applicable thereto.<sup>16</sup> Every investigation, therefore, relating to its powers must be conducted from the standpoint of such laws. Wherefore, the usual formula, invariably supported by judicial utterances and judgments, in substance is: That a municipal corporation possesses and can exercise these powers only: (1) Those granted in

essential to the declared objects and purposes of the corporation.” *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217, 10 Ann. Cas. 130.

“Has such powers as are expressly granted to it and such others as are necessary and convenient to the exercise of the powers expressly granted.” *Milwaukee v. Raulf*, 164 Wis. 172, 179, 159 N. W. 819; *State ex rel. v. Kelly*, 154 Wis. 482, 487, 143 N. W. 153.

“Municipalities are legal entities for local governmental purposes, and they can exercise only such authority as is conferred by express or implied provisions of the law. The existence of authority to act cannot be assumed, but it should be made to appear.” *Wyeth v. Whitman*, 72 Fla. 40, 72 So. 472; *Malone v. Quincy*, 66 Fla. 52, 62 So. 922; *State ex rel. v. Lewis*, 55 Fla. 570, 46 So. 630.

“It is a well settled rule of construction that a delegation of powers will not be presumed in favor of a municipal corporation unless they be such as are necessary to its corporate existence, but that the same must be clearly conferred by express statutory enactment.” *Tacoma Gas & E. L. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655.

<sup>16</sup> The charter is the measure of powers; all acts beyond are void. *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.

“Its charter is the limit of a city’s prerogative and its authority to pass an ordinance must be expressed or necessarily implied.” *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378.

“A city’s charter measures its powers, and these consist of such as are expressly or impliedly granted. No incidental powers are implied except those essential to the continued existence of the municipality and to the accomplishment of the purpose of its creation.” *South Bend v. Chicago S. B. & N. I. Ry. Co.*, 179 Ind. 455, 101 N. E. 628.

Can enact ordinance only when power conferred. *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917.

City may by charter reserve right to exercise any power existing by general statute or powers given thereafter. *State ex rel. v. Otis*, 98 Ohio 83, 120 N. E. 313.

All municipal powers are not necessarily embraced in the charter. Powers may be conferred by legislative acts. *Grants Pass v. Rogue River Pub. Ser. Corp.*, 87 Or. 637, 171 Pac. 400.



express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient but indispensable.<sup>17</sup>

Obviously this universally accepted formula omits cer-

17 Alabama. *Ex parte Birmingham* (Ala. 1918), 79 So. 113, 119, reversing 78 So. 100; *Cleveland Co. v. Greenville*, 146 Ala. 559, 41 So. 862.

Arkansas. *Willis v. Ft. Smith*, 121 Ark. 606, 182 S. W. 275; *Lapraire v. Hot Springs*, 124 Ark. 346, 187 S. W. 442; *Argenta v. Keath* (Ark. 1917), 197 S. W. 686; *Merrill v. Van Buren*, 125 Ark. 248, 188 S. W. 537; *Bain v. Ft. Smith Light & Traction Co.*, 116 Ark. 125, 172 S. W. 843.

Alaska. *Fairbanks v. Independent Meat Market*, 4 Alaska 147; *Ballaine v. Seward*, 5 Alaska 734, 739, quoting from text; *Valdez v. Valdez Dock Co.*, 5 Alaska 399, 403, quoting from text.

California. *Oro Electric Corp. v. R. R. Com.*, 169 Cal. 466, 147 Pac. 118; *Long Beach v. Lisenby*, 175 Cal. 575, 166 Pac. 333; *Egan v. San Francisco*, 165 Cal. 576, 133 Pac. 294; *Gassner v. McCarthy*, 160 Cal. 82, 116 Pac. 73; *Woodland v. Leech*, 20 Cal. App. 15, 127 Pac. 1040.

Florida. *Wyeth v. Whitman*, 72 Fla. 40, 72 So. 472; *Malone v. Quincy*, 66 Fla. 52, 62 So. 922; *Ferguson v. McDonald*, 66 Fla. 494, 63 So. 915; *Scott v. Tampa*, 62 Fla. 275, 55 So. 983.

Indiana. *Pittsburg C. C. & St. L. Ry. Co. v. Anderson*, 176 Ind. 16, 95 N. E. 363; *South Bend v. Chicago S. B. & N. I. Ry. Co.*,

179 Ind. 455, 101 N. E. 628; *Scott v. La Porte*, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; *State ex rel. v. Indianapolis, etc. R. Co.*, 160 Ind. 45, 66 N. E. 163, 60 L. R. A. 831.

Illinois. *People v. Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A, 292; *People v. Chicago*, 260 Ill. 150, 102 N. E. 1039; *Chicago v. Chicago & S. R. Co.*, 267 Ill. 252, 108 N. E. 312; *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192; *People v. Paynter*, 197 Ill. App. 78, 81; *Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285; *Merchants Loan & Trust Co. v. Chicago*, 264 Ill. 76, 105 N. E. 726, affirming 182 Ill. App. 298; *Kilborne v. Blakely*, 184 Ill. App. 370; *Stoessand v. Frank* (Ill. 1918), 119 N. E. 300; *Sullivan v. Cloe*, 277 Ill. 56, 115 N. E. 135; *Heartt v. Downers Grove*, 278 Ill. 92, 115 N. E. 869; *Chicago v. Ross*, 257 Ill. 76, 100 N. E. 159, 43 L. R. A. (N. S.) 205; *People ex rel. v. Oak Park*, 268 Ill. 256, 109 N. E. 11; *Springfield v. Postal Telegraph Cable Co.*, 253 Ill. 346, 97 N. E. 672, affirming 164 Ill. App. 276.

Iowa. *Akron v. McElligott*, 166 Iowa 297, 147 N. W. 773; *State ex rel. v. Chariton Telephone Co.*, 173 Iowa 497, 155 N. W. 968; *Decatur v. Gould* (Iowa 1919), 170 N. W. 449, following statement of

tain essential elements. True, such elements are assumed to be inserted by implication. Clearly the exercise of municipal powers must conform to the constitu-

Dillon, C. J. in *Merriam v. Moody*, 25 Iowa 163.

Idaho. *State v. Frederic*, 28 Idaho 709, 155 Pac. 977; *Boise Development Co. v. Boise City*, 30 Idaho 675, 167 Pac. 1032.

Kentucky. *District of Clifton v. Cummins*, 165 Ky. 526, 177 S. W. 432.

Maryland. *Rushe v. Hyattsville*, 116 Md. 122, 81 Atl. 278.

Missouri. *Richland v. Null*, 194 Mo. App. 176, 185 S. W. 250; *State ex rel. v. Hackman* (Mo. 1918), 202 S. W. 7; *Hays v. Poplar Bluffs*, 263 Mo. 516, 173 S. W. 676; *Webb City ex rel. v. Aylor*, 163 Mo. App. 155, 147 S. W. 214.

Montana. *Shapard v. Missoula*, 49 Mont. 269, 141 Pac. 544; *State ex rel. v. Billings Gas Co.* (Mont. 1918), 173 Pac. 799; *Helena Light & Ry. Co. v. Helena*, 47 Mont. 18, 130 Pac. 446.

Massachusetts. *Higginson v. Slattery*, 212 Mass. 583, 90 N. E. 523.

Nebraska. *State v. Temple*, 99 Neb. 505, 156 N. W. 1063.

N. Carolina. *Vance County Comrs. v. Henderson*, 163 N. C. 114, 79 S. E. 442; *Batson v. Southern Ry. Co.*, 106 N. C. 307, 91 S. E. 310.

N. Dakota. *Ashley v. Ashley Lumber Co.* (N. D. 1918), 169 N. W. 86.

Oklahoma. *Re Lankford* (Okl. 1919), 178 Pac. 673.

Oregon. *Robertson v. Portland*, 77 Or. 121, 149 Pac. 545; *Cole v. Seaside*, 80 Or. 73, 156 Pac. 569.

Pennsylvania. *McCormick v. Hanover*, 246 Pa. 169, 92 Atl. 195.

S. Carolina. *University of South Carolina v. Columbia*, 108 S. C. 244, 93 S. E. 934; *Blake v. Walker*, 23 S. C. 517; *Douglas v. Greenville*, 92 S. C. 374, 75 S. E. 687.

Texas. *Choice v. Dallas* (Tex. Civ. App. 1919), 210 S. W. 753; *Dibrell v. Coleman* (Tex. Civ. App.), 172 S. W. 550; *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549; *Waldschmit v. New Braunfels* (Tex. Civ. App.), 193 S. W. 1077; *Lindsley v. Dallas Consol. St. Ry. Co.* (Tex. Civ. App. 1918), 200 S. W. 207; *Stevens v. Dublin* (Tex. Civ. App.), 169 S. W. 188; *Brenham v. Holle & Seelhorst* (Tex. Civ. App.), 153 S. W. 345.

Virginia. *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139; *Radford v. Clark*, 113 Va. 199, 73 S. E. 571.

Washington. *State v. Burr*, 65 Wash. 524, 118 Pac. 639; *State v. Tacoma*, 97 Wash. 190, 166 Pac. 66; *State v. Bridges*, 97 Wash. 553, 166 Pac. 780; *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005; *State v. Superior Court of Whitman County*, 92 Wash. 360, 159 Pac. 383; *State v. Lovering*, 78 Wash. 624, 139 Pac. 617.

Wisconsin. *Superior v. Roemer*, 154 Wis. 345, 141 N. W. 250; *State v. Kelly*, 154 Wis. 482, 143 N. W. 153.

West Virginia. *Mineral County Court v. Piedmont*, 72 W. Va. 296, 78 S. E. 63.

United States. *Fort Scott v.*

tion of the United States and the treaties made pursuant thereto, and to the constitution of the state and the general laws of the state,<sup>18</sup> (unless in special instances designated municipalities are excepted therefrom). And, moreover, not only must all municipal powers be exer-

Eads Brokerage Co., 54 C. C. A. 440, 117 Fed. 54; Iowa Telephone Co. v. Keokuk, 226 Fed. 82, 97, 98.

A municipal corporation may exercise these, and only these powers: "Those granted in express terms; those necessarily implied in, or incident to, the powers expressly conferred; and those indispensably necessary to the accomplishment of the declared objects and purposes of the municipality." Stokes v. Montgomery (Ala. 1919), 82 So. 663, 665; Colvin v. Ward, 189 Ala. 198, 199, 66 So. 98; Pearson v. Duncan (Ala. 1916), 73 So. 406.

"A municipal corporation possesses and can exercise such powers, and such only, as (1) those which are granted in express words; (2) those necessarily or fairly implied by, or incident to, the powers expressly granted; and (3) those powers which are essential to the declared objects and purposes of the municipality, which latter class does not include those powers which are convenient but not indispensable." Spear v. Ward (Ala. 1917), 74 So. 27, 29.

Any power necessary to effectuate the general purpose of the grant is incident to the enumerated powers. State ex rel. v. Bridges, 87 Wash. 260, 151 Pac. 490.

"Essential," etc., means indispensable. St. Louis v. Dreisoerner, 234 Mo. 217, 147 S. W. 998.

Express grant of power carries with it all powers necessary to its execution. Burrell v. Portland, 61 Or. 105, 121 Pac. 1.

"Necessary" relating to implied powers, does not mean indispensable. Chicago v. Kluever, 257 Ill. 317, 100 N. E. 917.

Powers are implied only when they are necessarily incidental to the full exercise of those expressly granted, to the end that the objects declared by the municipal charter may be accomplished. Buffalo v. Stevenson, 207 N. Y. 258, 100 N. E. 798, 129 N. Y. S. 125, 145 App. Div. 117.

<sup>18</sup>Section 740, et seq., post; section 741, et seq., vol. 2, ante.

Can lawfully exercise only powers conferred by express or implied provisions "within the limitations imposed by organic law." Ferguson v. McDonald, 66 Fla. 494, 497, 63 So. 915.

In the exercise of such powers a municipal corporation can enact no ordinance which violates the constitution of the state or the United States, or which contravenes the statutes and decisions of the state. The existence of reasonable doubt touching the power in question results in the denial of the power. St. Louis v. Dreisoerner, 243 Mo. 217, 223, 147 S. W. 998, 41 L. R. A. (N. S.) 177.

cised within the limits of the organic laws, but they must also be consistent with the general law and public policy of the particular state including the common law in force therein.<sup>19</sup>

### § 353. Rules of construction.

In ascertaining municipal powers that may be exercised in specific instances, late cases quite uniformly apply the well established rule of strict rather than liberal construction,<sup>20</sup> especially in the exercise of public

<sup>19</sup> No power express or implied which conflicts with general principles of the common law in force in the state may be exercised. *Carroll Blake Const. Co. v. Boyle*, 140 Tenn. 166, 203 S. W. 945; *Farmer v. Nashville*, 127 Tenn. 515, 156 S. W. 189, 45 L. R. A. (N. S.) 240.

<sup>20</sup> *Georgia Ry. & Power Co. v. Railroad Commission* (Ga. 1919), 98 S. E. 696, P. U. R. 1919D, 546, 5 A. L. R., citing 353, vol. 1, ante (*McQuillin*, Mun. Ord. § 48); *Decatur v. Gould* (Iowa 1919), 170 N. W. 449; *Boise City v. Boise Artesian Hot & Cold Water Co.*, 186 Fed. 705; *Ex parte Rowe*, 4 Ala. App. 254, 59 So. 69; *Douglas v. Greenville*, 92 S. C. 374, 75 S. E. 687; *Cole v. Seaside*, 80 Or. 73, 156 Pac. 569, 571; *Rosa v. Bandon*, 71 Or. 510, 142 Pac. 339; *State v. Porter* (W. Va. 1919), 99 S. E. 508; *Kellar v. Los Angeles*, 179 Cal. 605, 178 Pac. 505; *Re Lankford* (Okl. 1919), 178 Pac. 673.

Strict construction applies as to the power to enact an ordinance, irrespective of the law providing for a liberal construction with a view to effect the object designed. *Waldschmit v. New Braunfels*

(Tex. Civ. App.), 193 S. W. 1077.

*Re Smith* 146 N. Y. 77, 40 N. E. 499, 28 L. R. A. 824, 48 Am. St. Rep. 769, denying right of quarantine.

A provision of a municipal charter inflicting a penalty by way of increased interest for non-payment of a special tax bill before maturity should be strictly construed. *Eyer mann v. Stevens*, 185 Mo. App. 168, 175, 170 S. W. 330.

When a discretion is given, e. g., power to do all things within the discretion of the governing authorities which may seem necessary for the good order and welfare of the municipality, such discretion must be exercised within the scope of the authority conferred. *Pearson v. Duncan* (Ala. 1916), 73 So. 406; *Montgomery v. Montgomery & W. Plank-Road Co.*, 31 Ala. 76, 83, 84.

"Grants of powers to municipalities are to be strictly construed, and if there is a doubt, or the exercise of the asserted power would lead to absurd consequences, a construction that limits, rather than one which expands the admitted power will be preferred." *State ex rel. v. Bridges*, 87 Wash. 260, 151 Pac. 490.

or governmental powers,<sup>21</sup> or powers which are out of the usual range or impose public burdens which affect the common law rights of citizens.<sup>22</sup> In construction, however, neither presumptions nor implications should be invoked to deprive a municipality of its rightful public powers.<sup>23</sup> "A statute granting to a city, authority to do a particular thing, with a limitation on the power, must be construed so as to give effect to the limitation as well as to the power granted."<sup>24</sup> Where the whole subject of providing for public work within a city is committed to such city, the city has, as an incident to its power to contract for the erection and construction of public works, the same inherent power to prescribe the conditions under which the work shall be carried on within the city, in the absence of any restriction by the

<sup>21</sup> "To the extent that the attributes of sovereignty are granted to local subdivisions the language carrying the grant should be strictly construed, for the reason that such grant is a limitation upon the power of the legislature. *Rose v. Portland*, 82 Or. 541, 162 Pac. 498; *Thurber v. Henderson*, 63 Or. 410, 414, 128 Pac. 43.

Constitutional provisions designed to grant attributes of sovereignty to specified local subdivisions of the state, and such grant being a limitation on the power of the legislature, should be strictly construed. *State v. Port of Astoria*, 79 Or. 1, 154 Pac. 399, 402, following *Thurber v. Henderson*, 63 Or. 410, 414, 128 Pac. 43. "This rule of construction must be applied here notwithstanding the suggestion broached in *State v. Schuler*, 59 Or. 18, 27, 115 Pac. 1057, and regardless of the inference that may possibly be drawn from *Schubel v. Olecott*, 60 Or. 503, 515, 120 Pac. 375."

<sup>22</sup> Rule of construction is not so strict as that applied to private corporations, "except where the power sought to be exercised is out of the usual range or imposes a public burden which affects the common law rights of citizens." *State ex rel. v. Hackman* (Mo. 1918), 202 S. W. 7.

Authority conferred upon a municipal corporation by statute should not be extended beyond the fair import of the language used, considered in connection with the general powers and purposes of the municipality. This rule of interpretation is particularly applicable when the asserted authority directly and materially affects the rights of an owner to the use of his property. *Wyeth v. Whitman*, 72 Fla. 40, 72 So. 472.

<sup>23</sup> *Norfolk v. Norfolk County Water Co.*, 113 Va. 303, 74 S. E. 226.

<sup>24</sup> *Anhalt v. Waterloo, etc., Ry. Co.*, 166 Iowa 479, 147 N. W. 928.

state, that the state has, and it may exercise this inherent power unless and until it is restricted by legislative enactment. Such power includes the authority to specify the conditions under which labor upon public works shall be performed, e. g., prescribing the hours thereof.<sup>25</sup>

The municipality is not restricted to grants of power contained in its charter, but it is generally affirmed that all statutes applicable may be invoked.<sup>26</sup>

Notwithstanding the general rule is that every word in a law is to be given force and effect, words inadvertently used in grants of power which destroy the sense and meaning of the power intended to be given may be eliminated in construction.<sup>27</sup>

Since municipal powers are required to be conferred in plain, unambiguous terms, the general well settled rule is that a doubtful power is a power denied.<sup>28</sup>

<sup>25</sup> *Milwaukee v. Raulf*, 164 Wis. 172, 183, 184, 159 N. W. 819.

<sup>26</sup> *Grants Pass v. Rogue River Public Service Corp.*, 87 Or. 637, 171 Pac. 400.

<sup>27</sup> *Shapard v. Missoula*, 49 Mont. 269, 141 Pac. 544, 546.

<sup>28</sup> *Alaska. Fairbanks v. Independent Meat Market*, 4 Alaska 147; *Valdez v. Valdez Dock Co.*, 5 Alaska 399, 403, quoting from text; *Valdez v. Valdez Dock Co.*, 5 Alaska, 399, 403, quoting with approval part of § 353, vol. 1, ante.

*California. Kellar v. Los Angeles*, 179 Cal. 605, 178 Pac. 505, 507; *O Electric Corporation v. R. R. Com.*, 169 Cal. 466, 477, 147 Pac. 118; *Long Beach v. Lisenby*, 175 Cal. 575, 166 Pac. 333.

*Florida. Malone v. Quincy*, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916D, 208; *Ex parte Davidson* (Fla. 1918), 79 So. 727.

*Georgia. Georgia Ry. & Power Co. v. Georgia Railroad Com.* (Ga.

1919), 98 S. E. 696, 701; citing § 353, vol. 1, ante (*McQuillin Mun. Ord.*, § 48); *Lockwood v. Muhlberg*, 124 Ga. 662, 53 S. E. 92, citing § 353, vol. 1, ante. (*McQuillin Mun. Ord.*, § 48).

*Indiana. South Bend v. Chicago S. B. & N. I. Ry. Co.*, 179 Ind. 455, 101 N. E. 628; *Pittsburg, etc., R. Co. v. Crown Point*, 146 Ind. 421, 422, 45 N. E. 587, 35 L. R. A. 684; *Pittsburg, C. C. & St. L. Ry. Co. v. Anderson*, 176 Ind. 16, 95 N. E. 363; *Caldwell v. Bauer*, 179 Ind. 146, 99 N. E. 117; *South Bend v. Chicago, etc., R. Co.*, 179 Ind. 455, 101 N. E. 628.

*Illinois. Chicago v. Ross*, 257 Ill. 76, 100 N. E. 159, 43 L. R. A. (N. S.) 205; *Chicago v. Mandel Bros.*, 264 Ill. 206, 106 N. E. 181; *People v. Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A, 292; *People v. Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas.

As to implied or incidental powers statutes provide, in substance, that municipalities (of a named class) are by virtue of such laws granted the powers necessary to give full force and effect to the intention of such laws which are followed by rules of liberal construction.<sup>29</sup> Thus, for example, the Wisconsin statute recites: "Whenever the legislature has heretofore or may hereafter grant any such city power to do anything, such power shall be construed as including all things necessary to carry out said grant; and whenever, in construing any statute granting any powers or any rights to cities, there shall

1913A, 292; *Metropolitan West Side El. Ry. v. Chicago*, 261 Ill. 624, 104 N. E. 165; *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825, 827; *People ex rel. v. Oak Park*, 268 Ill. 256, 109 N. E. 11; *Stoessand v. Frank* (Ill. 1918), 119 N. E. 300; *Cortland v. Larson*, 273 Ill. 602, 113 N. E. 51, L. R. A. 1917A, 314, Ann. Cas. 1916 E, 775.

*Idaho. State v. Frederic*, 28 Idaho 709, 155 Pac. 977.

*Montana. Sharkey v. Butte City*, 52 Mont. 16, 155 Pac. 266; *State ex rel. v. Billings Gas Co.* (Mont. 1918), 173 Pac. 799; *Shapard v. Missoula*, 49 Mont. 269, 141 Pac. 544, 547.

*Maryland. Rushe v. Hyattsville*, 116 Md. 122, 81 Atl. 278.

*Missouri. Pierce City v. Hentchel* (Mo. App.), 180 S. W. 1027; *State ex rel. v. Hackman* (Mo. 1918), 202 S. W. 7; *Hays v. Poplar Bluff*, 263 Mo. 516, 523, 173 S. W. 676.

*Oklahoma. Re Lankford* (Okla. 1919), 173 Pac. 673.

*Texas. Ex parte Farley* (Tex. Civ. App.), 144 S. W. 530.

*Virginia. Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139.

*Washington. State ex rel. v.*

*Bridges*, 97 Wash. 553, 556, 166 Pac. 780, citing § 353, vol. 1, ante; *State ex rel. v. Seattle* (Wash. 1919), 177 Pac. 671.

*United States. San Francisco-Oakland Terminal Rys. v. Alameda*, 226 Fed. 889.

"The general rule is that the power of a municipality to take or place a burden upon the property of a citizen must be conferred by an unambiguous statute before that power can be exercised. If there be a fair and reasonable doubt as to the existence of such power such doubt must be resolved in favor of the taxpayer and against the municipality." *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 136, 168 S. W. 721; *St. Louis v. Dreisoerner*, 243 Mo. 217, 223, 147 S. W. 998.

"If there is a fair, reasonable doubt concerning the exercise of the power \* \* \* it will be resolved against the city and the exercise of the power denied." *State ex rel. v. Wilson*, 151 Mo. App. 723, 727, 132 S. W. 625; *Re Pier, North River* (N. Y. 1920), 126 N. E. 809.

<sup>29</sup>*Milwaukee v. Raulf*, 164 Wis. 172, 178, 159 N. W. 819.

arise merely a question of doubt as to whether the legislature intended to grant any power or right, whether expressed or implied, such doubt shall be resolved in favor of the city possessing such power or right, whether such power or right shall concern the above or the manner of carrying out any power or right.”<sup>31</sup>

If the invalid part of a law is separable from the rest, the presumption is that the rest is valid.<sup>32</sup>

“Courts are always reluctant to declare invalid legislation. When, however, the error is clear, the duty to hold the legislative branch of the government within the clear bounds of its power is imperative.”<sup>33</sup>

#### § 354. Same subject—reasonable construction.

When the authority to exercise the power appears, wide latitude is allowed in its exercise, where in the action taken no abuse of power or a violation of organic or fundamental rights results.<sup>34</sup> A municipal corporation when exerting its functions for the general good is not to be shorn of its power by mere implication. “The intention to restrict the exercise of its powers must be manifest by words so clear as not to admit of two different or inconsistent meanings.”<sup>35</sup>

Statutes often enjoin a liberal construction, and provide, in substance, that all statutes enacted by the legislature granting to cities of a specified class any powers or prescribing the method and manner of exercising such powers shall be given a liberal construction, to the end

<sup>31</sup> *Milwaukee v. Raulf*, 164 Wis. 172, 178, 159 N. W. 819.

<sup>32</sup> § 816, post; § 816, vol. 2, ante.

If part of a law, through inherent vice must perish, the separable and independent parts of the law still stand protected by the presumption of validity attending the whole law at the outset. “A judge is not to be like a tyrant, making all void when part is void, but like a nursing father, making

void only that part where the fault is and preserving the rest if he can.” *State ex rel. v. St. Louis*, 241 Mo. 231, 247, 145 S. W. 801, per Lamm, J.

<sup>33</sup> *Dangel v. Williams* (Del. Ch. 1916), 99 Atl. 84.

<sup>34</sup> *State ex rel. v. Ackerly*, 69 Fla. 23, 67 So. 232.

<sup>35</sup> *Bethlehem City Water Co. v. Bethlehem Borough*, 231 Pa. 454, 458, 459, 80 Atl. 984.



that such cities shall be given the largest possible power and leeway of action under such statutes.<sup>36</sup> "We regard the principle to be well settled that the private and proprietary powers conferred upon a municipal corporation are to be construed with liberality to the end that the purpose of the grant may be fully accomplished."<sup>37</sup>

"In its private commercial capacity, while acting primarily as a business concern, the powers conferred on a municipal corporation are for its own special benefit and advantage. \* \* \* Recognizing this to be the principal object in the creation of such corporations and the sole purpose of endowing them with such commercial and proprietary powers as permit them and their citizens to enjoy the benefit of municipal public utilities, the courts permit and favor the exercise of the fullest discretion in the enjoyment and administration of such powers which are consistent with the general object of their grant and the best interest of all parties concerned who are intended to be benefited by such advantages." "The discretion of municipal corporations in the exercise of their powers is as wide as that enjoyed by the general government and is to be exercised in accordance with the judgment of the authorities in charge of the municipal corporation as to the necessity or expediency of each particular subject when it arises."<sup>38</sup>

**§ 354a. Same—specific grants of power—enumeration.**

Late decisions adhere to the general rule that where the law enumerates specific powers with reference to a named subject, a power not enumerated is presumed to be withheld.<sup>39</sup> "The enumeration of powers operates to

<sup>36</sup> *Milwaukee v. Raulf*, 164 Wis. 172, 178, 159 N. W. 819.

<sup>37</sup> *Butler v. Karb*, 96 Ohio St. 472, 481, speaking of power to establish, maintain and operate a lighting plant.

In the exercise of proprietary acts as distinguished from govern-

mental, as in the management of property, strict construction is not always applied. *Audit Co. v. Louisville*, 185 Fed. 349, 107 C. C. A. 467.

<sup>38</sup> *Pond, Public Utilities*, § 11.

<sup>39</sup> *South Bend v. Chicago, etc., R. Co.*, 179 Ind. 455, 101 N. E. 628;

exclude such others as are not enumerated.”<sup>40</sup> Moreover, general welfare powers do not ordinarily extend powers specifically limited.<sup>41</sup> Where, however, particular powers are expressly conferred, and there is also a general grant of power, such general grant by intentment, it is held, includes all powers that are fairly within the terms of the grant, and are essential to the purposes of the municipal corporation, and consistent with the particular powers.<sup>42</sup>

Statutes, in effect, prescribed that, whenever the legislature has heretofore granted to any city, however incorporated, a general welfare clause, preceded or followed by specific grants of power, such specific grants shall not be construed as restrictions upon such general welfare clause, but such general welfare clause shall be given a liberal construction, to the end that the cities may exercise all powers granted therein or reasonably implied therefrom.<sup>43</sup>

### § 355. Effect of the specific enumeration of powers illustrated in the enactment of ordinances.<sup>44</sup>

### § 356. Construction of power “to regulate.”

The power to regulate gives authority to impose reasonable restrictions and restraints upon a trade or business regulated.<sup>45</sup> The word “regulate” means to direct

Scott v. La Porte, 162 Ind. 34, 68 N. E. 278, 69 N. E. 675; Bogue v. Bennett, 156 Ind. 478, 60 N. E. 143, 83 Am. St. Rep. 212; Chicago v. M. & M. Hotel Co., 248 Ill. 264, 93 N. E. 753.

<sup>40</sup> People ex rel. v. Oak Park, 268 Ill. 256, 109 N. E. 11; People v. Chicago, 261 Ill. 16, 103 N. E. 609. 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A 292.

<sup>41</sup> Ex parte Davidson (Fla. 1918), 79 So. 727; Malone v. Quincy, 66 Fla. 52, 62 So. 922, Ann. Cas. 1916D, 208; State ex rel. Ellis v. Tampa Waterworks Co., 56 Fla. 858, 47

So. 358, 19 L. R. A. (N. S.) 183.

<sup>42</sup> Malone v. Quincy, 66 Fla. 52, 62 So. 922, 924, Ann. Cas. 1916D, 208.

<sup>43</sup> Milwaukee v. Raulf, 164 Wis. 172, 178, 159 N. W. 819.

<sup>44</sup> Malone v. Quincy, 66 Fla. 52, 62 So. 922, 924, citing § 355, vol. 1, ante; Re Simmons, 4 Okl. Cr. 662, 671, 672, 112 Pac. 951, 955, quoting with approval the entire section 355, vol. 1, ante. (McQuillin, Mun. Ord., § 50.)

<sup>45</sup> Ogden City v. Leo (Utah 1919), 182 Pac. 530.

by rule or restriction, to subject to governing principles of law. Hence, "to regulate" is to govern by, or subject to, certain rules or restrictions. It has been said that it implies a power of restriction and restraint, not only as to the manner of conducting a specified business, but also as to the erection in or upon which the business is to be conducted.<sup>46</sup> Thus the power to regulate livery stables is ample authority to prohibit their operation within limited areas or districts within the corporate limits.<sup>47</sup> But the power to regulate will not usually be construed as authority to impose an absolute prohibition of a legitimate business,<sup>48</sup> that may be pursued as of common right,<sup>50</sup> but the rule is otherwise as to wrongful occupations.<sup>51</sup> Thus power "to regulate stone quarries and quarrying of stone," will not sustain an ordinance prohibiting, under penalty, the operation of a stone quarry without permission of the municipal legislative body.<sup>52</sup> And power to regulate or suppress "billiard

<sup>46</sup> *Rochester v. West*, 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659.

<sup>47</sup> *Little Rock v. Reinman*, 107 Ark. 174, 155 S. W. 105, 107, quoting with approval from § 910, vol. 3, ante. *Curtis v. Los Angeles*, 172 Cal. 230, 156 Pac. 462, 464, stating that "while power to regulate a legitimate business does not contain as a part thereof the power to suppress, yet it does contain within itself the power to prohibit within delimited areas and districts if reasons appear for so doing." *Ex parte Hadacheck*, 165 Cal. 417, 420, 132 Pac. 584, holding that under power to regulate, the business of brickmaking may be restricted, within the city limits.

<sup>48</sup> *Malone v. Quincy*, 66 Fla. 52, 62 So. 922, 925, citing § 56, vol. 1, ante (*McQuillin*, Mun. Ord., § 51.)

Power "to regulate" an occupation does not include power to act

without regulation or to prohibit or suppress the business. *Hanover v. Atkins*, 78 N. H. 308, 99 Atl. 293.

<sup>50</sup> "The power to regulate does not authorize an absolute prohibition of any legitimate business that may be pursued as of common right." *Portland v. Western Union Tel. Co.*, 75 Or. 37, 146 Pac. 148, 150.

<sup>51</sup> Power to regulate prostitution is power to prohibit, as general welfare clause would give such power. Powers not essentially municipal cannot be relegated, e. g., to define and enforce state offenses, as adultery and fornication. *Shreveport v. Price* (La. 1918), 77 So. 883.

<sup>52</sup> *St. Louis v. Atlantic Quarry & Const. Co.*, 244 Mo. 479, 490, 148 S. W. 948, distinguishing *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872, affirmed in *Fischer v. St.*

tables or other instruments used for gambling," is not authority to prohibit the keeping of billiard hall in which gambling is not permitted.<sup>59</sup>

## II. IMPLIED OR INCIDENTAL POWERS.

### § 357. General rules as to implied or incidental powers stated.

That municipal corporations have certain inherent powers has been affirmed often,<sup>60</sup> and also denied.<sup>61</sup> It is a truism, nevertheless, that the existence of authority to act on the part of a municipal corporation cannot be assumed, but it should be made to appear.<sup>63</sup> Undoubtedly municipal corporations possessed implied as well as express powers.<sup>64</sup> But a power is implied only when it is necessarily incidental to the exercise of powers granted.<sup>65</sup>

Louis, 94 U. S. 361, 24 Sup. Ct. 673, 48 L. ed. 1018.

<sup>59</sup> Dardenelle v. Gillespie, 116 Ark. 390, 172 S. W. 1036.

<sup>60</sup> Aurora Water Co. v. Aurora, 129 Mo. 540, 576, 31 S. W. 946; Milwaukee v. Raulf, 164 Wis. 172, 159 N. W. 819.

But not as to taxation. *Ex parte Birmingham* (Ala. 1918), 79 So. 113, 116; *Boyd v. Selma*, 96 Ala. 144, 148, 11 So. 393, 16 L. R. A. 729.

<sup>61</sup> *Ashley v. Ashley Lumber Co.* (N. D. 1918), 169 N. W. 87; *States Public Utilities Com. v. Quincy*, 290 Ill. 360, 125 N. E. 374. No inherent power exists to exact a license for conducting a business. *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825.

<sup>63</sup> *Malone v. Quincy*, 66 Fla. 52, 62 So. 922.

<sup>64</sup> *Carthage v. Frederick*, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490.

Selection of location of city hall,

is clearly within a city's powers. *Harbor Center Land Co. v. Richmond* (Cal. App. 1918), 176 Pac. 50.

<sup>65</sup> *Buffalo v. Stevenson*, 207 N. Y. 258, 100 N. E. 798; *Jeffery v. Smith*, 63 Or. 514, 128 Pac. 822.

**Implied power must be essential** to powers expressly conferred, e. g., power to contract for rates for supplying water, light or heat. *State v. Wyandotte County Gas Co.*, 88 Kan. 165, 127 Pac. 639, affirmed 231 U. S. 622.

"To be implied, a power must be so essential to the exercise of some power expressly conferred as plainly to appear to have been within the intention of the legislature. The implied power must be necessary, not merely convenient, and the intention of the legislature must be free from doubt. *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361, 27 L. ed. 669; *Minturn v. Larne*, 23 How. 435, 16 L. ed. 574; Powers of local government and

“That the incidental powers necessary to make effective the object of a legislative act are impliedly granted is elementary.”<sup>66</sup> In brief, a municipal corporation has implied authority to take necessary lawful means to execute powers.<sup>67</sup>

**§ 358. Implied powers are confined to municipal affairs.<sup>68</sup>**

Incidental or implied powers which a municipal corporation may exercise must be germane to the purpose for which the corporation was created. They will not be enlarged by construction to the detriment of individual or public rights.<sup>69</sup>

**§ 359a. Municipal power cannot be used for private purposes.**

It is elementary that the powers of a municipal corporation may be used for public or municipal purposes

police regulations possessed by municipal corporations will be implied more readily than a delegation of the police power, e. g., to regulate the exercise of franchises by public service corporations.” *People ex rel. v. Western New York & P. T. Co.*, 214 N. Y. 526, 108 N. E. 847, reversing 150 N. Y. S. 1104.

**Power to issue bonds** to raise money to construct and equip new school buildings, carries power to purchase lands upon which to erect such buildings. *Van Arsdale v. Justice*, 133 N. Y. S. 661, 75 Misc. Rep. 495.

<sup>66</sup>*Fitzgerald v. Sattler* (Neb. 1918), 168 N. W. 599.

<sup>67</sup>*Boise Development Co. v. Boise City*, 30 Idaho 675, 167 Pac. 1032.

<sup>68</sup>*Ruth v. Merrill*, 43 Okl. 764, 144 Pac. 371.

“A doubtful power is a power

denied.” *State ex rel. v. Bridges*, 97 Wash. 553, 166 Pac. 780, citing § 353, vol. 1, ante.

Without express authority the general rules of evidence cannot be changed by the local corporation. *Cohen v. St. Louis M. B. Term. Ry. Co.*, 193 Mo. App. 69, 75 (citing § 1072, vol. 3, ante); *Re Wong Hane*, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138; *Charleston v. Dunn*, 1 McCord (S. C.) 333; *Fitch v. Pinckard*, 5 Ill. 76.

Cannot regulate practice and procedure in state courts. *Badgley v. St. Louis*, 149 Mo. 122, 50 S. W. 817; *Kilroy v. St. Louis*, 242 Mo. 83, 145 S. W. 769.

Exercise of powers must not be inconsistent with the common law in force in the state, or the state's public policy. § 649, post, § 649, vol. 2, ante.

<sup>69</sup>Have implied or inherent

only. A municipal corporation is a public institution created to promote public, as distinguished from private, objects. All its powers, property and offices constitute a public trust to be administered by its municipal authorities and public servants for the time being as such public trust, and not to aid private business ventures. This familiar and salutary principle has been stated in various forms by courts of last resort of the highest character.<sup>70</sup>

The law was early declared, and never questioned, that a municipal corporation cannot use its powers or funds to encourage the establishment and operation of private manufacturing or industrial plants within or near its limits.<sup>71</sup> Nor can it aid any private manufacturing enterprise indirectly under the guise of performing municipal service.<sup>72</sup> Nor can it encourage the development of coal, natural gas and other resources of the locality by subscribing to the stock of the companies organized for such purpose.<sup>73</sup> Nor can it authorize the issuance of bonds for the purpose of loaning their proceeds to the owners of ground in the city whose buildings had been destroyed by fire, to aid in rebuilding.<sup>74</sup> Nor can it give

powers, but not as to taxation. *Ex parte Birmingham* (Ala. 1918), 79 So. 113, 116; *Boyd v. Selma*, 96 Ala. 144, 148, 11 So. 393, 16 L. R. A. 729.

<sup>70</sup> § 2170, post, § 2170, vol. 5, ante.

As clearly expressed by the Missouri Supreme Court, the members of the municipal legislative body "in the discharge of their duties do not act for themselves but for the public. They are trustees clothed with a trust, not for the corporation as such, but for the citizens and the public who have confided the authority to them." The employment of public power for any purpose other than public is a perversion of the trust and an

excess of authority." *Hitchcock v. St. Louis*, 49 Mo. 484, 488.

<sup>71</sup> *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. ed. 238; *Re Manistee Watch Co.*, 197 Fed. 455; *Southerland Ines Co. v. Evart*, 86 Fed. 579, 30 C. C. A. 305; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185.

<sup>72</sup> *Austin v. Nalle*, 85 Tex. 520, 21 S. W. 375, 22 S. W. 668.

<sup>73</sup> *Geneseo v. Geneseo Natural Gas, etc., Co.*, 55 Kan. 358, 40 Pac. 655; *Vail v. Attica*, 8 Kan. App. 688, 57 Pac. 137.

<sup>74</sup> *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Feldman & Co. v. Charleston*, 23 S. C. 57, 55 Am. Rep. 6.

its funds to charitable<sup>75</sup> or educational<sup>76</sup> institutions within the city not under the control of the municipality. Nor has a municipal corporation power to bind itself in consideration of a state institution locating in or near the city to furnish for a nominal sum (\$5) all water the institution may use for fifty years.<sup>77</sup>

The above examples are sufficient to illustrate the universal doctrine that the powers of the municipal corporation must be employed alone for public purposes or objects. Aiding manufacturers is not such public purpose. As observed by the Supreme Court of the United States: "If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steam-boat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."<sup>78</sup>

### § 360. Implied power to enact ordinances.

The authority to pass an ordinance must be found in some grant of power either expressly given or necessarily implied for the proper and effective execution of some power expressly granted.<sup>79</sup> Thus under general

<sup>75</sup> *Hitchcock v. St. Louis*, 49 Mo. 484, 488; *State ex rel. Orr v. New Orleans*, 50 La. Ann. 880, 24 So. 666.

<sup>76</sup> *Jenkins v. Anderson*, 103 Mass. 74; *Curtis v. Whipple*, 24 Wis. 350.

<sup>77</sup> *Eastern Illinois Normal School v. Charleston*, 271 Ill. 602, 607, 111 N. E. 573, affirming 193 Ill. App. 600.

<sup>78</sup> *Citizens' Savings and Loan Association v. Topeka*, 20 Wall.

(87 U. S.) 655, 665, 22 L. ed. 455.

See § 363, post; § 363, vol. 1, ante; § 2171, vol. 5, ante.

<sup>79</sup> *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825, 827; *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *People v. Paynter*, 197 Ill. App. 78, 81; *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378.

"The power of the city to pass an ordinance must be found in its charter in express terms, or it must

powers, it has been held that, a municipal corporation has implied authority in police control, by ordinance, to penalize acts which are already punishable by statute where the exigencies of municipal life seem to require more rigid regulations than is required in the state at large.<sup>80</sup> But a clause in a section, for example, relating to police powers, granting authority to pass and enforce all necessary police ordinances, it was held, applied only to such ordinances as are necessary to enable the city to exercise the powers enumerated in the other clauses of the section.<sup>81</sup> And so under a general grant of power to preserve health and suppress disease, it was held there existed no implied power to pass a compulsory vaccination ordinance.<sup>82</sup> A municipal corporation has no inherent or implied power to pass an ordinance exacting a license to conduct the game of golf.<sup>83</sup>

### § 363. Appropriations as donations forbidden.<sup>84</sup>

be necessary in order to carry out the powers expressly granted, or be essential and not simply convenient to the declared objects and purposes of the corporation." *Marion v. Criolo*, 278 Ill. 159, 115 N. E. 820; *Eastern Illinois Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573, L. R. A. 1916D, 991; *Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285; *Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192; *Chicago v. M. & M. Hotel Co.*, 248 Ill. 264, 93 N. E. 753; *Chicago v. Weber*, 246 Ill. 304, 92 N. E. 859, 34 L. R. A. (N. S.) 306, 2 Ann. Cas. 359.

All doubt is resolved against the exercise of the power. *Ex parte Farley* (Tex. Civ. App.), 144 S. W. 530.

<sup>80</sup> *Guidoni v. Wheeler*, 230 Fed. 93, 96, 144 C. C. A. 391.

<sup>81</sup> *Marion v. Criolo*, 278 Ill. 159, 115 N. E. 820.

<sup>82</sup> *Waldschmit v. New Braunfels* (Tex. Civ. App.), 193 S. W. 1077.

No such power will arise by implication. *Morris v. Columbus*, 102 Ga. 802, 30 S. E. 854, 46 L. R. A. 180, 66 Am. St. Rep. 243.

Such power will not support an ordinance "which makes vaccination a condition precedent to the right to an education." *People ex rel. v. Board of Education*, 234 Ill. 422, 425, 84 N. E. 1046, 17 L. R. A. (N. S.) 712, 14 Ann. Cas. 943; *Mathews v. Board of Education*, 127 Mich. 538, 86 N. W. 1040, 54 L. R. A. 737.

<sup>83</sup> *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825.

<sup>84</sup> § 185, ante; § 2171, post.

*Hospital Le Bourgeois v. New Orleans* (La. 1919), 82 So. 268.

Cannot donate its property to a public library of a school district within its limits. *Cleveland v.*



**§ 366. Expenditures to obtain or oppose legislation.<sup>85</sup>**

Cleveland Public Library Board, 94 Ohio 311, 114 N. E. 247.

Donation to secure the location of a state institution held not a "corporate purpose." If institution would locate, city would give it water for fifty years for \$5 per year. *Eastern Illinois State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573, affirming 193 Ill. App. 600.

**Pensions** to city employees including policemen except for firemen is against the policy of Missouri. *State ex rel. v. Kimmel*, 256 Mo. 611, 165 S. W. 1067.

**Payments to firemen** in case of injury in performance of duty, or to their representatives in event of death, sustained. *Hammond v. Fulton*, 220 N. Y. 337, 115 N. E. 998, Ann. Cas. 1917C, 1137, reversing 163 N. Y. S. 51.

**Act to legalize acts of village** in contracting for and authorizing the determination of the amount of unpaid taxes and assessments and improving methods of accounting, held not a gift, since valuable services were rendered. *Gaynor v. Port Chester*, 160 N. Y. S. 978, 985, 174 App. Div. 122.

"The city as such has no property interest in the streets in which it has a fee. Even if it owned the fee in such streets such fee would not be such a property right as would be protected by the above clause of the constitution." *McCutcheon v. Buffalo Terminal Station Com.*, 154 N. Y. S. 711, 719, affirming 150 N. Y. S. 850.

**Witnesses fee** for the benefit of

a police relief association, held unconstitutional as creating a pension fund out of public moneys, and also as making grant of public moneys. *State ex rel. v. Kimmel*, 256 Mo. 611, 165 S. W. 1067.

<sup>85</sup> **Expenses of mayor** in appearing at the instance of the city before members of congress to advance legitimate arguments to obtain appropriations for repairing and strengthening levees at Cairo. "An agreement which is contingent upon obtaining certain legislation is void," the court admitted. The mayor claimed on portion of "proper, necessary and suitable expenses incurred in connection with three trips to Washington." If Congress had not made appropriation the burden would have been on city. "The city, therefore, had the undoubted right to authorize its chief executive to appear before the various congressional committees and interview the members of congress to urge upon them the claims of the city and to advance any legitimate argument in favor of the passage of an appropriation bill for the relief of the city in this respect. Having undoubtedly the right to intercede with the members of Congress and to appear before its committees through its authorized agent it must follow that the city undoubtedly has the right to pay the necessary and legitimate expenses of its agent in presenting its claim to the members of Congress." *Meehan v. Parsons*, 271 Ill. 546, 111 N. E. 529, reversing 194 Ill. App. 131.

### § 367. Miscellaneous illustrations of implied powers.<sup>86</sup>

Power to build a new city hall, is implied authority to discontinue the use of an old city hall, also, implied power to use in aid of building the new city hall, money realized from the sale of the old city hall.<sup>87</sup> Power to manage and control the finances and all the property of the city, is authority to sell a cause of action acquired by compensation of the widow of an injured city employee.<sup>88</sup> Independent of statute by virtue of, and as incident to, the ordinary power given it by statute as such municipal corporation, and as necessary to a proper exercise of its functions as such corporation, a town, it was held, had the right to use its accumulated funds and current revenues, not otherwise appropriated, for the use of furnishing its streets, alleys, parks, or other public places and buildings with electric light.<sup>89</sup> Power to protect property against fire, and to safeguard life and property, is authority to offer a reward for the arrest and conviction of any one guilty of arson within the municipal area.<sup>90</sup>

### III. EXECUTION OF POWERS.

#### § 371. Method of exercise of power.

Powers "must be exercised in a reasonable, lawful and constitutional manner."<sup>91</sup> Although there is no express

<sup>86</sup> Town held to have no implied power to employ an attorney. *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.

<sup>87</sup> *Marshall v. Meridian*, 103 Miss. 206, 60 So. 135.

<sup>88</sup> *Sandek v. Milwaukee El. Ry. & Light Co.*, 163 Wis. 579, 157 N. W. 579.

<sup>89</sup> *Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393, following *Crawfordsville v. Braden*, 130 Ind. 150, 152, 153, 28 N. E. 849, 14 L. R. A. 268, 30 Am. St. Rep. 214, and *Rushville Natural Gas Co. v.*

*Rushville*, 121 Ind. 206, 23 N. E. 72, 6 L. R. A. 315, 16 Am. St. Rep. 388.

See § 1783, vol. 4, ante.

<sup>90</sup> *Choice v. Dallas* (Tex. Civ. App. 1919), 210 S. W. 753.

<sup>91</sup> *Kilcullen v. Webster* (Pa. 1918), 103 Atl. 592.

Initiative and referendum. *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775.

Obviously legislative powers must be exercised for the public benefit, but that does not authorize a municipality to sell or bar-

limitation on the grant of power, for example, in levying a tax or license, such power must be lawfully and reasonably exercised, within the restrictions of the state and federal constitution and laws.<sup>92</sup> In determining whether a power has been granted the presumption is against the corporation, but in determining whether a municipal corporation is properly exercising a granted power the presumption is in favor of the corporation, and to enjoin it from so doing it must be made to appear clearly that it is abusing its discretion.<sup>93</sup> "It is within the legislative province to direct in what way, through what board of municipal officers or agents, or by what municipal officers the powers given shall be exercised. Authority to distribute and regulate the exercise of a power is not equivalent to an authority to enlarge a power already existing."<sup>94</sup>

When the mode of the execution of the power is pointed out in the grant that mode must be pursued in all substantial particulars.<sup>95</sup> So when the charter

gain legislation as a means of obtaining revenue, e. g., vacating an alley. *Pease v. Rockford City Traction Co.*, 279 Ill. 445, 117 N. E. 81, reversing 203 Ill. App. 336.

<sup>92</sup> "It should not be so exercised as to deprive any person of property without due process of law, or so as to deny to any person the equal protection of the laws, or so as to encroach upon the dominant authority of Congress to regulate interstate and foreign commerce, or so as to impose a tax or burden upon interstate commerce or the means employed by the government of the United States to execute its constitutional powers." *Ferguson v. McDonald*, 66 Fla. 494, 497, 498, 63 So. 915.

<sup>93</sup> *Waldschmit v. New Braunfels* (Tex. Civ. App.), 193 S. W. 1077, 1080.

<sup>94</sup> *Cleveland v. Watertown*, 222 N. Y. 159, 118 N. E. 500.

<sup>95</sup> *Shaford v. Missoula*, 49 Mont. 269, 141 Pac. 544, 547; *State Board of Control v. Buckstegge*, 18 Ariz. 277, 158 Pac. 837, 839; *Cooper v. Middletown*, 56 Ind. App. 374, 105 N. E. 393, 395.

In the exercise of granted powers the law granting must be followed. *Webb City v. Aylor*, 163 Mo. App. 155, 163, 147 S. W. 214.

Where the act authorized the city to do the particular thing in a way prescribed, an ordinance will not be held void as unreasonable, or contrary to public policy. *Indianapolis v. College Park Land Co.* (Ind. 1918), 118 N. E. 356.

"The act of incorporation is to them (corporations) an enabling act; it gives them all the powers they possess; it enables them to

or law applicable prescribes the mode of exercising the power, e. g., of contracting, that mode must be observed. So in ratifying an unauthorized contract, the mode for making must be followed. Nor is there any material difference in this respect between the powers of a municipal corporation when acting in its political and governmental capacity, and when acting with reference to its private property.<sup>96</sup>

"In the absence of any mode prescribed by law, the council may in its discretion, exercise its power in any usual and appropriate manner."<sup>97</sup> The rule of strict construction is not applied to the mode chosen by the municipal corporation executing a power plainly granted, where the law is silent as to the mode.<sup>98</sup>

### § 373. When ordinance necessary to exercise power.<sup>99</sup>

### § 375. Same subject—self-enforcing charter provisions.

Self-enforcing provisions, it is plain, require no legislation,<sup>1</sup> but where merely a grant of power is made, to

contract, and when it prescribes to them a mode of contracting they must observe that mode, or the instrument, no more creates a contract than if the body had never been incorporated." *Head v. Providence Ins. Co.*, 2 Cranch (U. S.) 156, 2 L. ed. 229, per Chief Justice Marshall.

<sup>96</sup> *Astoria v. American La France Fire Engine Co.*, 225 Fed. 21, 139 C. C. A. 80, reversing 218 Fed. 480.

<sup>97</sup> *Kendricks v. Machin* (Ark. 1918), 205 S. W. 815, 817.

Method not prescribed. *Merrell v. St. Petersburg* (Fla. 1917), 76 So. 699.

When law does not prescribe the manner, the mode adopted must be reasonable. *Central Life Assurance Soc. v. Des Moines* (Iowa 1919), 171 N. W. 31.

<sup>98</sup> *Brenham v. Holle & Seelhorst* (Tex. Civ. App.), 153 S. W. 345.

<sup>99</sup> See §§ 633-636, post; §§ 633-636, vol. 2, ante.

"Permanent regulations for the government of the borough and the creation of liability by contract generally are regarded as of a legislative character; the ordinary administration of municipal affairs, the awarding of contracts which had been previously authorized and the transaction of routine business are ministerial or executive rather than legislative." *Jeffreys v. Versailles*, 55 Pa. Super. Ct. 85.

<sup>1</sup> *State ex rel. v. White*, 36 Nev. 334, 136 Pac. 110, 50 L. R. A. (N. S.) 195, 199, 200, quoting with approval from § 375, vol. 1, ante, per Talbot, C. J., in concurring opinion.

make such power effective, it is equally plain, that appropriate legislation is essential.<sup>2</sup>

**§ 376. Judiciary will not control the exercises of discretionary powers.<sup>3</sup>**

The latest judicial judgments uniformly affirm the general rule, early established and uniformly maintained, that courts will not disturb the exercise of discretionary powers by municipal authorities, unless so clearly unreasonable as to constitute an abuse of discretion.<sup>4</sup> Thus where a municipal board is authorized to do a particular act in its discretion the courts will not control that discretion unless manifestly abused, nor inquire into the propriety, economy and general wisdom of the undertaking, or into the details of the manner adopted to carry the matter into execution.<sup>5</sup> And where a municipality is duly authorized to exercise a particular function (e. g., issue bonds for municipal purposes), and the manner of the exercise of authority is not defined by

<sup>2</sup> Act authorizing municipal corporations in the anthracite regions to create a bureau of mine inspection and surface support, held act depended upon the affirmative action of the municipal corporation by ordinance. *Scranton City v. Rose*, 60 Pa. Super. Ct. 458.

<sup>3</sup> *Alabama. Horton v. Southern Ry. Co.*, 173 Ala. 231, 55 So. 531, 534.

*Arkansas. Pierce Oil Corp. v. Hope*, 127 Ark. 38, 191 S. W. 405.

*Colorado. Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816.

*Illinois. Mortell v. Clark*, 272 Ill. 201, 111 N. E. 993; *Leonard v. Garland*, 190 Ill. 216, letting contracts for public work.

*Indiana. Windle v. Valparaiso*, 62 Ind. App. 342, 113 N. E. 429.

*Louisiana. State ex rel. v. St.*

*Louis I. M. & S. Ry.*, 138 La. 714, 70 So. 621.

*Ohio. Newark Natural Gas & F. Co. v. Newark*, 92 Ohio St. 393, 111 N. E. 150, affirming 3 Ohio App. 383, 35 Ohio Cir. Ct. R. 94.

*S. Dakota. Mobridge v. Brown*, 39 S. D. 270, 164 N. W. 94.

<sup>4</sup> *State v. Stafles*, 157 N. C. 637, 73 S. E. 112; *Burns v. Nashville* (Tenn. 1920), 221 S. W. 828, 846, quoting with approval first paragraph of § 376, vol. 1, ante.

"It is elementary that the courts will not interfere with or overrule the action of legislative bodies of municipalities except in the clearest cases of abuse of power." *Re Christy*, 15 N. Y. S. 39, 92 Misc. Rep. 1.

<sup>5</sup> *Chipstead v. Oliver*, 137 Ga. 483, 73 S. E. 576; *Dyer v. Martin*, 132 Ga. 445, 64 S. E. 475.

statute, but is left to the city council, the courts will not undertake to control the manner of the exercise of the authority by the city council where no applicable rule of law is violated, and the authority given is not exceeded or abused.<sup>6</sup>

The general doctrine is clearly outlined in a Connecticut decision. "With the exercise of discetionary powers, courts rarely, and only for grave reasons interfere. These grave reasons are found only where fraud, corruption, improper motives or influence, plain disregard of duty, gross abuse of power or violation of law, enter into and characterize the result. Difference in opinion or judgment is never a sufficient ground for interference." Municipal bodies exercise an authority delegated by the legislature "which carries with it corresponding duties, and vests the delegated body with the right and duty to exercise the discretion and judgment incidental to the proper performance of what is delegated."<sup>7</sup>

The judicial decisions are replete with apt illustrations. For example, where a municipality has express power to do the thing involved (the enactment of a particular ordinance) the opinion of the court against such grant of power will not justify a judicial declaration adverse to the validity of such act.<sup>8</sup> Other instances are: Disbursement of the public funds, and the administration of the municipal affairs;<sup>9</sup> matters of municipal policy, e. g., extending the waterworks system, and issuing bonds to pay therefor;<sup>10</sup> compromising and paying claims;<sup>11</sup> em-

<sup>6</sup> *Perry v. Panama City*, 67 Fla. 285, 288, 65 So. 6, per Whitfield, J., approved in *Merrell v. St. Petersburg* (Fla. 1917), 76 So. 699, 701.

<sup>7</sup> *Dailey v. New Haven*, 60 Conn. 314, 319, 22 Atl. 945, 14 L. R. A. 69, per Seymour, J.

<sup>8</sup> *Silva v. Newport*, 150 Ky. 781, 150 S. W. 1024.

<sup>9</sup> *Bentonville v. Browne*, 108 Ark. 306, 158 S. W. 161; *Browne v. Ben-*

*tonville*, 94 Ark. 80, 126 S. W. 93.

Street committee in buying lumber. *American Hardwood Lumber Co. v. Benton*, 132 Ark. 41, 200 S. W. 276.

<sup>10</sup> *Hibbard v. Barker*, 84 Kan. 848, 115 Pac. 561, 563.

<sup>11</sup> *Re Christy*, 155 N. Y. S. 39, 92 Misc. Rep. 1.

Section 2479 et seq., post; § 2479 et seq., vol. 5, ante.

ployment of an attorney for special service for the city;<sup>12</sup> dividing city into wards;<sup>13</sup> advisability or wisdom of annexing territory;<sup>14</sup> vacating streets and alleys;<sup>15</sup> determining what part of public street shall be open for travel, as to width;<sup>16</sup> granting franchises for the public benefit, e. g., to construct and operate a street railway in the streets;<sup>17</sup> the propriety, time, manner and terms of municipal contracts;<sup>18</sup> selecting site for and contract-

<sup>12</sup> *Charleston v. Littlepage*, 73 W. Va. 156, 80 S. E. 131.

<sup>13</sup> *State ex rel. v. Milwaukee*, 150 Wis. 616, 138 N. W. 76.

<sup>14</sup> *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N. W. 725, 727.

An ordinance for the extension of city limits is presumed to be valid and reasonable until that presumption is overthrown by evidence which clearly shows the contrary, and courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion. *Hislop v. Joplin*, 250 Mo. 588, 599, 157 S. W. 625.

<sup>15</sup> *Hill v. Kimball*, 269 Ill. 398, 110 N. E. 18, 21, citing § 1402, vol. 3, ante.

<sup>16</sup> *Wallin v. Mitchell*, 200 Ill. App. 324.

<sup>17</sup> *Little Rock Ry. & Electric Co. v. Dowell*, 101 Ark. 223, 142 S. W. 165, holding that courts cannot take away the discretion vested in the municipal authorities. Courts can control only an arbitrary abuse of power. When questioned, the presumption is that the council acted in good faith, in the public interest, without abuse of discretion. Any other rule would be a substitution of the discretion of the court for that of the council,

that is, a usurpation by the judiciary of legislative powers.

<sup>18</sup> Whether a contract contemplated is a good business proposition, e. g., building a railroad. *Pearce v. Roseburg*, 77 Or. 195, 150 Pac. 855, 860.

Providing for the installation and maintenance of a sanitary system of sewers, drains and closets, with penalties for their enforcement. *Spear v. Ward* (Ala. 1917), 74 So. 27.

The propriety or wisdom of making municipal contracts are not within the power of courts to determine, e. g., contract for the building and leasing of subways. *Admiral Realty Co. v. New York*, 206 N. Y. 110, 99 N. E. 241, affirming 135 N. Y. S. 384, 76 Misc. Rep. 345, 135 N. Y. S. 1097, 151 App. Div. 888, 135 N. Y. S. 1140, 151 App. Div. 890.

A presumption exists in favor of the reasonableness of an ordinance for the construction of a sewer which included a cemetery within the sewer district and taxing the cemetery property for a part of the cost of construction. The burden to establish the contrary is upon the objector to overcome the prima facie case by satisfactory evidence. *Mullins v. Mount Saint Mary's Cemetery Assn.*, 268 Mo. 691, 698, 187 S. W. 1169.

ing for the erection of school buildings thereon;<sup>19</sup> accepting work of street construction;<sup>20</sup> compelling by ordinance a railroad company to open a street through an embankment obstructing a public way;<sup>21</sup> requiring the separation of grades where a public service railroad crosses a street, and prescribing details, etc.;<sup>22</sup> determination that certain kinds of street obstruction are nuisances and regulations for abatement where done in good faith and in a reasonable manner;<sup>23</sup> prescribing conditions under which cattle may be kept within the city;<sup>24</sup> regulating the location and licensing of livery stables;<sup>25</sup> regulating weighing specified commodities on city scales;<sup>26</sup> regulating markets;<sup>27</sup> regulation of navigation;<sup>28</sup> an ordinance forbidding the erection of illuminating signs extending over the sidewalks a named distance from the building line;<sup>29</sup> regulating public moving van companies, and requiring statement of transactions weekly to police;<sup>30</sup> building regulations;<sup>31</sup> establishing fire limits;<sup>32</sup> dividing city into industrial and resi-

<sup>19</sup> *Chipstead v. Oliver*, 137 Ga. 483, 73 S. E. 576.

<sup>20</sup> *Lovelace v. Little*, 147 Ky. 137, 143 S. W. 1031.

<sup>21</sup> *Emporia v. Atchison, T. & S. F. Ry. Co.*, 88 Kan. 611, 161 Pac. 161.

<sup>22</sup> "Since the power to require the grade separation exists as an integral part of the police power of the city the appropriate means to its exercise must rest largely in the discretion of the city's governing body. The courts will not interfere with that discretion in the absence of a clear abuse." *Detroit v. Hindley*, 83 Wash. 322, 145 Pac. 462, 465.

<sup>23</sup> *Duncan Electric & Ice Co. v. Duncan* (Okl. 1917), 166 Pac. 1048.

<sup>24</sup> *Thorpe v. Savannah*, 13 Ga. App. 767, 79 S. E. 949, 952, citing §§ 899 and 909, vol. 3, ante.

<sup>25</sup> *Douglas v. Greenville*, 92 S. C. 374, 75 S. E. 687, citing § 910, vol. 3, ante. (*McQuillin*, Mun. Ord., § 450.)

<sup>26</sup> *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487, 490, citing § 970, vol. 3, ante.

<sup>27</sup> *Baltimore v. Wollman*, 123 Md. 310, 91 Atl. 339.

<sup>28</sup> *Canada Atlantic Transit Co. v. Chicago*, 210 Fed. 7, 126 C. C. A. 587.

<sup>29</sup> *St. Louis v. St. Louis Theatre Co.*, 202 Mo. 690, 699-701, 100 S. W. 627.

<sup>30</sup> *Lawson v. Connolly*, 175 Mich. 375, 141 N. W. 623.

<sup>31</sup> *Aitschul v. Ludwig*, 216 N. Y. 459, 111 N. E. 216, affirming 155 N. Y. S. 1091.

<sup>32</sup> *Mansfield v. Herndon*, 134 La. 10, 63 So. 606.



dence districts, and forbidding the conducting of specified classes of business in the latter, without discrimination.<sup>33</sup>

Finally, the rule that courts will not look closely into mere matters of judgment where there may be a reasonable difference of opinion, and the further rule that ordinances are presumed to be valid and reasonable until that presumption is overthrown by evidence which clearly shows the contrary are uniformly sustained by current decisions.<sup>34</sup>

### § 378. Limitations of rule of non-judicial interference.

Courts will interfere to keep municipal authorities within the law.<sup>35</sup> They will interpose to prevent any municipal action "which is *ultra vires* because of some constitutional impediment or lack of antecedent legislative authority, or because the action is so arbitrary, capricious, unreasonable and subversive of private rights as to indicate a clear abuse rather than a *bona fide* exercise of power."<sup>36</sup> However, in all such cases, it must be shown that the actions taken or sought to be taken, or the regulations made or in contemplation, are unreasonable, unduly oppressive, arbitrary, inconsistent with the policy of the state, or interfere with personal and property right, within the meaning of the organic law.<sup>37</sup>

<sup>33</sup> Ex parte Quong Wo, 61 Cal. 220, 118 Pac. 714.

<sup>34</sup> Collins v. A. Jaicks (Mo. 1919), 214 S. W. 391, 393, 394.

<sup>35</sup> Attorney General v. Thompson, 167 Mich. 507, 133 N. W. 532.

<sup>36</sup> Emporia v. Atchison T. & S. F. Ry. Co., 88 Kan. 611, 129 Pac. 161.

Courts will restrain prosecution under void ordinances. Chan Sing v. Astoria, 79 Or. 411, 155 Pac. 378; Spaulding v. McNary, 64 Or. 491, 130 Pac. 391.

Arbitrary or oppressive restrictions, having no reasonable adapta-

tion in promoting the public health, safety or comfort, as to the use of property or the conduct of legitimate business, will be prevented by the courts as contravening fundamental constitutional rights. Ex parte Barmore (Cal. 1917), 163 Pac. 50, L. R. A. 1917D, 688.

"Where the case be plain that needless oppression is worked and constitutional rights invaded." Re Smith, 143 Cal. 368, 372, 77 Pac. 180, 182.

<sup>37</sup> Spear v. Ward (Ala. 1917), 74 So. 27; Ex parte Hadacheck, 165 Cal. 416, 132 Pac. 584.

Familiar instances are: Unreasonable, arbitrary and oppressive ordinances,<sup>38</sup> unreasonable discriminations in license ordinances, as failure to provide a uniform rule thus depriving one of property without due process of law, or denying equal protection of the laws;<sup>39</sup> vesting unrestrained arbitrary discretion in the legislative body,<sup>40</sup> or an executive or administrative officer in issuing permits;<sup>41</sup> arbitrary declarations as to nuisances, as that the use of particular property constitutes a nuisance.<sup>42</sup>

Courts will inquire as to what are the corporate limits established, and whether in extending corporate limits, legislative authority has been exceeded, and also as to the validity of the proceedings.<sup>43</sup>

Some courts have declared that contracts between municipalities and public service corporations, involve matters of public interest, and are subject to the supervision of the courts.<sup>44</sup> "The interests of the public demand that

<sup>38</sup> *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378.

Courts may declare any ordinance void "if in itself or because of the peculiar facts and circumstances which gave rise to its adoption, or with reference to which it must be enforced, it will be unreasonable and oppressive in its operation." *Berger v. Smith*, 160 N. C. 205, 75 S. E. 1098, 1102, 156 N. C. 323, 72 S. E. 376.

The reasonableness of the exercise of the power conferred where the grant of power does not prescribe the mode of its exercise, e. g., an ordinance regulating the operation of moving picture theaters. *North Little Rock v. Rose* (Ark. 1918), 206 S. W. 449, 452.

Ordinance regulating the manufacture, distribution and use of medicines and drugs (whether in requiring certificate forces one to

give evidence against himself for use in criminal prosecution) is open to judicial scrutiny. *Fongera & Co. v. New York*, 166 N. Y. S. 248, 178 App. Div. 824.

<sup>39</sup> *Ideal Tea Co. v. Salem*, 77 Or. 182, 150 Pac. 852.

See § 998, post.

<sup>40</sup> *Richmond v. Model Steam Laundry*, 111 Va. 758, 69 S. E. 932.

<sup>41</sup> § 998, post.

<sup>42</sup> *Palmberg v. Kinney*, 65 Or. 220, 132 Pac. 538, 540.

<sup>43</sup> *Red River Valley Brick Co. v. Grand Forks*, 27 N. D. 8, 145 N. W. 725, 727; *Glaspell v. Jamestown*, 11 N. D. 86, 88 N. W. 1023.

<sup>44</sup> *Slade v. Lexington*, 141 Ky. 214, 132 S. W. 404, 32 L. R. A. (N. S.) 201; *Schmidt v. Louisville & Nashville R. Co.*, 101 Ky. 441, 41 S. W. 1015.

all such contracts be made with due regard to the interest and welfare of the public, and are to a greater or less degree necessarily subject to the supervision of the court.' 45

### § 381a. Distinction between mandatory and directory powers.

If omission to observe the provision of law applicable renders the action taken void the power is mandatory, but if such omission does not invalidate the action taken it is directory. The form taken in the exercise of the power is not important; it is the intention that controls. Nor are the words alone of the particular provision necessarily controlling. The purpose of the law, the ends in view, the consequences of observing or the failure to observe, whether rights will be impaired, the time and manner of complying, must all be considered in ascertaining the precise nature of the power, whether mandatory or directory.<sup>46</sup>

### § 382. Public powers cannot be surrendered or delegated.<sup>47</sup>

Numerous instances of the practical application of this familiar and fundamental rule are furnished by late judicial decisions, especially concerning the exercise of the police power.<sup>48</sup> For example, a municipality cannot

<sup>45</sup> McKnight v. Broadway Inv. Co., 147 Ky. 535, 547, 145 S. W. 377, 383, declaring inapplicability of Bates v. Harris, 144 Ky. 399, 138 S. W. 276.

<sup>46</sup> Bond v. Baltimore, 118 Md. 159, 84 Atl. 258; Upshur v. Baltimore, 94 Md. 743, 51 Atl. 953; Baltimore v. Gorter, 93 Md. 26, 48 Atl. 454.

<sup>47</sup> Lotspeich v. Morristown, 141 Tenn. 113, 207 S. W. 719, 721, quoting with approval greater part of § 382, vol. 1, ante.

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City cannot by ordinance surrender its power so that it cannot exercise them in the future. Superior v. Roemer, 154 Wis. 345, 141 N. W. 250.

Board of education cannot abdicate or surrender any of its powers to the electors. Molacek v. White, 31 Okl. 693, 122 Pac. 523, 525, quoting with approval from § 382, vol. 1, ante.

<sup>48</sup> Helena Light & Ry. Co. v. Helena, 47 Mont. 18, 130 Pac. 446. Police power, cannot be bartered

divest itself of power vested in it to regulate rates of public service companies.<sup>49</sup> Another illustration is: A contract between a city and a railroad which provided that whenever the city should direct that a street be carried over the tracks of the company by a bridge the company should build the abutments of the bridge and the superstructure over its tracks, and that the city should build the approaches thereto and should maintain the bridge and keep it in repair, was held void as a clear attempt to take from the city part of its police powers.<sup>50</sup> And so under power to erect an opera house on property belonging to the city, a contract with a private person to erect the building which was thereafter to be managed by trustees, a majority of whom the city was not to appoint, and whose actions the city was not to control, was held void.<sup>51</sup>

away by express contract. *Maguire v. Reardon* (Cal. App. 1919), 183 Pac. 303.

Neither the state nor municipality can surrender or bargain away the police power, e. g., abrogate the power of enacting law forbidding burials in places when they constitute a public nuisance. *Union Cemetery Assn. v. Kansas City*, 252 Mo. 466, 504, 161 S. W. 261.

*Humphreys v. Pratt Board of Comrs.*, 93 Kan. 413, 144 Pac. 197, holding may provide for lighting city, although a private corporation is supplying such service.

Regulating the storing of gasoline. *Pierce Oil Corporation v. Hope*, 127 Ark. 38, 191 S. W. 405.

Discretion in granting or refusing license for junk shop. *Milwaukee v. Ruplinger*, 155 Wis. 39, 145 N. W. 42.

Discretion as to granting or refusing license for dance hall. *Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882.

<sup>49</sup> *Ft. Smith Light & Traction Co.*

*v. Ft. Smith*, 202 Fed. 581, 584; *Cedar Rapids Gas-Light Co. v. Cedar Rapids*, 223 U. S. 655, 32 Sup. Ct. 389, 56 L. ed. 594, affirming 144 Ia. 426, 120 N. W. 966, 138 Am. St. Rep. 299; *Puget Sound Traction, etc., Co. v. Reynolds*, 223 Fed. 371, 375, declaring that a municipal corporation cannot barter away the police power of the state by unalterably fixing rates and fares during the life of a franchise, unless specifically and expressly authorized so to do by the supreme legislative authority of the state, relying on *Home Telephone Co. v. Los Angeles*, 211 U. S. 265, 272, 29 Sup. Ct. 50, 51, 53 L. ed. 176, and *Portland Ry., etc., Co. v. Portland*, 201 Fed. 119.

<sup>50</sup> *State ex rel. v. Great Northern Ry. Co.*, 134 Minn. 249, 158 N. W. 972, 974.

Compare *Chicago v. Chicago & Western Ind. R. Co.*, 174 Ill. App. 452, 471.

<sup>51</sup> *Egan v. San Francisco*, 165 Cal. 576, 133 Pac. 294.

**§ 383. Powers and duties imposed upon particular departments or officers cannot be delegated.<sup>52</sup>**

Whenever a power is conferred upon a municipal corporation by the legislature and no officer or person is expressly authorized to exercise such power, the common council as the general agent of the municipality, is the only authority which can exercise it.<sup>53</sup>

**§ 384. Legislative authority cannot be delegated.<sup>54</sup>**

The early well settled rule, uniformly enforced, forbidding the delegation of legislative authority, does not

<sup>52</sup> *People ex rel. v. Miller*, 176 N. Y. S. 398.

For example, powers of a city council or board of trustees. *Commonwealth Water Co. v. Castleton*, 171 N. Y. S. 542, 546.

Powers of a city council cannot be delegated to the mayor and a commission. *Louisville v. Parsons*, 150 Ky. 424, 150 S. W. 498.

Powers entrusted to commissioners of finance, in disposing of stock to raise money, held not an unlawful delegation. *Bond v. Baltimore*, 118 Md. 159, 84 Atl. 258.

A grant of power to a water board to make regulations as to laying out and tapping of pipes, etc., held not an unlawful delegation. *Lee v. Leitch*, 131 Md. 30, 101 Atl. 716, 721.

Police powers may be delegated to boards and officers to enforce. *Brown v. Stubbs*, 128 Md. 129, 97 Atl. 227; *Downs v. Swann*, 111 Md. 53, 73 Atl. 653, 23 L. R. A. (N. S.) 739, 134 Am. St. Rep. 586.

Arbitrary power to inspector of slaughter house. *Noe v. Morris-ton*, 128 Tenn. 350, 161 S. W. 485.

Power to remove vested in city council cannot be delegated. "Up-

on familiar principles the power given the common council to remove cannot by it be delegated to another body nor to a committee of its own members. Such power must be exercised by itself." *State ex rel. v. Milwaukee*, 157 Wis. 505, 509, 510, 147 N. W. 50, 52, citing § 563, vol. 2, ante.

Hearing before a council committee is not a trial as contemplated by law. *Darmstatter v. Passaic*, 81 N. J. L. 162, 165, 79 Atl. 545.

*Lotspeich v. Morristown*, 141 Tenn. 113, 207 S. W. 719, 721, quoting with approval the greater part of § 383, vol. 1, ante, and holding power to contract vested in the mayor and legislative body, could not be exercised by the mayor alone, although directed so to contract by resolution of such body.

<sup>53</sup> *Crouch v. Commonwealth*, 172 Ky. 463, 469, 189 S. W. 698.

Public works; entire subject sometimes vested in the council, to be exercised under legal limitations, *Milwaukee v. Raulf*, 164 Wis. 172, 159 N. W. 819.

<sup>54</sup> *Telford v. Belknap*, 126 Ky.

preclude the appointment of administrative agents for

244, 31 Ky. L. Rep. 662, 103 S. W. 289, 11 L. R. A. (N. S.) 708; *Bigelow v. Springfield*, 178 Mo. App. 463, 473, 162 S. W. 750; *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, 143.

The establishment of the grade of a sidewalk is a legislative function to be exercised by the council, and such power cannot be delegated to a committee or other officer of the city. *Staunton v. Bond*, 281 Ill. 568, 118 N. E. 47; *People v. Meertz*, 267 Ill. 210, 108 N. E. 57.

Ordinance giving discretion to chief of police to grant or refuse permission to excavate in streets, etc., held unlawful delegation of power. *Talladega v. Sims*, 8 Ala. App. 471, 62 So. 958, citing § 728, vol. 2, ante. (*McQuillin Mun. Ord.*, § 184.)

"The rule seems to be well settled that, so far as the powers of a municipal corporation are legislative they rest in the discretion and judgment of the municipal body intrusted with them, and the general rule is that that body cannot delegate or refer the exercise of such powers to the judgment of a committee." *Lotspeich v. Morristown*, 141 Tenn. 113, 207 S. W. 719, 721, quoting with approval parts of §§ 384 and 385, vol. 1, ante.

Ordinance forbidding erection of poles and wires or other fixtures in streets and alleys without permission of mayor and street committee, held attempted delegation of street regulation which by law is vested in the council. *Sullivan v. Cloe*, 277 Ill. 56, 115 N. E. 135.

A committee was created by a city council to employ an attorney. An agreement between the committee and attorney that his fee should be the same as that fixed by the adverse attorney was held void as delegating power to fix the fee. *Oglesby v. Fort Smith*, 105 Ark. 506, 152 S. W. 145.

Ordinance requiring purchaser of deadly weapons to obtain a permit from the chief of police on the presentation of proof of good character, was held not a delegation of legislative authority. *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182.

Ordinance creating a board to ascertain qualifications of applicants for stationary engineers, and if found qualified the board issues a certificate which is to be presented to the city treasurer who issues the licenses, was held not a delegation of legislative authority. *People v. Fournier*, 175 Mich. 364, 141 N. W. 689.

Board of education may determine what taxes within named limits are required to support the schools, where the taxes are to be levied by the authorities designated by law. *Taylor v. Greensboro*, 175 N. C. 423, 95 S. E. 771.

Charter required council "to determine the character, kind and extent" of the improvement, held such authority cannot be delegated to city engineer. *Bolton v. Gileran*, 105 Cal. 244, 247, 38 Pac. 881, 45 Am. St. Rep. 33; *Miller v. Portland*, 78 Or. 165, 169, 151 Pac. 728. But a preliminary resolution to further council action, as direction to the engineer to submit

the performance of administrative duties in making effective the legislative will.<sup>55</sup>

two or more kinds of paving, at least one of which is to be a non-patentable kind, the probable cost of each kind and the amount of work required to be done, is not an unlawful delegation where the engineer in pursuance to the direction submits a report, and thereupon the council proceeds as the law commands, accepts a bid, and by ordinance specifies work to be done. *Lawrence v. Portland*, 87 Or. 586, 167 Pac. 587.

An ordinance declaring that wooden or combustible buildings shall not be constructed within certain limits without special permission of the mayor and council and that such permission is not to be granted unless the application therefor is accompanied by a written consent of all persons owning property within the block in which such proposed building is to be erected or placed, was held void, because it constitutes a delegation of legislative powers to such property owners. *Hays v. Poplar Bluff*, 263 Mo. 516, 536, 173 S. W. 676, L. R. A. 1915D, 595.

*State v. Withnell*, 78 Neb. 33, 110 N. W. 680, 8 L. R. A. (N. S.) 978, 126 Am. St. Rep. 586, declaring such ordinance unreasonable and a delegation of legislative power to adjoining owners for the use of property for a proper purpose was made to depend on the caprice, or malice, or favoritism, or ignorance of adjoining owners who may be inaccessible or non-residents, and whose mere inaction is effective.

Ordinances requiring consent of owners of adjoining property to erect a garage is unreasonable, because not uniform and is a delegation of legislative power, etc. *Dangel v. Williams*, Del. Ch. (1916), 99 Atl. 84.

Ordinances requiring consent of adjoining owners to establish laundry, held unreasonable and an unwarranted interference with the right to use property. The right to use property "cannot be thus made to rest upon the caprice of a majority or any number of those owning property surrounding that which he desires to use." *Ex parte Sing Lee*, 96 Cal. 354, 359, 31 Pac. 245, 247, 24 L. R. A. 195, 31 Am. St. Rep. 218.

Contra. "The operation of the ordinance is made to depend upon the fact of the consent of a majority of the lot owners, but the ordinance is complete in itself as passed." *Chicago v. Stratton*, 162 Ill. 494, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325; *People v. Ericsson*, 263 Ill. 369, 105 N. E. 315, L. R. A. 1915D, 607, Ann. Cas. 1915C, 183; *People v. Oak Parks*, 266 Ill. 366, 107 N. E. 636.

<sup>55</sup> *State ex rel. v. Cincinnati St. Ry. Co.*, 97 Ohio 283, 119 N. E. 735.

No legislative duty is delegated to a ministerial officer in an improvement ordinance providing the street commissioner should make certain estimates, etc. *Gallatin v. Netherton*, 189 Mo. App. 24, 176 S. W. 495.

**§ 387. Ministerial duties may be delegated.**

While legislative or discretionary powers or trusts devolved by charter or law on a council or governing body, or a specified board or officer cannot be delegated to others, it is equally well established that ministerial or administrative functions may be delegated to subordinates.<sup>56</sup> The determination of questions of fact, as for example, the qualifications of an applicant as to character and competency, for a license or permit, is generally held, to be a ministerial rather than a legislative function.<sup>57</sup>

<sup>56</sup> *Jonesboro v. Montague* (Ark. 1920), 219 S. W. 309; *Lotspeich v. Morristown*, 141 Tenn. 113, 207 S. W. 719, 721, quoting with approval greater part of § 387, vol. 1, ante; *Bigelow v. Springfield*, 178 Mo. App. 463, 473, 162 S. W. 750; *Menefee v. Taubman*, 159 Mo. App. 318, 325, 140 S. W. 604; *First National Bank v. Shewalter*, 153 Mo. App. 635, 637, 134 S. W. 42.

The fixing of rent of market stalls, held administrative function and may be delegated to market clerks in Baltimore. *Baltimore v. Wollman*, 123 Md. 310, 91 Atl. 339.

Ordinance sufficiently described character of construction of aseptic tank, but details including matter of material and strength were given to city engineer, as per ordinance, held not delegation, as it was at most an irregularity. *Schueler v. Kirkwood*, 191 Mo. App. 575, 583, 177 S. W. 760.

Authority to agent of city to tear down a building constituting a nuisance, held act ministerial. The commission charter recited: "This provision shall not be con-

strued, however, so as to prevent the said board from delegating or assigning to one or more of its boards or to such boards, commissioners, officers or employees as may be created or selected by it, the performance of such executive and judicial powers and duties as may be necessary or convenient, provided the same is done by resolution, by-law or ordinance duly enacted according to the terms of this act." *Birch v. Ward* (Ala. 1917), 75 So. 566.

<sup>57</sup> Ascertaining by examination the qualifications of an applicant to serve as stationary engineer is a ministerial function. *People v. Fournier*, 175 Mich. 364, 141 N. W. 689, citing § 1028, vol. 3, ante. (*McQuillin*, Mun. Ord., § 428, p. 653).

Issuing permit by chief of police on proof of good character to purchase deadly weapons, held determination of question of fact, and not legislative function. *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182.



## CHAPTER 11.

### NATURE, CONSTRUCTION AND EXERCISE OF SPECIAL OR PARTICULAR AND MISCELLANEOUS MUNICIPAL POWERS.

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| § 391. Reward of offenders against municipal regulations.  | § 402. Power to charge and collect wharfage.                        |
| § 397. Nature of wharves and power to construct and control.   | § 404. Wharfage charge as an interference with interstate commerce. |
| § 398. Lands on navigable waters are held in trust for the public—state may grant control to municipal corporations. | § 405. Wharfage distinguished from tonnage.                         |
| § 400. Municipal corporations cannot abdicate control of wharves.  | § 406. Character of public ferries.                                 |
|  | § 407. Lease and operation of ferries.                              |

#### § 391. Rewards for offenders against municipal regulations.

The general rule is that municipal authorities have no power to offer rewards for offenders against the criminal laws of the state unless such power is expressly conferred. Power to provide for the general welfare does not include such authority.<sup>1</sup> But a reward for the arrest and conviction of one guilty of arson within the municipal area is authorized by virtue of power to protect property against fire, and to safeguard life and property.<sup>2</sup>

#### § 397. Nature of wharves and power to construct and control.

A public wharf on a navigable stream connected with public streets and in a sense an extension of such streets

<sup>1</sup> Denied in case of one charged with the murder of an inhabitant of the city. *Barrett v. Atlanta*, 145 Ga. 678, 89 S. E. 781, citing § 391, vol. 1, ante.

<sup>2</sup> *Choice v. Dallas* (Tex. Civ. App. 1919), 210 S. W. 753.

is in the eye of the law a public highway. Its character is similar. The right to the common use of it in the public is similar, and in a very just sense, the right of the city in and its duties towards it are akin to its rights and duties towards its public streets.<sup>3</sup> Charter power to "build, own, alter" and "improve \* \* \* the water front of said city," and to build and improve wharves, piers, bulkheads, retaining walls and chutes, is not authority to improve the harbor "by dredging, deepening and improving the channels and slips therein and the water front thereof," and by opening a channel to connect the harbor with another inner harbor, since the charter words "water front" do not include the waters comprising the harbor and the underlying land.<sup>4</sup>

Power to lay out, construct and condemn wharves and other terminal facilities, and to fix warehousing and port and terminal charges operated by a port district, is authority to construct, equip and operate a fish and cold storage plant and an ice manufacturing plant at one of the ocean docks erected by it, because, in the opinion of the court, this is incident to the warehousing and keeping of the product that is to be shipped while in the warehouse. The fact that such warehouse, a public utility, necessarily comes in competition with private ownership, is not a sufficient reason for denying the exercise of the power which is a right of sovereignty, exercisable either directly or by delegated authority.<sup>5</sup>

**§ 398. Lands on navigable waters are held in trust for the public—state may grant control to municipal corporations.<sup>6</sup>**

<sup>3</sup> *Hafner Mfg. Co. v. St. Louis*, 262 Mo. 621, 638, 172 S. W. 28.

<sup>4</sup> *Long Beach v. Lisenby*, 175 Cal. 575, 166 Pac. 333.

<sup>5</sup> *State ex rel. v. Bridges*, 87 Wash. 260, 151 Pac. 490.

<sup>6</sup> "A public trust in tide and submerged lands situated in a city for the purpose of establishing

thereon a harbor; improving the same, and of managing such harbor when so established for the promotion and accommodation of commerce and navigation is a trust not forbidden by any general law, but is in accordance therewith. The title to the tide-lands, the adjacent submerged lands and the

**§ 400. Municipal corporations cannot abdicate control of wharves.<sup>7</sup>**

**§ 402. Power to charge and collect wharfage.<sup>8</sup>**

In the absence of inconsistent congressional action on the subject it is competent for the municipal authorities to impose a reasonable charge for the use by vessels of wharves and other facilities furnished.<sup>9</sup> Although a municipality conveys land along a water front, and agrees that the grantees may build wharves thereon and have free use of them forever, it may charge wharfage fees to others for the landing of merchandise on the pier.<sup>10</sup> Wharfage charges have always been considered as differing from ordinary rent. It is a toll or duty for the pitching or lodging of goods upon a wharf, or pay for taking goods into a boat and from thence.<sup>11</sup> The right of a city to impose wharfage charges within its jurisdiction does not arise, it has been said, solely out of the expense which it incurs in the maintenance of the wharf. Where some improvement has been made upon the natural conditions, as riprapping upon the banks and the maintenance of artificial steps, and clear power to regulate the use of wharves and fix the rate of wharf-

control of the navigable waters within the limits of the state are vested in the state impressed with a public use for purposes of navigation and commerce. The state as trustee may manage and control such use and may improve such lands and waters in furtherance of the use. (*People v. California Fish Co.*, 166 Cal. 576, 138 Pac. 79.) "It may for the purpose commit the execution of the trust in any specified territory to a local administrative agency, such as an incorporated city possessing the necessary power. \* \* \* A city can be given power \* \* \* to improve and control a public harbor

within its limits for the promotion of navigation and commerce." *Long Beach v. Lisenby*, 175 Cal. 575, 166 Pac. 333; *Santa Cruz v. Southern Pac. R. Co.*, 163 Cal. 538, 126 Pac. 362.

<sup>7</sup> *Pittsburg v. Epping-Carpenter Co.*, 194 Pa. 318, 45 Atl. 129; *Walker v. Erie*, 64 Pa. Super. Ct. 525.

<sup>8</sup> Only reasonable charges can be exacted. *Keckevoët v. Dubuque*, 158 Ia. 631, 138 N. W. 540.

<sup>9</sup> *The Cestrian*, 240 Fed. 929, 153 C. C. A. 615.

<sup>10</sup> *Kusenbergh v. Browne*, 42 Pa. 173, 179.

<sup>11</sup> *Walker v. Erie*, 64 Pa. Super. Ct. 525.

age is conferred, it is competent to make wharfage charges.<sup>12</sup>

**§ 404. Wharfage charge as an interference with interstate commerce.**

The exercise of the power of charging and collecting reasonable wharfage is not an interference with interstate commerce. Unreasonable wharfage fees cannot be exacted.<sup>13</sup>

**§ 405. Wharfage distinguished from tonnage.**

Charges on vessels, for the use of wharves may be computed with reference to the gross tonnage, and not upon the net tonnage, which is the basis of the United States tonnage duties.<sup>14</sup>

**§ 406. Character of public ferries.<sup>15</sup>**

**§ 407. Lease and operation of ferries.**

Without appropriate grant of power a municipality cannot operate a public ferry, although such operation may stimulate local trade. This is not a municipal purpose. The power to operate ferries is in the state, and such power may be given to municipal corporations.<sup>16</sup>

<sup>12</sup> *Keckevoet v. Dubuque*, 158 Ia. 631, 138 N. W. 540.

<sup>13</sup> *Keckevoet v. Dubuque*, 158 Ia. 631, 138 N. W. 540, 547.

<sup>14</sup> *The Cestrian*, 240 Fed. 929, 153 C. C. A. 615; *The Thomas Melville*, 62 Fed. 749, 10 C. C. A. 619.

<sup>15</sup> State authorization to city to grant right to establish and maintain. *Vallejo Ferry Co. v. Salano Aquatic Club*, 165 Cal. 255, 131 Pac. 864.

<sup>16</sup> *Re Town of Woolley*, 75 Wash. 206, 134 Pac. 825.

## CHAPTER 12.

### MUNICIPAL ELECTIONS, OFFICES AND OFFICERS, EMPLOYEES AND AGENTS AND MUNICIPAL DEPARTMENTS.

- I. MUNICIPAL ELECTIONS.
- II. GENERAL CONSIDERATION CONCERNING OFFICES AND OFFICERS, SUBORDINATE AND EMPLOYEES.
- III. MUNICIPAL DEPARTMENTS, BOARDS, OFFICERS, COMMISSIONERS, ETC.
- IV. ELIGIBILITY TO HOLD PUBLIC OFFICE OR PLACE.
- V. MANNER OF SECURING OFFICE OR PUBLIC PLACE—ELECTION OR APPOINTMENT—TESTING TITLE—QUALIFYING, ETC.
- VI. DE FACTO OFFICERS.
- VII. TENURE OF OFFICERS, SUBORDINATES AND EMPLOYEES.
- VIII. POWERS AND FUNCTIONS OF OFFICERS, AND MISCELLANEOUS MATTERS INCIDENT THERETO.
- IX. SALARIES AND COMPENSATION, FEES AND COMMISSIONS.
- X. LIABILITIES OF OFFICERS.
- XI. REMOVAL AND SUSPENSION OF OFFICERS.

#### I. MUNICIPAL ELECTIONS.

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|---|---|
| § 411. Regulation of offices and officers in general.   | § 418. How is vote required to be determined? Are all of the qualified electors or only those voting at the given election to be counted. |
| § 412. How municipal elections are regulated.   |   |
| § 413. How qualification of electors prescribed.  |   |
| §§ 414-416. Time, place and mode prescribed for election—initiative, referendum, recall—irregularities. | § 419. Same — determination of vote, on a separate proposition when other issues are submitted at the same election.                      |

#### II. GENERAL CONSIDERATION CONCERNING OFFICES AND OFFICERS, SUBORDINATES AND EMPLOYEES.

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|---|---|
| § 420. Designation and classification of officers and persons in the municipal service. | § 422. Nature and elements of the terms "office" and "officer." |
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- § 423. Same—the precise manner in which the question is presented is important.
- § 424. Office distinguished from employment.
- § 428. Employee described.
- § 430. Power to create offices and situations, to fix salaries, etc.
- § 431. Same—cannot be delegated.

### III. MUNICIPAL DEPARTMENTS, BOARDS, OFFICERS, COMMISSIONERS, ETC.

- § 432. Forms of municipal organization widely vary—authority to create and abolish offices and departments.
- § 433. The mayor, his term, functions and powers.
- § 434. The department of public works or the department of public improvements.
- § 435. The water department.
- § 436. Police department.
- § 437. City marshal.
- § 438. Fire department.
- § 439. The health department.
- § 440. Law department.
- § 441. Department of education.
- § 442. Various municipal departments.

### IV. ELIGIBILITY TO HOLD PUBLIC OFFICE OR PLACE.

- § 443. Officer must possess the prescribed qualifications.
- § 444. Same—residence.
- § 445. Same—residence in ward.
- § 446. Same—elector or voter.
- § 447. Same—property owner—freeholder.
- § 449. Same—educational qualifications.
- § 450. Same—ceasing to possess the prescribed qualifications.
- § 451. Same—officer cannot hold two offices.
- § 452. Same—incompatible offices.
- § 452a. Same—removing disqualifications.

### V. MANNER OF SECURING OFFICE OR PUBLIC PLACE—ELECTION OR APPOINTMENT—TESTING TITLE—QUALIFYING, ETC.

- § 453. Manner of conferring office.
- § 454. Authority to appoint to office or situation in the public service.
- § 455. Same—only by authority named.
- § 456. Same—delegation of power to appoint or elect forbidden.
- § 457. Same—by mayor.
- § 457a. Same—self-appointment.
- § 458. Charters often prescribe that the council or common council shall have power to appoint or elect certain municipal officers.
- § 460. Restrictions—merit system—civil service laws and regulations.
- § 461. Preferences in appointments and promotions—veteran acts.
- § 461a. Preference of citizens of State.
- § 463. Manner of appointment to office.
- § 464. Commission.
- § 465. When appointment is complete it cannot be revoked.
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- § 571. Certiorari to review proceedings are sanctioned in most jurisdictions.
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## I. MUNICIPAL ELECTIONS.

## § 411. Regulation of offices and officers in general.

Constitutions,<sup>1</sup> or statutes may prescribe the election and tenure of municipal officers,<sup>2</sup> the manner of appointment, suspension and removal of subordinate officers, clerks and employees; forbid them from taking an active or managing part in partisan political affairs, and prohibit the discharge of employees for religious or political causes.<sup>3</sup>

<sup>1</sup> Tenure, in case of failure to elect fixed by Constitution, and present could hold "until the election and qualification of their successors." *Ringling v. Hempstead*, 193 Fed. 596, 113 C. C. A. 464.

Constitutional amendment schedule extending term of municipal officers to bridge channel between old and new system of governments. *Meisel v. O'Neil*, 233 Pa. 213, 82 Atl. 71.

<sup>2</sup> Legislative act in providing for advancement of class and change in form may prescribe tenure of present officers, and time of election of new. *Commonwealth ex rel. v. Langley*, 233 Pa. 222, 82 Atl. 56.

Members of board of education of named class of cities to be elected by wards. *Searcy v. State* (Okla. 1917), 167 Pac. 476.

<sup>3</sup> *Duffy v. Cooke*, 239 Pa. 427,

### § 412. How municipal elections are regulated.

Municipal elections may be provided for and regulated by general laws,<sup>4</sup> or municipal charters.<sup>5</sup> Under some constitutions, as that of Oregon, municipal elections and the choice of municipal officers are matters of local concern, and the power of regulation and selection is vested in the qualified voters of the community.<sup>6</sup>

### § 413. How qualification of electors prescribed.<sup>7</sup>

In the absence of express constitutional restriction the legislature may prescribe the qualification of municipal electors.<sup>8</sup>

Municipal charters frequently prescribed the qualifica-

86 Atl. 1076; Commonwealth ex rel. v. Hasskarl, 21 Pa. Dist. R. 119.

<sup>4</sup> Commonwealth ex rel. v. Brennan, 258 Pa. 1, 101 Atl. 947.

<sup>5</sup> Municipal charters often provide as to elections. State v. Ryan, 91 Neb. 696, 136 N. W. 1077.

City in adopting a commission form, may provide for the time and manner of elections and provide that elective officers may be five commissioners to be elected by the city at large, who shall exercise the general powers. Lackey v. State, 29 Okl. 255, 116 Pac. 913.

<sup>6</sup> State ex rel. v. Portland, 65 Or. 273, 133 Pac. 62, stating that "municipal elections and the choice of municipal officers are matters of purely local concern; and as to these the people of the city have ample power to legislate, subject only to the restrictions heretofore noted."

The constitutional provision that "cities and towns may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation," is a part of the charter of each city and town. Curtis v. Tillamook

City, 88 Or. 443, 172 Pac. 122, 171 Pac. 574.

Constitutional power to provide the manner of exercising the initiative and referendum concerning municipal legislation, is power to provide the manner of enacting a new charter. Duncan v. Dryer, 71 Or. 548, 143 Pac. 644.

Under the constitution each city may prescribe its own procedure in initiative and referendum elections. Colby v. Medford, 85 Or. 485, 167 Pac. 487, 495.

Under a constitution conferring power of initiative and referendum to electors of cities, the city council may provide by ordinance the method or plan or scheme of its exercise in municipal legislation. Curtis v. Tillamook City, 88 Or. 443, 171 Pac. 574.

<sup>7</sup> Wheeler v. Brady, 15 Kan. 26; People v. English, 139 Ill. 622, 29 N. E. 678, 15 L. R. A. 131; Plummer v. Yost, 144 Ill. 68, 33 N. E. 191, 19 L. R. A. 110; State ex rel. v. Dillon, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124.

<sup>8</sup> Booten v. Pinson, 77 W. Va. 412, 89 S. E. 985, 989, L. R. A. 1917A, 1244, 1250, citing § 413,

tions of voters voting at municipal elections. In voting for the issuance of bonds, sometimes only tax payers are permitted to vote. Ordinarily this qualification is not specified in voting on other propositions, as an ordinance to increase the salary of the mayor.<sup>9</sup> Where the constitution, as in Oregon, reserves the initiative power to the "legal voters" of every municipality, a provision in a municipal charter that an election to authorize an increase of indebtedness should be by the "legal voters" instead of "property owners," was held valid.<sup>10</sup> Qualified voters or electors is a term frequently employed,<sup>11</sup> and in irrigation districts in Oregon, it may be restricted to landowners, and include such as are non-resident.<sup>12</sup>

**§§ 414-416. Time, place and mode prescribed for election—initiative, referendum, recall—irregularities.**

The privilege of the exercise of the power of recall of officers and of the initiative and referendum, the form

vol. 2, ante; *Ward v. Kropf*, 120 N. Y. S. 476, 127 N. Y. S. 1148.

"The right to vote is not an inherent or absolute right generally reserved in Bills of Rights, but its possession is dependent upon constitutional or statutory grant. Subject to the limitations contained in the federal constitution such right is under the control of the sovereign power of the state, and where the constitution has conferred the right and prescribed the qualifications of electors, the legislature cannot change or add to them in any way; but where the constitution does not confer the right to vote or prescribe the qualifications of voters, it is competent for the legislature, as the representative of the law making power of the state to do so." *State ex rel. Lamar v. Dillon*, 32 Fla. 545, 14 So. 383, 23 L. R. A. 124.

<sup>9</sup> *Bradshaw v. Marmion* (Tex. Civ. App. 1916), 188 S. W. 973.

<sup>10</sup> *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806.

<sup>11</sup> **Qualified voters.** Law did not prescribe what election city should use as a basis to ascertain the number of qualified electors who should sign the petition for the election—local option—held, petition reciting it was signed by the required number of the "qualified voters" of the city was good. *State ex rel. v. Carter*, 257 Mo. 52, 83, 165 S. W. 773.

<sup>12</sup> In irrigation districts in Oregon only landowners are authorized to vote for officers who are to manage the affairs of the district, since such land owners are the only persons who have an interest, notwithstanding the Constitution provides that in all elections, not otherwise provided for, etc., every white male citizen 21

of municipal organization, the nature of charter provisions and amendments thereof, change of form of local government and municipal legislation is quite generally secured to municipal electors in recent constitutions,<sup>13</sup> statutes and charters,<sup>14</sup> and consequently many new and difficult legal problems have been presented for solution. The municipal election has thus become in some instances rather complex. In addition, under these new provisions it may be and is more frequently invoked than heretofore. Apart from the election of officers at stated periods to serve the local community and elections to fill vacancies other elections for various purposes are now required. For example, whether the city or town shall adopt a new charter, a particular form of government as the commission form, the general manager plan, the provisions of a legislative act, or amend or repeal an existing charter and substitute another therefor, or annex or sever territory or by the initiative and referendum enact ordinances, or invoke the recall for the removal of an officer, the election of municipal officers, etc.

Petitions for nominations<sup>15</sup> for elections for various purposes,<sup>16</sup> as to exercise the recall of officers,<sup>17</sup> the initiative,<sup>18</sup> and referendum,<sup>19</sup> are generally required, and their

years of age, with certain resident qualifications shall be entitled to vote. In such district a non-resident landowner may vote. Statute so provides, etc., *Payette-Oregon Slope Irrigation District v. Peterson*, 64 Or. 46, 128 Pac. 837, 839, 840.

<sup>13</sup> *Thielke v. Albee*, 76 Or. 449, 150 Pac. 854; *Cole v. Seaside* (Or. 1919), 182 Pac. 165.

<sup>14</sup> Recall provisions in municipal charter is constitutional. *Dallas, Texas, Charter. Bonner v. Belsterling*, 104 Tex. 138, S. W. 571, affirming (Tex. Civ. App.), 137 S. W. 1154.

<sup>15</sup> Nomination by petition. If petition is not filed with proper election officers, it is not error not

to put his name on the ticket. *State ex rel. v. Ratliff*, 108 Miss. 242, 66 So. 538.

Name of one not a nominee for alderman may be written on the ballot. *State ex rel. v. Ratliff*, 108 Miss. 242, 66 So. 538.

<sup>16</sup> To vote on city manager plan. *State ex rel. v. Bentley*, 100 Kan. 399, 164 Pac. 290.

To vote on commission form. *Territory ex rel. v. Roswell*, 16 N. Mex. 340, 117 Pac. 846.

<sup>17</sup> *Baines v. Zemansky*, 176 Cal. 369, 168 Pac. 565.

<sup>18</sup> *Gabbert v. Perry* (Cal. App. 1918), 173 Pac. 412.

<sup>19</sup> *Coney v. Topeka*, 96 Kan. 46, 149 Pac. 689.

sufficiency as to form,<sup>20</sup> the number and qualifications of the signers thereof,<sup>21</sup> the officers empowered to determine their sufficiency,<sup>22</sup> the duty of the designated body or officer to act when the petition is sufficient,<sup>23</sup> the right of signers of petitions to withdraw their names,<sup>24</sup> and the time and manner of its exercise,<sup>25</sup> the correction of de-

<sup>20</sup> Sufficiency of petition under particular law. *Bennett v. Drulard*, 27 Cal. App. 180, 149 Pac. 368.

<sup>21</sup> Petition to be signed by 25 per cent of the legal voters. *State ex rel. v. Bentley*, 100 Kan. 399, 164 Pac. 290.

**Qualification of signers.** Must have requisite number of qualified voters, duly verified. *Woodward v. Barbur*, 59 Or. 70, 116 Pac. 101.

Petition for election, tested by number of registered voters whose names appear on petition. *Coney v. Topeka*, 96 Kan. 46, 149 Pac. 689.

**Qualification of signers in petition proposing municipal laws.** The constitution said: "legal voters," does not mean "registered voters," where under the law non-registered voters may exercise the right to vote by the production of the proof prescribed. Such persons may sign an initiative petition proposing charter amendments. A provision in an initiative and referendum ordinance making the petition subject to voting qualifications of the signers by reference to list of "registered voters," held illegal restriction. *Woodward v. Barbur*, 59 Or. 70, 116 Pac. 101.

Restricting the signers to registered voters is void, but it does not render void the other provisions. *State ex rel. v. Dalles City*, 72 Or. 337, 143 Pac. 1127.

**Qualified electors.** Registration is not a qualification as prescribed by constitution, but is reasonable regulation to learn who are qualified electors, to prevent fraud, etc. *Minges v. Merced*, 27 Cal. App. 15, 148 Pac. 816.

<sup>22</sup> *Woodward v. Barbur*, 59 Or. 70, 116 Pac. 101.

**Recall petition.** Who to judge of its sufficiency as to signatures. *Baines v. Zemansky*, 176 Cal. 369, 168 Pac. 565.

Initiative petition to be examined by clerk, to ascertain whether it is signed by requisite number of qualified voters. *Gabbert v. Perry* (Cal. App. 1918), 173 Pac. 412.

<sup>23</sup> Duty of city council to act on sufficient petition, held mandatory. *Conn v. Richmond*, 17 Cal. App. 705, 121 Pac. 714.

<sup>24</sup> Right to withdraw from petition asking for election to vote on commission form of government; allowed under particular facts. *Territory ex rel. v. Roswell*, 16 N. Mex. 340, 117 Pac. 846.

<sup>25</sup> One may withdraw his name from an initiative petition. The right must be exercised personally, as it is personal privilege. *State v. Spokane County Superior Court*, 70 Wash. 352, 126 Pac. 920.

May withdraw after filing and before clerk makes out certificate to legislative body. *Dagley v. Mc-*

fects as to signatures (when and under what circumstances permitted), and amendments of proposed legislation (when, under what circumstances and the nature thereof),<sup>26</sup> and in event the initiative petition, for example, should be insufficient, whether and within what period the requisite number of qualified electors may thereafter obtain action,<sup>27</sup> are all to be tested by the proper construction of the various provisions of all local laws relating to the subject. This statement also applies as to when the proposition is to be submitted to the electors,<sup>28</sup> and whether at a general or special election. Initiative amendment may be voted on at a general or special election.<sup>29</sup>

Likewise the sound construction of local laws governs the appropriate procedure,<sup>30</sup> as, for example,

Indoe, 190 Mo. App. 166, 176 S. W. 243.

<sup>26</sup> Law permitted the withdrawal of petitions to submit ordinances or amendments or charter amendments, when insufficient or if it contained defects, and in such case petitions may be amended or added to and refiled as an original petition; held may not only correct defects as to signatures, but proposed legislation may be amended. *State ex rel. v. Mac Queen* (W. Va. 1918), 95 S. E. 666.

<sup>27</sup> *Dagley v. McIndoe*, 190 Mo. App. 166, 176 S. W. 243.

<sup>28</sup> Law construed to require submission of charter amendment at the next ensuing election, general or special. *Attorney General v. Detroit*, 168 Mich. 249, 133 N. W. 1090.

Provisions as to time, held not mandatory. Election may be ordered to be held after time prescribed. *Attorney General v. Saginaw*, 177 Mich. 432, 143 N. W. 598.

<sup>29</sup> *State v. Spokane County Su-*

*perior Court*, 70 Wash. 352, 126 Pac. 920.

"General election" means election for state and county officers and members of congress. *People v. Berkeley*, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838; *State v. Cobb*, 2 Kan. 32; *Bond v. White*, 8 Kan. 333; *McIntyre v. Iliff*, 64 Kan. 747, 68 Pac. 633; *Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641; *State v. Tausick*, 64 Wash. 69, 116 Pac. 651.

Refers to an election by the people, open to all electors, as distinguished from any special class, and may be called "general election," "special election," or "regular election." *Kessler v. Fritchman*, 21 Idaho 30, 119 Pac. 692.

"General election" as to ascertaining number of votes cast as basis for number of signers to petition. *Bakersfield & Kern Electric Ry. Co. v. Hay*, 29 Cal. App. 289, 155 Pac. 132.

<sup>30</sup> Charter amendment may be submitted by resolution of council.

what authority may prescribe the form, method and time of submission of the proposition,<sup>31</sup> the sufficiency of the notice of election,<sup>32</sup> and other matters of detail, and whether certain requirements are mandatory or directory only.<sup>33</sup> "An election will be sustained, notwithstanding there was no proclamation, if the electors had general knowledge of it, and a reasonable number of votes were polled,"<sup>34</sup> especially when held on the regular day ordained by law, in the customary place and by the proper officials.<sup>35</sup>

Where certain things are required to be done which

State v. Andresen, 75 Or. 509, 147 Pac. 526.

Charter amendment enacting clause, sufficiency. The people "do ordain," equivalent to "Be it enacted." State ex rel. v. Dalles City, 72 Or. 337, 143 Pac. 1127.

Amendments of charter. Each section need not have separate vote. Amendments in effect constituting a general revision of the charter, where the purpose is to submit the proposition of a commission form of government, may be voted on as a whole. Of course, "amendments" includes to repeal provisions of charter. State ex rel. v. Portland, 65 Or. 273, 133 Pac. 62.

<sup>31</sup> Initiative election procedure may be prescribed by each city under Oregon Constitution and that in general law, held not applicable, when town has its own. Colby v. Medford, 85 Or. 485, 167 Pac. 487, 495.

Constitution allowing city to provide the manner of exercising the power of initiative and referendum authorize an ordinance prescribing the manner for holding an election to amend the charter. Pearce v. Rosenberg, 77 Or. 195, 150 Pac. 855.

Calling special election to submit a proposed new charter by a "resolution," held valid. Publication of notice, etc., time, place and object of election. Council sometimes has power to specify length of notice. State ex rel. v. Kelsey, 66 Or. 70, 133 Pac. 806.

<sup>32</sup> Pearce v. Rosenberg, 77 Or. 195, 150 Pac. 855.

Mode prescribed for election to be followed. For new charter. State ex rel. v. Kelsey, 66 Or. 70, 133 Pac. 806.

For new charter as a whole and an amendment to part thereof. Maher v. Jackson, 191 Mich. 266, 157 N. W. 561.

<sup>33</sup> Sufficiency of ordinance providing for enacting new charter by vote of electors. Duncan v. Dryer, 71 Or. 548, 143 Pac. 644; Curtis v. Tillamook City, 88 Or. 443, 172 Pac. 122, 171 Pac. 574.

<sup>34</sup> Commonwealth v. Reynolds, 5 Kulp 547, approved and followed in Commonwealth v. Kelly, 255 Pa. 475, 100 Atl. 272, 274, which also approves Foster v. Scarff, 15 Ohio St. 532, 537.

<sup>35</sup> Commonwealth v. Kelly, 255 Pa. 475, 100 Atl. 272, 274.

are in the nature of conditions precedent to the validity of the election, such prerequisites are regarded as mandatory directions, and failure to observe them, in substance at least, will nullify the election. To illustrate, if the law declares any particular act essential to the validity of the election, or that its non-observance shall nullify the election, such provision will be held mandatory and its observance as vital to the validity of the election, irrespective of whether the result of the election was affected by the omission. In any case, if the result is affected by the non-observance of the requirement such step becomes essential and mandatory. Usually provisions as to time, place and qualification of electors are mandatory. Those relating to the manner of procedure, the keeping of the record, returns of results, etc., are ordinarily viewed as directory.

Laws sometimes forbid the designation of political parties or the affiliation of candidates upon the ballot. Such laws have been sustained against the contention that they prohibit political parties or interfere with their workings.<sup>36</sup>

Close questions often arise relating to the sufficiency of the form and contents of the ballot.<sup>37</sup> Provisions as

<sup>36</sup> State ex rel. v. Portland, 65 Or. 273, 133 Pac. 62.

<sup>37</sup> Sufficiency of ballot for incorporation. State v. Heberlein, 36 S. D. 60, 153 N. W. 897.

Amend city charter—form of ballot. Shaw v. Lindsley (Tex. Civ. App.), 195 S. W. 338.

Sufficiency in designating unexpired term. Commonwealth v. Kelly, 255 Pa. 475, 100 Atl. 272.

Referendum to amend charter. Ballots were of two kinds, on one the words: "for the proposed amendment to city charter;" the other: "against the proposed amendment to city charter." Held valid. Taylor v. Greensboro (N. C. 1918), 95 S. E. 771.

Ordinance submitted amendment of charter to create a board of education, and also to increase maximum tax rate for schools, held submits but one proposition, hence but one ballot required. "A proposition could be submitted to amend a section of a city charter in a dozen particulars, and yet it would be but one proposition and require but one ballot for or against the amendment." Taylor v. Greensboro (N. C. 1918), 95 S. E. 771; Briggs v. Raleigh, 166 N. C. 149, 81 S. E. 1084; Keith v. Lockhart, 171 N. C. 451, 88 S. E. 640.

Law said electors should designate on their ballots for whom they



to the mere form of the ballot are generally regarded as directory,<sup>38</sup> and hence deviations therefrom will not, as a rule, vitiate the election,<sup>39</sup> especially in the absence of resulting harm.<sup>40</sup> Minor irregularities in the ballot will be disregarded, if the proposition contained therein was plainly stated,<sup>41</sup> and the electors were not misled.<sup>42</sup> "Mere irregularities in the form of a ballot or in the ordinance calling the election that do not tend to prevent a full and free expression of the will of the electors are immaterial and will not vitiate the election."<sup>43</sup>

A preferential system of voting is established in some

vote to fill the unexpired terms. Election was held to fill for vacancies for the full term and one vacancy for an unexpired term. Ballots had no designation of the terms, etc., due to error. Held, void. *Commonwealth v. Clark*, 249 Pa. 109, 94 Atl. 473.

A submission of adoption of a new charter as a whole and an amendment to one section of the charter on one ballot, but to be voted on separately. Under the law the charter could be carried by a majority vote, but the amendment required a two-thirds vote. Both propositions received a majority vote, but the amendment did not receive the two-thirds vote. *Maher v. Jackson*, 191 Mich. 266, 157 N. W. 561.

<sup>38</sup> Form of ballot, held directory. Mere irregularities will not vitiate the election. *Attorney General v. Belleville*, 81 N. J. L. 200, 80 Atl. 116.

<sup>39</sup> An election submitted provision contained in state act as to street improvements to voters to accept or reject. The direction was that the ballots should have printed thereon "for the act to improve streets," and "against

act to improve streets." The ballots used at the election were printed "for the road bill," and "against the road bill," held variance not important. *Carr v. Hyattsville*, 115 Md. 545, 81 Atl. 8.

<sup>40</sup> Deviated from form prescribed by law, but no harm resulted and statute did not say, to depart from form was fatal, held that, provision was not mandatory. *Commonwealth v. Kelly*, 255 Pa. 475, 100 Atl. 272.

<sup>41</sup> Ballot title, if clear, etc., irregularities are not important. "For the proposed new charter," "against the proposed new charter." *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806.

<sup>42</sup> The office was "superintendent of trade and commerce," and the ballot was for and against the establishment of the "office of Chamber of Commerce," held the election valid, as the voters were not misled. *State ex rel. v. Kelly*, 154 Wis. 482, 143 N. W. 153.

<sup>43</sup> *State v. Andresen*, 75 Or. 509, 147 Pac. 526, 529, citing §§ 2202, 2203, vol. 5, ante.

Election of only four trustees of a town instead of the required number of five, held not to invali-

municipalities; that is, provision is made for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office.<sup>44</sup>

The so-called bipartisan system of elections is also found in municipal charters. Such method has been sustained against the contention that it is a restriction of party representation in that it limits such representation to the political parties in existence for general purposes, since in municipal elections new parties may arise from members of the old.<sup>45</sup>

date the election. *Shackett v. Town of Island*, 146 Ky. 798, 143 S. W. 369.

Where the records of the body which held the election are expressly required by law to be kept, they constitute the best evidence of its acts. If it is sought to avoid the election, as for example, by showing that ballots of qualified voters had been rejected, the pleadings must raise the issue. "The reasonable doctrine which has long prevailed in other jurisdictions, that to go behind the returns of the officers appointed by the statute to ascertain and declare the vote of the electors, the special objection to the returns must be pleaded so that the ground upon which they are disputed may be understood." *State ex inf. v. Heffernan*, 243 Mo. 442, 454, 148 S. W. 90, approving *State ex rel. v. Townsley*, 56 Mo. 107, 112, and also following *Attorney General v. May*, 97 Mich. 573; *Attorney General v. McIvor*, 58 Mich. 516; *State v. Harris*, 3 Ark. 570, 578.

Irregularities not affecting results are disregarded. *Hughes v. Sapulpa* (Okla. 1919), 182 Pac. 511.

Although the notice of election was insufficient, the irregularity

will be disregarded if it did not in any way affect the result, as where there is no showing that any one entitled to vote at the election failed to do so because of such defective notice, nor that any one not entitled to do so voted thereat. *Carivile v. Childress* (Tex. Civ. App. 1919), 213 S. W. 308, 313, following *Wallis v. Williams*, 50 Tex. Civ. App. 623, 110 S. W. 785.

<sup>44</sup> Such provision in charter is a "provision made by law" within Oregon Constitution. *State ex rel. v. Portland*, 65 Or. 273, 133 Pac. 62.

<sup>45</sup> Bipartisan commission government, wherein each ward being entitled to elect four councilmen, not more than two of whom, belonging to the same political party, are eligible to seats in the council at the same time. The four candidates receiving the highest number of votes are declared elected, provided that only two of the four can be taken from the candidates of one party.

"A voter may belong to one political party for state and national purposes and another for municipal purposes, and his party affiliations generally do not class

**§ 418. How is vote required to be determined? Are all of the qualified electors or only those voting at the given election to be counted?**

Provisions as to the determination of the specified vote are of two general classes: First, laws which by express terms or necessary implication require only a prescribed percentage, as a majority, two-thirds, three-fourths, etc., of the votes cast at the election, or on the particular proposition; second, laws which require by express terms, or necessary implication a prescribed percentage, as a majority, two-thirds, three-fourths, etc., of the electors within the city or voting area, or of such percentage of the duly, legally or lawfully qualified electors or voters entitled to vote at the election.<sup>46</sup> As to the first class under a law providing that if "a majority of the qualified voters" shall vote in favor of the

him politically as to municipal elections. *Hasson v. Chester*, 67 W. Va. 278, 67 S. E. 731. And a new political party can be formed at any time for a particular election or for participation in elections generally. *Morris v. Ballot Commissioners*, 71 W. Va. 180, 76 S. E. 446. These cases assert the right of such parties to have the names of their candidates printed on the ballots when nominated as provided by law." The charter is designed to secure bipartisan government, "but it does not contemplate indestructibility of existing parties, nor endeavor to prevent the birth of new ones. Nor, does it contain any expression of intent to limit the right of party participation in city elections to the political parties maintained for general political purposes." *Peyton v. Holley*, 72 W. Va. 540, 78 S. E. 666; *Carter v. Stowers*, 72 W. Va. 662, 78 S. E. 974.

General laws of state prescribe the mode and manner of obtaining and holding a status as a political party and securing representation on ballots as such to be used in elections and these bipartisan charters usually adopt these general state laws, or at any rate ordinarily they become applicable. Hence, "the ascertainment of the existence of a political party or organization and its character is governed by the same rules as are applied in ascertaining the existence and character of political parties for all other purposes and when it has been ascertained and the existence of the party established, its rights in respect to representation in municipal offices are governed by the provisions of the charter. *Carter v. Stowers*, 72 W. Va. 662, 78 S. E. 974.

<sup>46</sup> Section 418, vol. 2, ante.

proposition or ordinance it shall become effective, it was held that a majority of the qualified voters voting at the election was meant, not a majority of the qualified voters of the city.<sup>47</sup> So it has been held that the phrase, "The legal voters of said city by a majority shall determine" means a majority vote in favor, though not a majority of the voters of the city.<sup>48</sup> So to adopt or amend a charter by a "majority vote of the qualified voters of the city," means a majority vote of the votes polled.<sup>49</sup>

**§ 419. Same—determination of vote, on a separate proposition when other issues are submitted at the same election.**

A provision that a "majority of the ballots cast" should repeal a charter, was construed to mean a majority of those voting on the question notwithstanding at the election the ballot contained, in addition to questions of charter repeal and new plans of city government, many candidates for state and national offices and also constitutional amendments, to be voted on. The word 'ballots' was held synonymous with 'votes,' and only ballots relating to the repeal should be counted, "since it has been the unvarying policy of the legislature to make the acceptance of a city charter turn upon the affirmative votes of a majority of those voting on the question."<sup>50</sup>

<sup>47</sup> Bradshaw v. Marmion (Tex. Civ. App.), 188 S. W. 973.

"A tax shall be levied if two-thirds of the taxpayers voting shall vote in favor thereof." Werner v. Galveston, 72 Tex. 22, 7 S. W. 726, 12 S. W. 159.

<sup>48</sup> Spangler v. Mitchell, 35 S. D. 335, 152 N. W. 339, 343, 344.

<sup>49</sup> "The authorities of other jurisdictions are in conflict as to the proper construction to be placed on the language "majority vote of the qualified voters of the city," but we think the great weight of authority, those of our

courts of this state being among them, is with the majority, that to carry a proposition a majority vote of the votes polled is all that is necessary." Shaw v. Lindsley (Tex. Civ. App.), 195 S. W. 338.

<sup>50</sup> Cashman v. Entwistle, 213 Mass. 153, 100 N. E. 58; Wheelock v. Lowell, 196 Mass. 220, 226, 81 N. E. 977, 124 Am. St. 543, 12 Ann. Cas. 1109.

Law required a vote of two-thirds of the electors "voting at any election for that purpose." Such vote on the proposition is sufficient although two-thirds of all

## II. GENERAL CONSIDERATION CONCERNING OFFICES AND OFFICERS, SUBORDINATES AND EMPLOYEES.

### § 420. Designation and classification of officers and persons in the municipal service.

Those who render public service to municipal corporations may be divided into three classes: 1. The officer proper whose duties are defined by law, whose salary is prescribed by law as an incident to his office, irrespective of the performance of service, and who, if unlawfully removed from his office may be reinstated therein by appropriate judicial procedure. 2. Subordinates variously designated as assistants, deputies, clerks, etc., some of whom may have a definite tenure, and others may be removable at the will of the appointing authority, and others whose term of employment is indefinite but whose tenure is sought to be made stable and who are sought to be protected in their positions (1) by legal provisions forbidding their removal except for just cause, and without notice and an opportunity to be heard; (2) frequently by veteran laws; and (3) civil service laws when entitled to classification under their provisions, and if illegally removed they may be reinstated by mandamus. 3. Employees in minor positions whose pay depends upon work performed.<sup>51</sup>

### § 422. Nature and elements of the terms "office" and "officer."

Public officers are those who render public services in which the general public have an interest.<sup>52</sup> Constitu-

persons who voted at the general election held at the same time and places did not vote to issue the bonds. *State ex rel. v. Orear*, 277 Mo. 303, 316-329, 210 S. W. 392.

<sup>51</sup> *Goldschmit v. Hardy*, 163 N. Y. S. 305, 177 App. Div. 547; *Sutcliffe v. New York*, 117 N. Y. S. 813, 132 App. Div. 831; *People ex*

*rel. v. Cahill*, 188 N. Y. 489, 81 N. E. 453.

<sup>52</sup> "Public officers," as such as are required to be elected or appointed and whose duties are defined by law. Members of a committee to prepare Fourth of July celebration, held not public officers, as to liability for damages.

tional officers are those mentioned in the constitution and usually indicate an election.<sup>53</sup> But "officers" in the Ohio constitution embrace both elective and appointive officers.<sup>54</sup> An office, as defined in the New Jersey decisions is a place in a governmental system created, or at least recognized, by the law of the state to which certain permanent public duties are assigned, either by the law itself or by regulations adopted under the law by an agency created by it and acting in pursuance of it.<sup>55</sup> There cannot be an incumbent of an office, either *de jure* or *de facto*, without a *de jure* office.<sup>56</sup>

**§ 423. Same—the precise manner in which the question is presented is important.<sup>57</sup>**

*Sroka v. Halliday* (R. I. 1916), 97 Atl. 965, 973.

**Policeman**, held a public officer of the state, also an "executive officer," in prosecution of one assuming to act as policeman, under particular statute. *Ex parte Preston* (Tex. Cr. App.), 161 S. W. 115.

Policemen, who took oath of office, held "public officers," and not entitled to compensation under the workmen's compensation law. *Blynn v. Pontiac*, 185 Mich. 35, 43, 151 N. W. 681, citing § 424, vol. 2, ante.

Policemen as public officers, note in 36 L. R. A. (N. S.) 881.

**Municipal fireman**, held a "public officer" relating to the assignment of unearned salary which is forbidden by public policy. *Schmitt v. Dooling*, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881, and note, *Am. & Eng. Ann. Cas.* 1913B, 1078.

<sup>53</sup> *Franklin v. Westfall*, 273 Ill. 402, 112 N. E. 974.

<sup>54</sup> *State ex rel. v. Campbell* (Ohio St.), 115 N. E. 29.

<sup>55</sup> *McGrath v. Bayonne*, 85 N. J. L. 188, 89 Atl. 48, 50; *Fredricks v. West Hoboken Board of Health*, 82 N. J. L. 200, 82 Atl. 528; *Stewart v. Hudson*, 61 N. J. L. 118, 38 Atl. 842.

**A superintendent of a workhouse**, appointed by the mayor for a definite term and a stated salary and who is required to take an oath of office and give bond, held to be an officer as distinguished from an employee or agent. *State ex rel. v. Brodie*, 177 Mo. App. 382, 387, et seq.

<sup>56</sup> *State ex rel. v. Kelly*, 154 Wis. 482, 143 N. W. 153; *San Antonio v. Coultrass* (Tex. Civ. App.), 169 S. W. 917, 919.

<sup>57</sup> **Judge of city court**, held "city officer," as to election. *Franklin v. Westfall*, 273 Ill. 402, 112 N. E. 974; *People v. Olson*, 245 Ill. 288, 92 N. E. 157.

**Commissioners** under commission form, held municipal officers, with-

**§ 424. Office distinguished from employment.**

Office usually means office of a public character, and an officer, one chosen for a definite term, whose duties are continuous and who is usually required to take oath, and often give a bond.<sup>58</sup> A city manager under the com-

in the Kentucky Constitution forbidding holding two municipal offices at the same time. Commonwealth ex rel. v. Livingston, 171 Ky. 52, 186 S. W. 916.

**City engineer**, held municipal officer in Constitution forbidding holding two municipal offices at the same time. Commonwealth ex rel. v. Livingston, 171 Ky. 52, 186 S. W. 916.

**Aldermen** in New York City, held constitutional officers, also elective officers as to filling vacancies in such offices. People ex rel. v. Hogan, 214 N. Y. 216, 108 N. E. 459, 151 N. Y. S. 261, 165 App. Div. 298. Re Deitz 150 N. Y. S. 43, 87 Misc. Rep. 610.

Members of a city council, held not municipal officers as to filling vacancies. Lambert v. Barrett, 115 Va. 136, 78 S. E. 586, citing § 178, vol. 1, ante.

**Marshal**, held employee as to tenure under particular law, but an officer under the State Constitution. Uhr v. Lancaster (Tex. Civ. App.), 187 S. W. 379; Brown v. Uhr (Tex. Civ. App.), 187 S. W. 381.

**Policeman**, held an officer under law requiring officer to be a qualified elector of the city. State v. Shores, 48 Utah 76, 157 Pac. 225, citing § 2417, vol. 5, ante.

<sup>58</sup>One appointed for a definite term, e. g., superintendent of workhouse, required to take oath and give bond, held an officer as

distinguished from an employee or agent as to tenure and removal. State ex rel. v. Brodie, 177 Mo. App. 382, 164 S. W. 233.

**A sinking fund commissioner**, held to be a public officer as distinguished from an employee, since the position was not of a temporary character but the duties were continuous and not intermittent. "The incumbent was required to perform continuous public service for a definite period and of a very responsible character. It had all the elements and characteristics of a public office as distinguished from a mere public employment." Borden v. Goldsboro, 173 N. C. 661, 92 S. E. 694.

**Machinist**. One employed by city as a machinist under the civil service law, held a "municipal officer," relating to salary. Gathemann v. Chicago, 263 Ill. 292, 104 N. E. 1085, affirming 183 Ill. App. 210.

**Managers** of municipal business activities conducted for profit are business agents and not public officers. Rock Hill Iron & Coal Co. v. Taunton, 261 Fed. 234.

**Policemen** who took oath of office under a municipal charter, held not employees but public officers and not entitled to compensation under the workmen's compensation law of Michigan. Blynn v. Pontiac, 185 Mich. 35, 42-43, 151 N.

mission and city manager plan who is clothed with the executive and administrative functions and duties which under the aldermanic system were conferred upon and discharged by the mayor is an officer and not an employee, and his position is that of an office, and not an employment.<sup>59</sup> The existence of an office rests upon a provision of law.<sup>60</sup>

An officer is distinguished from a mere appointee or employee whose duties are to render assistance to an officer under his direction.<sup>61</sup> Employees and subordinates having no duties to perform other than those directed by the head of the department or chief officer, that is, where there is nothing in the nature of the employment itself that calls for the presence of a public functionary, and where every one of their duties can be discharged by a private agent, do not hold public offices, but their functions are rather in the nature of contracts of employment.<sup>62</sup>

W. 681, citing § 424, vol. 2, ante, § 2417, vol. 5, ante.

Positions or places held under the Civil Service Act for cities are not mere employments, but are in the nature of offices, as relates to salary. *Gathemann v. Chicago*, 263 Ill. 292, 104 N. E. 1085, affirming 183 Ill. App. 210.

<sup>59</sup> *McClendon v. Hot Springs Board of Health* (Ark. 1919), 216 S. W. 289.

<sup>60</sup> Section 422, ante.

One employed to do engineering work is not an officer. "The difference between an officer of a municipality and a mere employee is marked. The existence of an office must rest upon a provision of law. The duties, powers and emoluments of an office rest upon and have life from the provisions of law. The duties and powers of an incumbent of an office, are regulated and created by the provi-

sions of law. The incumbent of an office cannot enlarge or restrict the functions of his office by contract with the government. An employment arises out of a contract between the employee and the governing power. His duties, rights and emoluments are defined by contract." *Hermann v. Lampe*, 175 Ky. 109, 194 S. W. 122, 126.

<sup>61</sup> Superintendent of a bureau of highways, held employee. *People ex rel. v. McAneny*, 144 N. Y. S. 121; *Padden v. New York*, 92 N. Y. S. 926, 45 Misc. Rep. 517.

"Subordinate officer" as distinguished from employees who serve without official designation, and whose terms are not provided for or protected by, except, of course, frequently by civil service regulations. *McAvoy v. Trenton*, 82 N. J. L. 101, 80 Atl. 950.

<sup>62</sup> Clerk in a street department.



**§ 428. Employees described.**<sup>63</sup>**§ 430. Power to create offices and situations, to fix salaries, etc.**

Authority to create offices and positions and fix salaries and compensation in the municipal service is generally

*McAvoy v. Trenton*, 82 N. J. 101, 80 Atl. 950.

**Keeper** of a reservoir. *Uffert v. Vogt*, 65 N. J. L. 377, 77 Atl. 225.

**Janitor** at a police station. *Dolan v. Orange*, 70 N. J. L. 106, 56 Atl. 130.

**Superintendent** of a water department. *Cramer v. New Brunswick Water Comrs.*, 57 N. J. L. 478, 31 Atl. 384.

**Architect** employed to prepare plans and erect a public building. *State v. Broome*, 61 N. J. L. 115, 38 Atl. 841.

See § 428, post.

<sup>63</sup> See § 424, ante.

**City employees** distinguished from public officers as to pension within a constitutional provision forbidding the increasing of allowance of public officers by local laws. *Hammitt v. Gaynor*, 144 N. Y. S. 123.

**Fieldman** of a health department, held not an officer, but merely an employee relating to termination of position under a particular law. *Jagger v. Green*, 90 Kan. 153, 133 Pac. 174.

**An attorney** employed by a city, held not an officer, but a mere employee or agent. *Rochester v. Campbell* (Ind. 1916), 111 N. E. 420; *Charleston v. Littlepage*, 73 W. Va. 156, 80 S. E. 131.

**Attorney** appointed annually by a village, held an employee. *Fisher*

*v. Mechanicsville*, 225 N. Y. 210, 121 N. E. 764.

**City marshal** as "employee" in particular charter as to appointment and tenure. *Uhr v. Lancaster* (Tex. Civ. App.), 187 S. W. 379; *Brown v. Uhr* (Tex. Civ. App.), 187 S. W. 381.

**Storekeeper** having charge of yards wherein were kept tools of various kinds was held a mere employee, and not a public officer, within the meaning of a charter provision as to continuance in service until successors should be appointed. *Jones v. Battle Creek*, 193 Mich. 1, 159 N. W. 145.

**Superintendent** of the bureau of highways under Charter of New York City, held an employee relating to acceptance of another office as a vacation of the office held. *People ex rel. v. McAneny*, 144 N. Y. S. 121; *Padden v. New York*, 92 N. Y. S. 926, 45 Misc. Rep. 517.

**Assistant engineer** in the department of bridges in New York City, held an employee, and his relation to the city contractual. "There was some confusion in the earlier cases as to when the holder of a position in the municipal service was to be considered an officer, and when an employee. We consider it to be now settled, however, that the holder of a position such as plaintiff held is an employee and that his relation to the city is

vested in the council or legislative body,<sup>64</sup> which can be

contractual. The authorities to this effect are numerous." *La Chicotte v. New York*, 166 App. Div. 279, 283, 151 N. Y. S. 566.

**Draftsman.** *Allen v. New York*, 122 App. Div. 539.

Structural steel draftsman in department of bridges. *Lazinsk v. New York*, 163 App. Div. 423.

<sup>64</sup>*Kucharski v. Harrison*, 264 Ill. 563, 106 N. E. 488; *People v. Chicago*, 202 Ill. App. 105, 114; *People v. Coffin*, 202 Ill. App. 103; *Mahoney v. New York City Board of Education*, 167 N. Y. S. 222, 179 App. Div. 782.

Office of chief of police. *Heisler v. Robbins*, 17 Ariz. 429, 153 Pac. 771.

Ordinance creating police officer authorized by state act, held to have the force and effect of a state law. *State ex rel. v. Duncan*, 49 Mont. 54, 140 Pac. 95, citing § 643, vol. 2, ante (*McQuillin, Mun. Ord. § 12*).

May create office of night watchman, fix salary and discontinue. *State ex rel. v. Appling*, 191 Mo. App. 589, 177 S. W. 751.

Charter power to legislate for the benefit of trade and commerce under the general welfare clause and power to create such minor municipal offices as the council may deem necessary, fill the offices and fix the salaries, was held in Wisconsin as power to create the office of superintendent of trade and commerce. *State ex rel. v. Kelley*, 154 Wis. 482, 143 N. W. 153.

Charter power under the general welfare clause, and power to regulate the location of billboards and

billposting under penalty, held not sufficient to authorize the creation of the position of billposter, notwithstanding after naming the city officers, the charter concluded "and such other officers and employees, as the city council may determine." *Ex parte Savage* (Tex. Cr. App.), 141 S. W. 244, 250.

**Contra.** After enumerating certain officers the charter provision concluded, and such other offices, servants and agents as may be provided by ordinance, and broad powers as to health and sanitary measures; held authority to create by ordinance the office of superintendent of the garbage department. *Ex parte London* (Tex. Cr. App.), 163 S. W. 968.

Discretionary as to creation or election of town marshal. *State ex rel. v. Warrior*, 181 Ala. 642, 62 So. 69.

Council may fix salaries. *Rockwood v. Cambridge*, 228 Mass. 249, 117 N. E. 312; *Burton v. Detroit*, 190 Mich. 195, 156 N. W. 453.

Council to fix salary of mayor. *Uvalde v. Burney* (Tex. Civ. App.), 145 S. W. 311.

Denying right of board of a municipally owned railroad to fix compensation of attorney. *Porter v. Trustees* (Ohio), 117 N. E. 20.

Where power to fix salaries is vested in the council, civil service commission cannot alter. *Carmen v. New York*, 140 N. Y. S. 1024.

Civil service commission of Chicago has no power to create or abolish offices. *People ex rel. v. Chicago*, 202 Ill. App. 105; *Rudnick*

accomplished only by appropriate affirmative action.<sup>66</sup> However, to create an office it is not necessary that the council declare in express words that such office is created. The use of any language showing clearly the intention to create the office is sufficient. Express language creating the title of the office carries with it the implication of the creation of the office. Thus where an ordinance creates an executive department to be known as the department of public welfare in which are created two bureaus to be known as the bureau of employment and the bureau of social surveys, the chief officers of which are named as the superintendent of the bureau of employment and the superintendent of the bureau of social surveys, and the duties of the respective bureaus are prescribed, it is sufficient to create the offices mentioned.<sup>66</sup>

Power to fix salaries of municipal officers and employees does not embrace, it has been held, power to create positions.<sup>67</sup> But "power to create an office, by necessary inference, includes power to fill it efficiently by attaching thereto a salary incident, where compensation for performance of official duties is contemplated. Such power is a part of the written law as effectually as expressed in words."<sup>68</sup> If the charter makes no provi-

v. Chicago, 198 Ill. App. 474, 199 Ill. App. 375.

Usually power to discontinue an office is vested in the council. Mayor and commissioners or head of department cannot. *Foster v. Hindley*, 72 Wash. 657, 131 Pac. 197.

<sup>66</sup> State law providing there shall be established a division of housing and sanitation in the department of public health and charities in certain cities, requires affirmative action on the part of the city to establish and organize such division by creating the positions and fixing the salaries. *Thiel v. Philadelphia*, 245 Pa. 406, 91 Atl. 490.

<sup>66</sup> "The ordinance sufficiently indicates the intention of the council to start this executive department into operation at once with two bureaus, under the direction of a superintendent of each. Those offices were not left to be provided for or prescribed in the future by the council, but were then created by the ordinance itself." *People ex rel. v. Coffin*, 279 Ill. 401, 117 N. E. 85, affirming 202 Ill. App. 100.

<sup>67</sup> Greater New York Charter so construed. *Sullivan v. McAneny*, 130 N. Y. S. 24, 145 App. Div. 413.

<sup>68</sup> *State ex rel. v. Kelly*, 154 Wis. 482, 143 N. W. 153.

sion for an office, e. g., city physician, ordinarily it cannot be created by ordinance.<sup>69</sup>

**§ 431. Same—cannot be delegated.**

The power to create an office or appoint thereto, cannot be delegated. Thus where the power to appoint a deputy marshal is vested in the village trustees, an attempted appointment by the town marshal is of no effect.<sup>70</sup>

III. MUNICIPAL DEPARTMENTS, BOARDS, OFFICERS, COMMISSIONERS, ETC.

**§ 432. Forms of municipal organization widely vary—authority to create and abolish offices and departments.**

In the commission form the commissioners or members constitute a municipal board, and exercise all municipal powers, legislative, executive, or administrative and judicial.<sup>71</sup> The constitutional guarantee of a republican form of government is held to apply to the state department only, and not to incorporated cities and towns.<sup>72</sup>

In the discharge of a duty primarily resting upon the municipality, the rule is that a department thereof acts as its agent although the department may have full power in the particular matter involved. This rule may be changed. The department may be made responsible as a corporation and not the city. The charter or a legislative act may so provide. In that event liability for acts done or omitted by it is in its corporate capacity.<sup>73</sup>

<sup>69</sup> *Jacobs v. Elmira*, 132 N. Y. S. 54, 147 App. Div. 433.

<sup>70</sup> *Crouch v. Commonwealth*, 172 Ky. 463, 189 S. W. 698, 701.

Statute creating an office—commissioner of public works—in certain cities to take effect when approved “by a majority vote of the members elect of the common council,” held valid. The only prerequisite to the adoption is the

approval thereof by the vote stated. *Johnson v. Milwaukee*, 147 Wis. 476, 481, 133 N. W. 627.

See §§ 212, 213, vol. 1, ante.

<sup>71</sup> *State v. Lane*, 181 Ala. 646, 62 So. 31.

See § 340, ante.

<sup>72</sup> *Walker v. Spokane*, 62 Wash. 312, 113 Pac. 775.

<sup>73</sup> *Scott v. Saratoga Springs*, 199 N. Y. 183, 92 N. E. 393; *Henry*

**§ 433. The mayor, his term, functions and powers.**

Mayor originally meant the chief executive of a municipal government,<sup>74</sup> but modern legislation has given various designations to such officer, as president,<sup>75</sup> and city manager (a pseudo mayor).<sup>76</sup>

The powers and duties of the mayor depend, of course, upon the charter and other controlling laws.<sup>77</sup> He possesses only such powers as have been conferred either expressly or by necessary implication,<sup>78</sup> the policy

v. Saratoga Springs, 155 N. Y. S. 942, 171 App. Div. 827.

<sup>74</sup> Section 433, vol. 2, ante.

<sup>75</sup> The word "mayor," as used in a law creating the commission form was held to include the president of the board of city commissioners. *State v. Frazier* (N. D. 1918), 167 N. W. 510, 516.

<sup>76</sup> City manager. *Brownville v. Fernandez* (Tex. Civ. App. 1918), 202 S. W. 112.

City manager (Phoenix, Ariz.), appointed by city commission; power depends upon law applicable. *Farish v. Young*, 18 Ariz. 298, 158 Pac. 845.

<sup>77</sup> *Cochran v. McCleary*, 22 Ia. 75; *Weil v. Newbern*, 126 Tenn. 223, 148 S. W. 680, 690.

Sometimes he is required to approve bills, and his approval is frequently regarded as a condition precedent to payment. *O'Neill v. Worcester County*, 210 Mass. 374, 96 N. E. 1100.

Duties of commission mayor. *Kopczynski v. Schriber*, 194 Mich. 553, 161 N. W. 238, 240.

<sup>78</sup> *New Orleans Board of Public Utilities v. New Orleans Ry. & Light Co.* (La. 1919), 82 So. 280.

Mayor has no general power to authorize litigation in behalf of

the city or to control such litigation, except in case of emergency. *Owensboro v. Weir*, 95 Ky. 158, 15 Ky. Law. Rep. 506, 24 S. W. 115.

"If so he could disregard the legislative will of the municipality, bringing and dismissing suits at his pleasure. It is certainly an exceptional case where it should be allowed, and one that seldom arises; but the emergency in this case justified the act, as all the parties acted no doubt in the best of faith." *Louisville v. Murphy*, 86 Ky. 53, 9 Ky. Law Rep. 310, 5 S. W. 194, 18 Am. & Eng. Corp. Cas. 42.

Charter: "The mayor or chief executive shall see that the laws and ordinances of the city are duly enforced and observed and are faithfully executed." Held, does not confer authority to bring a suit to enforce an ordinance in the absence of direction by the council "unless an emergency should arise demanding prompt action on his part and it appeared that authorization from the council could not reasonably be obtained in time to permit him to take such steps as the exigencies of the case required." *Galanty*

of the state,<sup>79</sup> and to some extent upon prescriptive usage. His duties are mainly executive or administrative.<sup>80</sup> He has no legislative powers, nor authority to veto, legislation, unless conferred expressly or by necessary implication.<sup>81</sup>

According to the law in force in his jurisdiction, the mayor's powers and duties may be executive, legislative, or judicial.<sup>82</sup> His liabilities are to be tested by the applicable local laws.<sup>83</sup> The recent trend is to centralize power and responsibility in the mayor.<sup>84</sup>

Laws authorize a named officer, as an alderman, to act for the mayor while he is "unable to perform his duties."<sup>85</sup>

#### § 434. The department of public works or the department of public improvements.<sup>86</sup>

v. Maysville, 176 Ky. 523, 196 S. W. 169.

"Under ordinary charters the mayor may sometimes be entitled to act in a dual capacity. Although a constituent part of the council he is specially charged to see that the ordinances are enforced and the duties of subordinate officers faithfully performed." Rutter v. Burke, 89 Vt. 14, 93 Atl. 842, 849.

<sup>79</sup> Walker v. Spokane, 62 Wash. 312, 113 Pac. 775.

<sup>80</sup> "The executive powers of the city shall be vested solely in the mayor," with certain exceptions. Clarke v. Fall River, 219 Mass. 580, 107 N. E. 419.

<sup>81</sup> Has veto power. Dimick v. Barry, 211 Mass. 165, 97 N. E. 909.

<sup>82</sup> Waldo v. Wallace, 12 Ind. 569.

Judicial powers, also authority to hear and determine sufficiency of petitions relating to sale of intoxicating liquors. State ex rel. v. Davis (Ohio), 117 N. E. 358;

Heininger v. Davis (Ohio), 117 N. E. 229.

<sup>83</sup> State commission has no power to investigate acts and conduct of mayor relating to enforcement of the civil service law operative in the city. Green v. State Civil Service Com., 90 Ohio St. 252, 107 N. E. 531.

<sup>84</sup> Speaking of power of removal: "Great power is placed in the hands of the mayor. But that is in harmony with modern legislative policy touching the administration of municipal affairs, whereby large authority is reposed in the mayor, who on this account may be held to a high degree of personal responsibility in the administration of the affairs of the city." Murphy v. Curley, 220 Mass. 73, 107 N. E. 378; Gilligan v. Leonard, 204 Mass. 202, 90 N. E. 583.

<sup>85</sup> People ex rel. v. Cooke, 177 N. Y. 116.

<sup>86</sup> Board of public works of Ann Arbor, Michigan, is not the gov-

### § 435. The water department.

Sometimes the water department is a distinct corporate entity,<sup>87</sup> but generally it is a mere agency or department of the municipal government,<sup>88</sup> and hence, all its acts, and contracts made by its board or commissioners are the acts and contracts of the municipality.<sup>89</sup>

erning body of the city, but a board of limited powers, subject to direction of the city council. *Schneider v. Ann Arbor*, 195 Mich. 559, 162 N. W. 110, 113.

Board of public works, held department of city. *Union v. Sartor*, 91 S. C. 248, 74 S. E. 496.

Board of public service, consisting of department of the president, public utilities, street and sewers, public welfare and public safety. *St. Louis, Mo. Charter Art. XIII, Section 1*, effective August 29, 1914.

<sup>87</sup> Although the board of water commissioners is a distinct corporate entity, the act establishing it not being embraced within the charter of Detroit, an amendment to the Detroit charter providing for civil service for the municipal employees of the city is operative on employees of the water board. *Grobhel v. Detroit Water Commissioners*, 181 Mich. 364, 149 N. W. 675.

<sup>88</sup> *Sloan v. Cedar Rapids*, 161 Ia. 307, 142 N. W. 970.

A division of department of public utilities. *St. Louis Charter, Art. XIII, Section 11*, effective Aug. 29, 1914.

In some cities the title to the waterworks is in the name of the commissioners thereof. *Commonwealth ex rel. v. Elbert*, 244 Pa. 535, 91 Atl. 227.

Sewerage and Water Board of

New Orleans, held not a municipal corporation, but a mere agency. *State v. Servant*, 143 La. 175, 78 So. 437.

Board of Water commissioners as branch or agency of municipal government. *Water Commissioners v. People*, 137 Ill. 660, 667.

Waterworks of Binghamton, N. Y., held a city department. *Binghamton Water Comrs. v. Binghamton*, 158 N. Y. S. 888, 173 App. Div. 327, because the water act creating the water department, "in every particular, was inextricably interlaced with the city interests, the city government and the city charter. While the waterworks was not styled in the new city charter a department of the city it was in fact a department. It was not enumerated in the list of departments by the new city charter but it was created a department by the original water act."

<sup>89</sup> Charter: Board of three water commissioners to be appointed by the mayor, subject to council confirmation, with defined powers, with entire charge and control of the waterworks system, the expenditure of all moneys appropriated by the council or received by it from the sale of bonds issued for the extension or improvement of the system, power to purchase real estate and all property for the system, provided that no

**§ 436. Police department.<sup>90</sup>****§ 437. City marshal.<sup>91</sup>****§ 438. Fire department.<sup>92</sup>**

moneys shall be expended for any purpose other than that for which appropriated by the council, and that all disbursements on account of the water system shall be made by warrant of the city comptroller upon the city treasurer, etc., held not a body corporate, but is a mere agency of the city, and contracts made by the board, although signed in the names of the commissioners are the contracts of the city. *West Jersey & S. R. Co. v. Atlantic City Board of Water Comrs.*, 86 N. J. L. 634, 92 Atl. 369.

<sup>90</sup> See § 2414, et seq., post; § 2414, et seq., vol. 5, ante.

<sup>91</sup> Office exists. *French v. Cowan*, 79 Me. 426, 100 Atl. 335.

*St. Louis Charter*, Art. XI, effective Aug. 29, 1914.

Office of, may or may not be created, discretionary. *State ex rel. v. Warrior*, 181 Ala. 642, 62 So. 69.

Appointed by mayor with consent of aldermen. *Wilson v. McCarron*, 112 Me. 181, 91 Atl. 839.

Removal of by mayor and action thereon by council. *Michels v. McCarty*, 196 Ill. App. 493.

Removal for failure to enforce the law. *State v. Roth*, 162 Ia. 638, 144 N. W. 339.

May appoint deputies subject to approval of council. *Commonwealth v. Boles*, 160 Ky. 775, 170 S. W. 170.

Marshal sometimes is appointed

as night watchman. *State ex rel. v. Appling*, 191 Mo. App. 589, 177 S. W. 751.

May appoint deputy, de facto deputy. *Barter v. Rockland*, 114 Me. 466, 96 Atl. 773.

Marshal in certain cities (small) has control and direction of the police force, whose orders are to be executed by deputies. *Crouch v. Commonwealth*, 172 Ky. 463, 189 S. W. 698.

Marshal constituted chief of police. *Heisler v. Robbins*, 17 Ariz. 429, 153 Pac. 771.

May arrest one disturbing the peace in his presence. *Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596, 601.

Power to arrest. *Riter v. Neathery* (Tex. Civ. App.), 157 S. W. 439.

Town marshal under a particular law which made him ex officio a constable, held to have authority beyond the corporate limits, and co-extensive with the parish boundaries. *State v. Woodard*, 144 La. 845, 848, 81 So. 357, citing § 437, vol. 2, ante.

Marshal, of course, is liable for wrongful acts of commission or omission. Action against village marshal for seizure of intoxicating liquor, under warrant. *Ingraham v. Booten*, 117 Minn. 105, 134 N. W. 505.

Liability on bond. *People v. Morgan*, 188 Ill. App. 250.

<sup>92</sup> See § 2413, post.



§ 439. The health department.<sup>93</sup>

§ 440. Law department.

Although the law does not in express terms so prescribe, in Illinois, it is held that the city attorney must be licensed to practice law.<sup>94</sup>

The appointment of assistants in the legal department is governed by the local laws and regulations. Sometimes the head thereof may select his own assistants.<sup>95</sup>

The chief of the law department is usually required to give advice on legal matters to the city officers, departments and boards,<sup>96</sup> attend to all litigation in which the municipality is a party or interested,<sup>97</sup> and in some cities and towns he is required to act as the prosecuting attorney of the local municipal court.<sup>98</sup> He cannot go beyond the powers conferred upon him.<sup>99</sup> He must act for the city in the promotion of its policy, and not to further his own purpose.<sup>1</sup>

<sup>93</sup> Created by legislative act. Board may appoint and remove secretary without approval of council, although contrary provisions exist in the city charter. *Darling v. Brunson*, 94 S. C. 207, 77 S. E. 860.

Division of department of public welfare. *St. Louis Charter*, Art. XIII, Section 14.

Department of city government. *McClendon v. Hot Springs Board of Health* (Ark. 1919), 216 S. W. 289.

<sup>94</sup> *Baxter v. Venice*, 271 Ill. 233, 111 N. E. 111, affirming 194 Ill. App. 62; *Donaldson v. Dieterich*, 247 Ill. 522, 526, 93 N. E. 366.

<sup>95</sup> City solicitor may appoint assistants. *Christopher v. State*, 21 Ga. App. 244, 94 S. E. 72.

*St. Louis Charter* Art. X, effective Aug. 29, 1914.

<sup>96</sup> *State v. Gorman*, 117 Minn.

323, 136 N. W. 402; *Bridges v. Sierra Madre*, 27 Cal. App. 93, 148 Pac. 965.

<sup>97</sup> *Ludlow Board of Education v. Ritchie*, 149 Ky. 674.

<sup>98</sup> *State ex rel. v. Butter County Comrs.*, 7 Ohio App. 97.

<sup>99</sup> Corporation counsel cannot go beyond powers conferred upon him by the ordinance creating the office which prescribe his powers, e. g., he has no power to waive and release errors in litigation which has previously passed into judgment. *O'Neill v. Chicago*, 169 Ill. App. 546, 553.

<sup>1</sup> Council by resolution directed the city solicitor to discontinue a suit and instructed the mayor to arrange for a dismissal of the bill and an entry of judgment. On request of the mayor the suit was dismissed and judgment entered, and the city solicitor excepted.

Among other functions in the more important municipalities, the head of the law department is required to prepare contracts, or endorse on each his approval of the form thereof before the same shall take effect. If in his opinion there is good legal reason for not approving a contract, he must so advise the city, and his failure to do so would at least be negligence, or under the particular circumstance it might be more than mere negligence. Sometimes complications in such cases arise. On refusal to prepare and approve a contract awarded by the proper city authorities by the solicitor for legal reasons, as that the contract is illegal, although an erroneous conclusion, ordinarily courts will not compel the solicitor to proceed, for usually a court will decline to sit as a court of appeal to correct the errors of an officer by mandamus. Injury resulting from such error may be redressed "in another kind of proceeding in a manner which will avoid the direct interference of the courts in the ordinary functions of municipal government."<sup>2</sup>

#### § 441. Department of education.<sup>3</sup>

#### § 442. Various municipal departments.

Late municipal charters contain divisions and enumerations of departments and boards, somewhat at variance with those appearing in earlier organic local laws. The distribution of the several functions also differ, in some instances quite widely.<sup>4</sup>

The judgment on the request of the city solicitor will not be reviewed on exceptions. *Portsmouth v. New Hampshire Nat. Bk.*, 76 N. H. 577, 83 Atl. 459.

<sup>2</sup> *Day v. Ryan*, 245 Pa. 154, 91 Atl. 633.

<sup>3</sup> See § 2433, et seq., post.

Administrative department of the municipality. *Hirshfield v. Cook*, 227 N. Y. 297, 125 N. E. 504.

<sup>4</sup> Public welfare. Social sur-

veys. *People ex rel. v. Coffin*, 279 Ill. 401, 407, 117 N. E. 85.

Board of poor commissioners. *Pryzbylowski v. Detroit Poor Comrs.*, 188 Mich. 270, 154 N. W. 117.

Free employment bureau or public employment bureau. *Christenson v. Portland*, 89 Or. 609, 175 Pac. 135.

Department of finance. *Wood-*

## IV. ELIGIBILITY TO HOLD PUBLIC OFFICE OR PLACE.

## § 443. Officer must possess the prescribed qualifications.

Qualifications legally prescribed must be possessed to render a person eligible to hold office.<sup>5</sup> As there is no

mont Assn. v. Melford, 85 Conn. 517, 84 Atl. 307.

Board of estimates and apportionments, in charters of Greater New York and St. Louis.

Rapid Transit Commission in Cleveland, Ohio. Such commission may employ an attorney, fix his term of service and compensation. State ex rel. v. Otis (Ohio), 120 N. E. 313; State ex rel. v. Leimann (Ohio), 120 N. E. 174.

Public service commission, created by amendment of freeholder's charter. Mesmer v. Los Angeles Board of Pub. Ser. Comrs., 23 Cal. App. 578, 138 Pac. 935.

Civil Service Commission of Chicago is not a body corporate—is a branch or agency of municipal government. People v. Coffin (Ill. 1918), 119 N. E. 54; People ex rel. v. Chicago, 202 Ill. App. 105.

Board of park commissioners, Nashville, Tennessee, held corporation or quasi corporation with power to sue. Board of Park Comrs. v. Nashville, 134 Tenn. 612, 185 S. W. 694, 700.

<sup>5</sup> Delinquency in payment of poll tax renders one ineligible to serve as alderman. Faucette v. Gerlach (Ark.), 200 S. W. 279.

Law requiring petition signed by twenty-five resident electors to a statement that the signer knew the prospective candidate "to be a man of good moral character." State ex rel. v. Canavan, 155 Wis. 398, 145 N. W. 44, 48.

Law saying saloonkeeper is ineligible is valid. Saloonkeeper may be excluded from office of mayor or council. State v. Canavan, 155 Wis. 398, 145 N. W. 44.

Alderman ineligible if convicted "of malfeasance, bribery or other corrupt practice or crime," held to be restricted to the enumerated offenses committed within the state, and not applicable to such offenses committed in other states, and in violation of the laws of the United States. Strict construction applied. Conviction of using the mails for a lottery scheme, held did not disqualify. People ex rel. v. Bartlett, 169 Ill. App. 304.

One "who at the time of his election is, or within 100 days previous thereto has been an officer under any city government," declared by law to be ineligible to the legislature. Re Bewlez, 166 N. Y. S. 930.

Only one, a member of police was eligible as deputy marshal. One not such member is only deputy marshal de facto. Barter v. Rockland, 114 Me. 466, 96 Atl. 773.

One having been ousted from the office of mayor for misconduct in office is not ineligible to qualify subsequently for another term. State ex rel. v. Crump, 134 Tenn. 121, 183 S. W. 505, L. R. A. 1916D, 951.

Law prescribed that in event of increase of municipal indebtedness not authorized by vote of the electors the mayor and aldermen shall

constitutional or inherent right to be elected or appointed to office or public position, it is competent for the appropriate law-making body to prescribe reasonable qualifications.<sup>6</sup>

Unless restricted by the constitution the legislature may prescribe the qualifications of municipal officers.<sup>7</sup> If, however, the constitution prescribes the qualifications of an officer, of course, it is beyond the power of the legislature to prescribe additional qualifications.<sup>8</sup>

As to elective offices the eligibility, it has been held, refers to the date of the election not to a later date,<sup>9</sup> as the

not succeed themselves, held increase of the tax levy by mayor and aldermen without such vote does not disqualify, since taxes levied are not a part of the indebtedness of a municipality. *State ex rel. v. Ratliff*, 108 Miss. 242, 66 So. 538.

*Citizen of United States. State v. Marcus*, 160 Wis. 354, 152 N. W. 419; *Brown v. Foster*, 48 Mont. 114, 135 Pac. 993.

Under some laws certain appointive officers, as police marshal, need not be citizens of the United States. *Coxe v. Carson*, 194 Mich. 304, 160 N. W. 534.

<sup>6</sup> Twenty-five as a minimum age limit for the position of inspector in a bureau of fire prevention. Civil Service Commission in New York City may so prescribe by rule. *People ex rel. Moriarty v. Creelman*, 206 N. Y. 570, 100 N. E. 446, reversing 136 N. Y. S. 811, 152 App. Div. 147; *People ex rel. v. McWilliams*, 185 N. Y. 92, 99, followed.

<sup>7</sup> *Brown v. Foster*, 48 Mont. 114, 135 Pac. 993.

If the office is not a constitutional office, the legislature may define the qualification, etc., e. g.,

police commissioner. *State ex rel. v. Canavan*, 155 Wis. 398, 145 N. W. 44, 48.

A legislative act is constitutional which recites that no person shall be eligible to be a member of the board of commissioners—commission form—who shall have held such office for three consecutive years within the four years immediately preceding the date of the election. *State ex rel. v. Teasley*, 194 Ala. 574, 69 So. 723.

<sup>8</sup> *Wachter v. McEvoy*, 125 Md. 399, 93 Atl. 987.

<sup>9</sup> *Spitzer v. Martin*, 130 Md. 428, 100 Atl. 739; *People v. Purdy*, 21 App. Div. 601, 47 N. Y. S. 601.

"No collector or the deputy of any such officer shall be eligible to the office of treasurer." Deputy collector made ineligible to election as treasurer. If he is such deputy collector at the time of his election as treasurer but not such when he takes the office as treasurer, held ineligible. "Eligible," held to mean "electable" or "capable of being chosen," also that it means "qualified to hold office." That meaning should be given to carry out the legislative intent, rather than to seek to apply a

date when one seeks to take the office to which he was elected. "Eligible when used in statutes or constitution without contextual qualification or modificatory terms refers to the legal capacity to hold an office at the time of election or appointment thereto of the person designated." <sup>10</sup>

On the other hand, under a law providing that one shall not hold two offices at the same time, it has been held, that the eligibility relates not to the situation on election day, but on the day he qualifies to perform the duties of the office. Thus a trustee of a village may be elected to the presidency and resign as trustee, and then qualify as president. <sup>11</sup>

Under a law making one ineligible to another office *during his term*, it has been held he cannot resign before the expiration of the term and be elected or appointed to another office, e. g., a councilman selected to fill a vacancy, <sup>12</sup> or a police commissioner could not by resigning render himself eligible to become mayor. <sup>13</sup>

#### § 444. Same—residence. <sup>14</sup>

fixed meaning. State ex rel. v. Dunn (Mo. 1919), 209 S. W. 110; State ex rel. v. Brever, 235 Mo. 240, 250, 251, 138 S. W. 515.

<sup>10</sup> See §§ 447, 451, post.

<sup>11</sup> People ex rel. v. Myndersee, 126 N. Y. S. 198, 140 App. Div. 789, affirmed in 201 N. Y. 524, 94 N. E. 1098. Compare People v. Purdy, 154 N. Y. 439, 48 N. E. 821, 61 Am. St. Rep. 624.

<sup>12</sup> Doughty v. Scull (N. J. L.), 96 Atl. 564.

<sup>13</sup> Baltimore, police commission, made ineligible "to an elective or appointive office during the term for which he was appointed, except under the military laws of the state, or where the qualifications for such office are prescribed by the Constitution," held a po-

lice commissioner by resigning his office before the expiration of his term of two years did not render him eligible for the office of mayor. Wachter v. McEvoy, 125 Md. 399, 93 Atl. 987.

The law forbade increase of salary during term. The salary of the office of city marshal was increased. The incumbent resigned the day prior to the date the law raising the salary was to go into effect. Held, in the absence of statute forbidding, he was eligible to reappointment the next day. Henriod v. Church (Utah), 172 Pac. 701.

<sup>14</sup> Must have been a resident at least two years. Brown v. Foster, 48 Mont. 114, 135 Pac. 993.

Non-resident of state disquali-

§ 445. Same—residence in ward.<sup>15</sup>

§ 446. Same—elector or voter.<sup>16</sup>

Under a constitution providing that no person shall be elected or appointed to fill an office who does not possess the qualifications of an elector, a statute prescribing that a city manager need not be a resident of the city at the time of his appointment is unconstitutional.<sup>17</sup>

A qualified elector of a ward, eligible to represent the

fied. *State ex rel. v. Ratliff*, 108 Miss. 242, 66 So. 538.

Residence of state made a requirement to employment in city departments — sustained—non-resident nurse. *Hellyer v. Prendergast*, 162 N. Y. S. 788, 176 App. Div. 383.

City water superintendent was not a taxpayer, legal voter or inhabitant of city; held, as there was no applicable law prescribing these qualification incumbent was legally appointed. He is not "a civil officer, exercising a governmental function, but rather he is essentially the conductor or manager of a business, undertaken by the corporation. The distinction runs through the cases." *State ex rel. v. Lee*, 90 Vt. 55, 96 Atl. 382.

<sup>15</sup> Alderman shall be qualified elector of the ward. *State ex rel. v. Union*, 95 S. C. 131, 78 S. E. 738.

Alderman must be resident of ward for which elected for one year, otherwise ineligible. *People v. Kirkpatrick*, 164 Ill. App. 328.

Aldermen "elected from and by wards, must be residents of their respective wards." *Powell v. Hart*, 132 La. 287, 61 So. 233.

Residence in the ward for one year required to be eligible as

alderman, prescribed by constitution of Pennsylvania. *Commonwealth v. McAfee*, 237 Pa. 320, 85 Atl. 413.

Must be resident of ward. One elected and recognized as a member of council and acting as such is at least a *de facto* officer although a non-resident of the ward whose office under the terms of the charter had become vacant, and although his vote was required to pass an ordinance, the ordinance will not be held void, since the ordinance was "one of interest to all the people." *McAvoy v. Trenton*, 82 N. J. 101, 80 Atl. 950, 952, following as controlling *Oliver v. Jersey City*, 63 N. J. L. 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228.

<sup>16</sup> Must be a qualified elector of the city or town. *Brown v. Foster*, 48 Mont. 114, 135 Pac. 993.

A policeman, one eligible as, to be a qualified elector. *State v. Shores*, 48 Utah 76, 157 Pac. 225, citing § 2417, vol. 5, ante.

Mayor "shall be qualified elector of the municipality, and must have been, for two years, a resident of the parish." *Powell v. Hart*, 132 La. 287, 61 So. 233.

<sup>17</sup> *McClendon v. Hot Springs Board of Health* (Ark. 1919), 216 S. W. 289, 291.

ward as alderman, must be duly qualified to vote in the municipal election that elects him.<sup>18</sup>

**§ 447. Same—property owner—freeholder.<sup>19</sup>**

Whether the qualification refers to the date of the election or appointment, or the date when official duties are sought to be assumed must depend upon the proper construction of the applicable law.<sup>20</sup>

**§ 449. Same—educational qualifications.**

Although the only qualifications expressly prescribed were that the city attorney should be a resident for one year and a qualified elector, it has been held in Illinois that he must be a licensed attorney, because he is re-

<sup>18</sup> Qualification of alderman was that he should be a qualified elector of the ward. *State ex rel. v. Union*, 95 S. C. 131, 78 S. E. 738.

Relating to qualification to mayor, "voter" held to mean one who has the legal qualifications to vote, and not one who was a registered voter. *Trammell v. Griffin* (Tenn.), 207 S. W. 726.

<sup>19</sup> Property qualifications of mayor and aldermen. Sometimes required. *Powell v. Hart*, 132 La. 287, 61 So. 233.

The requirement that the trustee, alderman or councilman shall be a taxpayer and property owner, is merely to insure the proper interest in the prosperity and welfare of the community. Thus under a law providing that a trustee must at the time of his election own property assessed to him in the last preceding assessment roll, and when one is elected as trustee is both a property owner and taxpayer, and requested the proper officers to assess the property jointly owned by himself and

wife to them on the assessment rolls he has done all that could be reasonably required of him and the fact that the change was not made ought not to prejudice him in his eligibility. *Jewell v. Mohr*, 136 N. Y. S. 273.

<sup>20</sup> See § 443, ante; § 451, post.

Under particular law property qualification, held not to apply to persons who are merely candidates for the nominations, but should be restricted as applying to the time of the assumption by the persons elected of the duties of their offices. *Powell v. Hart*, 132 La. 287, 51 So. 233.

"Assessed with property in said town to the amount of \$500 and shall have paid taxes thereon two years preceding his election." Buying property afterwards does not qualify. Possession of a vested remainder in his father's estate upon which he paid taxes, although not assessed to him, is not sufficient. *Spitzer v. Martin*, 130 Md. 428, 100 Atl. 739.

quired to give legal advice, represent the city in the courts, and in the preparation and trial of cases for it. Without a license he could not represent the city in the courts.<sup>21</sup>

**§ 450. Same—ceasing to possess the prescribed qualifications.<sup>22</sup>**

**§ 451. Same—officer cannot hold two offices.<sup>23</sup>**

These prohibitory laws are generally construed to mean that one person shall not hold two offices at the

<sup>21</sup> *Baxter v. Venice*, 271 Ill. 233, 111 N. E. 111, affirming 194 Ill. App. 62; *Donaldson v. Dieterich*, 247 Ill. 522, 526, 93 N. E. 366.

<sup>22</sup> Guilty of malfeasance, ipso facto vacates his office. Commissioner under commission form. *Humphrey v. Pratt City Board of Comrs.*, 93 Kan. 413, 144 Pac. 197.

Requirement resident and qualified voter of ward be represented. Occupied summer cottage out of city, held no abandonment. *Williams v. Commonwealth*, 116 Va. 272; 81 S. E. 61.

Disqualification of city solicitor by entering officers' training school only operates from the time the fact "is ascertained and declared by the proper tribunal." In the meantime he would be at least a de facto officer. *Christopher v. State*, 21 Ga. App. 127, 94 S. E. 72.

Village trustee was voter and eligible when elected, and through failure to become a citizen he ceased to be an elector under an amendment to the constitution, held he was entitled to a reasonable time to qualify by becoming a full citizen before he should be put out of office. *State ex rel. v.*

*Marcus*, 160 Wis. 354, 152 N. W. 419, 428.

<sup>23</sup> Marshal of city cannot hold office of constable of township. *Nichelson v. Hardin* (Mo. 1920), 221 S. W. 358.

No person shall at the same time fill two municipal offices, either in the same or different municipalities. *State v. Bowman*, 184 Mo. App. 549, 180 S. W. 700.

The constitutional prohibition against holding two offices applies to municipal, as well as to state offices. *Darling v. Brunson*, 94 S. C. 207, 77 S. E. 860.

Under a constitutional provision forbidding one from holding more than one office of emolument, one holding an office to which a salary is attached, may also serve as alderman for which office no salary is provided. *Graves v. Griffin O'Neil & Sons* (Tex. Civ. App.), 189 S. W. 778.

Acts of one holding two offices are sometimes declared by statute "valid as the act of an officer de facto." *Christopher v. State*, 21 Ga. App. 127, 94 S. E. 72.

In Alabama, a judicial officer—circuit judge—may be appointed a commissioner of a city, having the



same time. The prohibition, it has been said, relates not to the situation on election day but on the day he qualifies to perform the duties of the office. Accordingly, a village trustee may be elected to the presidency and resign as trustee and then qualify as president.<sup>24</sup> But some laws of this kind extend the prohibition further. For example, "No member of the city council shall during the period for which he was elected, be elected or appointed to, or be competent to hold any other position or receive any employment directly or indirectly connected with the city government." Concerning this restriction a late Michigan case said: "The evils sought to be remedied were the holding of two offices by one man at the same time, and the holding by one man of a second office during the period of the term of his first office."<sup>25</sup>

commission form of government, and exercise judicial functions of the city as its judicial officer. *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31, 34, 35.

In *Georgia* members of a city council may hold other office, as the constitutional provision has been held not to apply to municipal officers, as they do not fall within the designation of civil officers of the state. *Phillips v. Jefferson*, 13 Ga. App. 376, 79 S. E. 222.

So in *Louisiana*, the constitution has no application to municipal officers. *State v. Martin*, 133 La. 1098, 63 So. 598.

Thus a district attorney by the acceptance of the appointment of attorney for a municipality does not become *functus officio* as district attorney. *State v. Phenix*, 134 La. 329, 64 So. 129.

The *Kentucky* constitution forbids holding two offices at same time, either in the same or dif-

ferent municipalities. City engineer, held municipal officer. Commissioner, under commission form of government, held municipal officer. *Commonwealth ex rel. v. Livingston*, 171 Ky. 52, 86 S. W. 916.

<sup>24</sup> *People ex rel. v. Myndersee*, 126 N. Y. S. 198, 140 App. Div. 789, affirmed in 201 N. Y. 524, 94 N. E. 1098.

Compare *People v. Purdy*, 154 N. Y. 439, 48 N. E. 821, 61 Am. St. Rep. 624, also cases in §§ 443, and 447, ante.

"A man may hold one office after he has been chosen to another which is incompatible with it, without thereby forfeiting either of them, provided he resigns the first before he enters upon the duties of the last." *Commonwealth v. Pyle*, 18 Pa. 519, 521.

<sup>25</sup> *People ex rel. v. Parsons*, 200 Mich. 39, 167 N. W. 344.

Police commissioner cannot be-

**§ 452. Same—incompatible offices.**

Declaratory of the common law rule, constitutions, statutes and charters provide, in substance, that the acceptance by one in public office of another public office or employment incompatible with the one he holds, shall operate to vacate the first.<sup>26</sup>

At common law offices were not incompatible unless the functions were inconsistent. In an early English authority it was stated that "Offices are said to be incompatible and inconsistent so as to be executed by the same person: First, when from the multiplicity of business in them they cannot be executed with care and ability; or, second, when, their being subordinate and interfering with each other, it induces a presumption that they cannot be executed with impartiality and honesty." However, in referring to this statement, an able New York opinion declares that "among the multitude of cases reported con-

come mayor during his term of office. *Wachter v. McEvoy*, 125 Md. 399, 93 Atl. 987.

Law provided that a recorder should not be eligible to any other office in the city during the term of his office as recorder, held to include all municipal offices, those in existence when law was enacted and those created thereafter. The purpose of the law was to prevent one in office with a fixed term from holding another municipal office during that term. A resignation may end the tenure, but it does not end the term. The term is fixed by law. The tenure, that is, the holding of the office may be terminated by resigning, when accepted. If the ineligibility clause is construed to mean that the incumbent may at any time resign his office and accept another office, the legislative prohibition becomes vain. "He is in-

eligible to another office during the term and cannot render himself eligible by resigning." *Rowe v. Tuck* (Ga. 1919), 99 S. E. 303.

<sup>26</sup> Commissioner under commission form accepting employment as engineer but he did not qualify as city engineer, held not to vacate office of commissioner. *Hermann v. Lampe*, 175 Ky. 109, 194 S. W. 122.

Under a law providing that no municipal officer or employee of the city or of any department thereof, shall serve as a member of councils during his continuance in such office or employment, a member of a city council forfeits his councilmanic place if he continues to hold another and incompatible office, e. g., office of local registrar of vital statistics. *Commonwealth v. Bennett*, 233 Pa. 286, 288, 82 Atl. 249.

taining adjudications as to what constitutes incompatibility in office illustrations are found of the latter class, but none whatever in the former. Indeed, where the question arose concerning the incumbent of two offices which bore no relation subordinating one to the other, it has been invariably held that they were not incompatible." Therefore, the conclusion: Offices which are declared by the adjudications to be incompatible "are such as bear a special relation to each other; one being subordinate to and interfering with the other so as, in the language of Coke, to induce the presumption that they cannot be executed with impartiality and honesty. And there are no cases of adjudged incompatibility involving any other principle."<sup>27</sup>

Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both.<sup>28</sup> Two offices are said to be incompatible when the holder cannot in every instance discharge the duties of each.<sup>29</sup>

Incompatibility arises, therefore, from the nature of the duties of the offices,<sup>30</sup> when there is an inconsistency in the functions of the two,<sup>31</sup> where the functions of the two are inherently inconsistent or repugnant,<sup>32</sup> as where antagonism would result in the at-

<sup>27</sup> *People v. Green*, 46 How. Pr. (N. Y.), 169, 173, 174.

<sup>28</sup> When it is physically impossible to perform the duties of both offices they are incompatible. *State v. Buttz*, 9 S. C. 156.

"Where one office is not subordinate to the other, nor the relations of one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that

the acceptance of the one is the vacation of the other." *People ex rel. v. Green*, 58 N. Y. 295, 304, 305.

<sup>29</sup> *King v. Tizzard*, 9 B. & C. 418.

<sup>30</sup> *Bryan v. Cattell*, 15 Iowa 538.

<sup>31</sup> *People ex rel. v. Green*, 58 N. Y. 295.

<sup>32</sup> *State v. Goff*, 15 R. I. 505; 9 Atl. 226, 2 Am. St. Rep. 921.

attempt by one person to discharge the duties of both offices,<sup>33</sup> or where the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both.<sup>34</sup> "The true test is whether the two offices are incompatible in their natures, in the rights, duties or obligations connected with or flowing from them."<sup>35</sup>

### § 452a. Same—removing disqualifications.

If the law declares that certain disqualifications shall render a person ineligible to an office, as stated in a Pennsylvania decision, he must get rid of his disqualification before he is appointed or elected, but if the law merely forbids him to hold or enjoy the office, or exercise its duties, it is sufficient if he qualifies himself before he is sworn.<sup>36</sup> Thus under a law forbidding a councilman from being interested in any contract for the sale

<sup>33</sup> Kenney v. Goergen, 36 Minn. 190, 31 N. W. 210.

<sup>34</sup> Abry v. Gray, 58 Kan. 148, 48 Pac. 577; State v. Wittmer, 50 Mont. 22, 144 Pac. 648.

<sup>35</sup> State ex rel. v. Thompson, 20 N. J. L. 689.

"Offices are incompatible when one has power of removal over the other, when one is in any way subordinate to the other, when one has power of supervision over the other, or when the nature and duties of the two offices are such as to render it improper from considerations of public policy for one person to retain both." State v. Wittmer, 50 Mont. 22, 144 Pac. 648.

City purchasing agent and alderman, held incompatible. State v. Wittmer, 50 Mont. 22, 144 Pac. 648.

Board of education member and clerk of board are incompatible.

Haymaker v. State (N. Mex. 1917), 163 Pac. 248, L. R. A. 1917D, 210.

Deputy collector and treasurer, held incompatible. State ex rel. v. Dunn (Mo. 1919), 209 S. W. 110.

Employment as civil engineer, and office of city commissioner under commission form, held not incompatible. Hermann v. Lampe, 175 Ky. 109, 194 S. W. 122.

Police judge is incompatible with that of mayor. Howard v. Harrington, 114 Me. 443, 96 Atl. 769.

Deputy sheriff and justice of the peace. Bamford v. Melvin, 7 Me. 14.

Sheriff and justice of the peace. Opinion of the Justices, 3 Me. 484.

Chosen freeholder and councilman. Wescott v. Scull, 87 N. J. L. 410, 96 Atl. 407.

<sup>36</sup> Commonwealth v. Pyle, 18 Pa. 519, 521.

or furnishing of any supplies for the use of any municipality, one when elected councilman was a stockholder in a company which held a contract with the borough, and he subsequently in a *bona fide* manner parted with his stock. The latter part of the above rule was applied because the councilman elect "got rid of his disqualification" and thus qualified himself before he was sworn to exercise the duties of the office to which he had been elected. The opinion was expressed that the real purpose of the legislation involved was to prevent one in public place from, directly or indirectly, being personally interested in contracts which he may have to pass upon officially, that is, the law was intended to forbid his occupying positions in any sense incompatible.<sup>37</sup>

V. MANNER OF SECURING OFFICE AND PUBLIC PLACE—ELECTION OR APPOINTMENT—TESTING TITLE—QUALIFYING, ETC.

§ 453. Manner of conferring office.<sup>38</sup>

The constitutional method for filling offices must be observed. Clearly, neither the legislature of the state, nor that of the municipality can change such method.<sup>39</sup>

37 "It shall not be lawful for any councilman \* \* \* to be \* \* \* interested, either directly or indirectly, in any contract for the sale or furnishing of any supplies \* \* \* for the use of any \* \* \* municipality \* \* \* of which he shall be a member. \* \* \* Nor shall any such member be a stockholder in any corporation in any way interested in any such contract. Any person violating these provisions \* \* \* shall forfeit his \* \* \* office, \* \* \* and shall be guilty of a misdemeanor." Commonwealth v. Kelly, 255 Pa. 475, 100 Atl. 272.

38 "Appoint," used as "nominate." Rhodes v. Tacoma, 97 Wash. 341, 166 Pac. 647.

Appoint, to allot, set apart, or designate, nominate or authoritatively assign.—Century Dict. "Appoint" does not mean "elect by popular vote." Heisler v. Robins, 17 Ariz. 429, 153 Pac. 771.

Appointment—The designation of a person by the person or persons having authority therefor to discharge the duties of some office or trust; election; choice; selection. Bouvier's Law Dict.

Adoption of ordinance and selection of a sanitary contractor, held governmental powers exercised under police powers. Gulfport v. Shepperd (Miss. 1918), 77 So. 193, citing § 453, vol. 2, ante.

39 Bloomfield v. Thompson, 136 La. 519, 67 So. 352.

Election as relates to a public office commonly means bestowing the office by a vote of the people in their capacity as electors or voters.<sup>40</sup> But the word has a broader meaning. It signifies the act of choosing, or a deliberate act of choice; the choice of a person to public office or place of any kind by the action or voting of a body of qualified or authorized persons or electors.<sup>41</sup> Thus a charter creating a commission form of seven commissioners may provide for the election by the council of one of their number as mayor, notwithstanding the home rule legislative act under which the municipal government was organized provided for the "election" of a mayor. Election, it was held, was not limited to choosing by the qualified electors of the municipality.<sup>42</sup>

**§ 454. Authority to appoint to office or situation in the public service.<sup>43</sup>**

In the absence of evidence to the contrary, a court will

<sup>40</sup> "An elective office is one where the officer is chosen by vote of the qualified voters of the city, and the office is an appointive one whether the appointment be made by the mayor or by the city council." *State v. Bowman*, 184 Mo. App. 549, 552, 180 S. W. 700.

Aldermen in New York are constitutional officers, and elected. *People ex rel. v. Hogan*, 214 N. Y. 216, 108 N. E. 459, affirming 151 N. Y. S. 261, 165 App. Div. 298; *Re Deitz*, 150 N. Y. S. 43, 84 Misc. Rep. 610.

<sup>41</sup> *Century*, Dict.; *Worcester's* Dict.

Election defined. *Attorney-General v. Bryan*, 182 Mich. 86, 148 N. W. 392; *State v. Hirsch*, 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170.

<sup>42</sup> *Kopezynski v. Schriber*, 194 Mich. 553, 161 N. W. 238. See

*State ex rel. v. Koeln*, 270 Mo. 174, 192 S. W. 748.

<sup>43</sup> Mayor and council under some charters are given authority to employ doctors to take charge of patients with smallpox. *Sugar Valley v. Mills*, 146 Ga. 210, 91 S. E. 17.

Health department created by legislative act, held board could appoint and remove its secretary without approval of council, although contrary provisions exist in the city charter. *Darling v. Brunson*, 94 S. C. 207, 77 S. E. 860.

Mayor cannot employ private detectives to aid in prosecutions of violations of ordinance without council authority. *Tate v. Johnson* (Idaho 1919), 181 Pac. 523.

Members of a board, having no legal title to the office, cannot dis-

presume that an appointment was legally made.<sup>44</sup>

In establishing the commission form of local government usually the governor is authorized to appoint the first commissioners to serve until an election by the qualified electors to choose their successor may be had. This method of selection, it has been held, does not change the character of the commissioners as municipal officers.<sup>45</sup>

### § 455. Same—only by authority named.<sup>46</sup>

miss employees and make new appointments. *People v. Coffin* (Ill. 1918), 120 N. E. 807.

Of course, an appointment cannot be for a longer term than that fixed by law. *McAvoy v. Trenton*, 82 N. J. L. 101, 80 Atl. 950.

Under civil service, the commission has no power to appoint but certifies eligibles, and the officer makes the appointment from the list, as law says. *People ex rel. v. Lower*, 251 Ill. 527, 96 N. E. 346.

<sup>44</sup> Legislative act required an ordinance to be enacted relating to waterworks and appointment of trustees by the council to manage such property. The city council appointed the trustees after the enactment of the statute. The record was silent whether the ordinance had been passed. The court said: "We, therefore, must assume that the council acted within the law and made the appointment of trustees after an ordinance had been enacted as required by statutes, providing for such offices." *Sloan v. Cedar Rapids*, 161 Ia. 307, 142 N. W. 970, 972.

<sup>45</sup> *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31.

<sup>46</sup> *People v. Welsh*, 260 Ill. 532, 103 N. E. 578.

Where the constitution gives power to mayor to make an appointment, an ordinance of the commission council conferring power on the commissioner of public utilities to make the appointment is void. *Bloomfield v. Thompson*, 136 La. 519, 67 So. 352.

Where the power to appoint is vested in commissioners, an ordinance giving such power to the mayor is void. *Uhr v. Lambert* (Tex. Civ. App.), 188 S. W. 946.

Where the power to appoint is in the council the president of the village cannot appoint an attorney. *Gansser v. Vander Veen*, 176 Mich. 517, 142 N. W. 744.

Law authorized the appointment of the officer by the president of the village "by and with the consent of the board of trustees," held appointment by president alone was void, although authorized by ordinance. *State v. Paynter*, 197 Ill. App. 78, 81; *People v. Hitchcocks*, 148 Ill. App. 456; *McKean v. Ganthier*, 132 Ill. App. 376; *Rowley v. People*, 53 Ill. App. 298.

Law providing that members of board of public works shall be elected by the board of mayor and aldermen, where under the law the mayor has a negative upon the action of the aldermen, and no vote

§ 456. Same—delegation of power to appoint or elect forbidden.<sup>47</sup>

§ 457. Same—by mayor.<sup>48</sup>

§ 457a. Same—self-appointment.

Although it possesses power of appointment a council may not select one of its own members, as clerk of the council,<sup>49</sup> or as a member of a board of assessors.<sup>50</sup>

In Kentucky, the fiscal court has no power to appoint one of its members to any office, place or position.<sup>51</sup> The fact that the services and compensation of the appointee will be under the jurisdiction of a new fiscal court does not alter the rule. Such void appointment cannot be ratified subsequently.<sup>52</sup> Such exercise of the appointive

can be passed or appointment made over his veto unless by a specified vote, held mayor had power to veto election by aldermen. *Attorney General v. Hayes*, 77 N. H. 358, 92 Atl. 166.

<sup>47</sup> *Milliken v. Gillum*, 135 Ky. 280; *McAvoy v. Trenton*, 82 N. J. L. 101, 80 Atl. 950.

When ordinance authorizes the council to appoint a clerk, the duty of selection cannot be delegated to an officer of the department where the clerk is to serve. *McAvoy v. Trenton*, 82 N. J. L. 101, 80 Atl. 950.

Giving mayor power to appoint a sealer of weights and measures, under legislative authority granting power to appoint such officer to counties and municipalities, is not a delegation of the legislative power of the city. The appointment is in the nature of an executive act. *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941.

<sup>48</sup> *People v. Welsh*, 260 Ill. 532, 103 N. E. 578; *Waldron v. Rowe* (N. J. L. 1919), 106 Atl. 212.

Temporary appointment by mayor sustained where officer had been removed, and prior to council action thereon, under particular law. *Michels v. McCarty*, 196 Ill. App. 493.

*Policemen. Grush v. Bishop*, 46 Mont. 97, 126 Pac. 619.

Sealer of weights and measures. *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941.

With consent of legislative body. *Wilson v. McCarron*, 112 Me. 181, 91 Atl. 839. *Uhr v. Lancaster* (Tex. Civ. App.), 187 S. W. 379; *Brush v. Bishop*, 46 Mont. 97, 126 Pac. 619.

<sup>49</sup> *State v. Bowman*, 184 Mo. App. 549, 553, 180 S. W. 700.

<sup>50</sup> *Felker v. Monroe*, 22 Ga. App. 301, 95 S. E. 1023; *Parrish v. Adel*, 144 Ga. 242, 86 S. E. 1095.

<sup>51</sup> *Milliken v. Gillum*, 135 Ky. 280.

<sup>52</sup> *Meglemery v. Weissinger*, 140 Ky. 353, 131 S. W. 40, 31 L. R. A. (N. S.) 575.



power is against public policy, and is void on its face, and the one so appointed, it has been said, is not even a *de facto* officer.<sup>53</sup>

For a like reason where a member of a board of education voted for himself as clerk, and his vote was essential to elect, it was held there was no election, as he could not be elected by his own vote.<sup>54</sup>

**§ 458. Charters often prescribe that the council or common council shall have power to appoint or elect certain municipal officers.<sup>55</sup>**

The general rule is often applied to appointments that "whenever a power is conferred upon a municipal cor-

<sup>53</sup> "It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford, to place the other members under obligations that they may feel obliged to repay. Few persons are altogether exempt from the influence that intimate business relations enable associates to obtain, and few strong enough to put aside personal considerations in dispensing public favors. And it is out of regard for this human sentiment and weakness, and the fear that the public interest will not be so well protected if appointing bodies are not required to go outside their membership in the selection of public servants, that the rule announced has been

adopted, and ought to be strictly applied." *Meglemery v. Weisinger, et al*, 140 Ky. 353, 355, 131 S. W. 40, 31 L. R. A. (N. S.) 575.

<sup>54</sup> *State v. Goodrich*, 86 Conn. 68, 84 Atl. 99; *State v. Fowler*, 66 Conn. 294, 298, 32 Atl. 162, 33 Atl. 1005.

<sup>55</sup> *State ex rel. v. Lincoln*, 101 Neb. 57, 162 N. W. 138; *Eckerson v. Englewood*, 82 N. J. L. 298, 81 Atl. 1070; *Gansser v. Vander Veen*, 176 Mich. 517, 142 S. W. 744; *State ex rel. v. Tyrrell*, 158 Wis. 425, 149 N. W. 280; *Felker v. Monroe*, 22 Ga. App. 301, 95 S. E. 1023.

Council, elect, city scavenger. *Ex parte Howell* (Tex. Cr. App.), 158 S. W. 535.

Board of trustees. *McKamy v. Bakersville*, 26 Cal. App. 315, 146 Pac. 910.

Council has power to appoint from time to time such subordinate officers as it may deem necessary "for the ordering and governing of the city and the execution of the powers and duties conferred and

poration by the legislature, and no officer or person is expressly authorized to exercise such power, the common council of the municipality is the only authority which can exercise it. It is the general agent of the municipality.”<sup>56</sup>

#### § 460. Restrictions—merit system—civil service laws and regulations.

To secure appointments to and promotions in the municipal service solely on the ground of merit, civil service laws generally exist,<sup>57</sup> and are uniformly sustained as valid and constitutional.<sup>58</sup>

It is competent for legislative bodies or the electors of a municipality by charter to confer authority upon executive boards, as civil service commissioners, to prepare and promulgate rules, consistent with law, to guide

imposed.” *McAvoy v. Trenton*, 82 N. J. 101, 80 Atl. 950.

Council may employ engineer. *Vermeule v. Corning*, 174 N. Y. S. 220.

Council may fill vacancy in office of mayor by election. *Blake v. Trout*, 127 Ark. 299, 192 S. W. 179.

Under commission form of seven commissioners, the commission may select or elect one of their members as mayor, since the word “election,” as used in law, is not limited to choice by qualified voters. *Kopezynski v. Schriber*, 194 Mich. 553, 161 N. W. 238.

<sup>56</sup> *Crouch v. Commonwealth*, 172 Ky. 463, 189 S. W. 698.

<sup>57</sup> *State ex rel. v. George*, 92 Ohio St. 344, 110 N. E. 951; *State ex rel. v. Lucas*, 236 Mo. 18, 139 S. W. 348.

“The civil service principle is the foundation of the law. The fundamental idea upon which the system rests is that appointments

to and promotions in the department shall depend upon merit and not upon favoritism.” *State ex rel. v. Duncan*, 49 Mont. 54, 140 Pac. 95, 97.

Statute has not the force of a constitutional provision; it may be repealed as to one class of cities and remain in effect as to others. *State ex rel. v. Bentley* (Kan. 1917), 164 Pac. 290; *Board of Education v. State*, 80 Ohio St. 133, 88 N. E. 412; *Union Bridge Co. v. United States*, 204 U. S. 386, 27 Sup. Ct. 367, 51 L. ed. 523; *Gregory v. Kansas City*, 244 Mo. 523, 149 S. W. 466.

<sup>58</sup> A charter is valid and constitutional if it complies with the state constitution by providing for appointments and promotions in the civil service according to merit and fitness to be ascertained by competitive examination. *State ex rel. v. Edwards*, 90 Ohio 305, 107 N. E. 768.

and control their discretion and the discretion of the municipal officers or departments in whom the power of appointment may be vested, and for conducting examinations of applicants for appointment, and to classify applicants and positions in the municipal service.<sup>59</sup> Such provisions do not constitute a delegation of power to enact laws. "It is merely a delegation of administrative powers and duties."<sup>60</sup>

Under our system the decision of the wisdom and practicability of such plan rests with the legislature or the people of the municipality and not with the executive or administrative officers of the city or the courts.<sup>61</sup>

The adoption of the civil service system is often left optional with the municipality but when once adopted the local corporation cannot relieve itself of the restriction.<sup>62</sup>

These laws usually apply to certain places and situations in all departments of the municipal government,<sup>63</sup> and sometimes to employees of boards or commissioners

<sup>59</sup> *Gregory v. Kansas City*, 244 Mo. 523, 551, 149 S. W. 466; *People v. Chicago*, 234 Ill. 416, 84 N. E. 1044; *People v. Kipley*, 171 Ill. 44, 49 N. E. 229; *State ex rel. v. Frear*, 146 Wis. 291, 131 N. W. 832.

Power vested in a state board of health to examine not only into the literary and technical requirements of applicants for a certificate to practice medicine, but also into their moral character is not a grant of judicial power in contravention of the constitution. *State v. Hathaway*, 115 Mo. 36, 47, 21 S. W. 1081.

Same rule applied to a statute relating to the practice of dentistry. *State v. Doerring*, 194 Mo. 398, 414, 92 S. W. 489.

<sup>60</sup> *Gregory v. Kansas City*, 244 Mo. 523, 551, 149 S. W. 466; *Opinion of Justices*, 138 Mass. 603; *Opinion of Justices*, 145 Mass. 587,

13 N. E. 15; *Green v. State Civil Service Com.*, 90 Ohio 252, 107 N. E. 531.

<sup>61</sup> "All officers, both state and municipal, are charged with the duty of obeying such written laws as have been enacted to govern their official conduct, and it is not within the power even of this court to suspend or set aside any constitutionally enacted statute." *Gregory v. Kansas City*, 244 Mo. 523, 551-553, 149 S. W. 466.

"If a law is constitutional it is our duty merely to interpret and declare it exactly as made by the legislative department on which the responsibility for its wisdom and policy rests." *Henry v. Evans*, 97 Mo. 47, 55.

<sup>62</sup> *Warren v. New Brunswick*, 79 N. J. L. 191, 80 Atl. 432.

<sup>63</sup> In Massachusetts civil service act extends to chief of police in

existing as corporate entities separate and distinct from the municipality.<sup>64</sup>

The application of these laws is limited. They do not apply, it has been held, to a mere *de facto* officer.<sup>65</sup> Nor do they apply usually to officers having a definite term of office. Such officers generally belong to the "unclassified service," e. g., the head of a department.<sup>66</sup> The application is restricted to offices the terms of which are not fixed by law.<sup>67</sup>

Exemptions of certain officers or classes of officers and specified employees are commonly made.<sup>68</sup> Instances

all cities except Boston. *Ellis v. Civil Service Com.*, 229 Mass. 147, 118 N. E. 231.

Employees of the civil service commission of Chicago are employees of the city, and they are required to be classified. *People ex rel. v. Chicago*, 202 Ill. App. 105.

Civil service classification held applicable to employees of free library located in a city paid by city. *Trustees of Free Library v. Civil Service Com.*, 83 N. J. L. 196, 83 Atl. 980.

Requirements as to civil service, held not applicable to employees appointed prior to the taking effect of the restrictions. *Kessler v. Seattle*, 93 Wash. 192, 160 Pac. 423.

<sup>64</sup> The board of water commissioners of Detroit was created by legislative act, which act was not a part of the charter of Detroit, and consequently the board is a distinct corporate entity. Notwithstanding an amendment to the Detroit charter creating a civil service commission for the municipal employees of the city, it has been held, operative on the employees of the water board. Therefore, where employees are removed with-

out cause, mandamus will lie to compel the commissioners to rescind the order of discharge. *Grob- bel v. Detroit Water Commis- sioners*, 181 Mich. 365, 149 N. W. 675.

<sup>65</sup> "To construe the civil service act so as to keep in office one holding such office without right would subvert the beneficent purposes of that legislation. It is manifest that its application must be limited to the protection of officers *de jure*." *Slater v. Burk*, 83 N. J. L. 152, 83 Atl. 973, 976; *Wilson v. Burk*, 83 N. J. L. 205, 83 Atl. 977; *Volk v. Burk*, 83 N. J. L. 204, 83 Atl. 978.

<sup>66</sup> *Fagen v. Morris*, 83 N. J. L. 3, 84 Atl. 1067, holding clerk head of a department.

<sup>67</sup> *Browne v. Hagen* (N. J. L. 1918), 104 Atl. 207, holding that a health inspector with a "term fixed by law," was exempt. Under the law, the board of health had power to appoint its subordinates and fix their terms.

<sup>68</sup> Certain employees exempt under laws and regulations. *People ex rel. v. Prendergast*, 132 N. Y. S. 115, 148 App. Div. 129; *Mc-*

are heads of departments and officers and clerks for the faithful discharge of whose duties a superior officer is required to give bond and who is responsible.<sup>69</sup>

Classification of eligibles is generally made by taking the municipality as a unit, and not according to residence, wards, boroughs and other subdivisions.<sup>70</sup>

Such a law requiring the commission to omit from the list of eligibles, aliens and to give preference to citizens of the state was sustained.<sup>71</sup>

"The court can neither conduct nor supervise civil service examinations. It has been held that the action of civil service commissioners in making classifications, and making and amending rules, is neither reviewable by *certiorari* nor in a taxpayer's action, and that the official acts of the commissioners are not judicial, in the technical sense, but are executive, ministerial, or administrative."<sup>72</sup> "The effect of the adjudications appears to be that the acts of such commissioners may only be ques-

Carthy v. San Francisco Board, etc. (Cal. App. 1918), 174 Pac. 402.

"Confidential clerk" exempt as one for mayor, and directors or heads of departments. In such case the civil service commission cannot limit the officer's choice of such confidential clerk, who may be discharged by the officer at pleasure. "The term 'confidential' is not necessarily limited to such positions as involve matters of secrecy, but includes those which involve trust and confidence in the person occupying the particular employment. Any relation in which one person represents another in the performance of duties involving skill, integrity and trust is a confidential one within the general legal acceptance of the meaning of that term." Davies v. Pittsburgh, 252 Pa. 251, 97 Atl. 413; Crummey v. Palmer, 152 N. Y. 217, 46 N. E. 328.

Civil service law for city, held not to apply to clerk of state court. Detroit Civil Service Com. v. Engel, 187 Mich. 83, 153 N. W. 358.

Council had power to employ outside consulting engineer to aid city engineer; exempt from civil service. Burrell v. Portland, 61 Or. 105, 121 Pac. 1.

<sup>69</sup> Johnson v. Milwaukee, 147 Wis. 476, 133 N. W. 627.

<sup>70</sup> People ex rel. v. Fetherston, 153 N. Y. S. 325, 168 App. Div. 416.

<sup>71</sup> Lee v. Lynn, 223 Mass. 109, 111 N. E. 700.

<sup>72</sup> People ex rel. v. McWilliams, 185 N. Y. 92, 77 N. E. 785; Slavin v. McGuire, 205 N. Y. 84, 98 N. E. 405; Simon v. McGuire, 204 N. Y. 253, 97 N. E. 526. See also People ex rel. v. Wiggins, 199 N. Y. 382, 92 N. E. 789.

tioned in the court by mandamus proceeding, and that the remedy afforded by mandamus in such cases is very limited, and exists only where some provisions of the constitution or of a statute which vests no discretion in the commissioners have been violated." <sup>73</sup>

A civil service rule may prescribe a minimum age limit for certain employments. <sup>74</sup>

Courts will not take judicial notice of civil service rules. <sup>75</sup>

In the classification of eligibles, promulgation of rules and amendments thereto, public notice is usually given by the commission. Often public hearings, when requested, are held, and after such hearings promulgation and notice is given. <sup>76</sup>

After the system is put into operation appointments to the places and positions covered by the law can only be made from the eligible list authorized or certified to by the commission. <sup>77</sup>

Where one has been in the service for a stated period a new appointment may be given him without examination, as provided by some laws. <sup>78</sup>

Appointments for probationary terms are often made and frequently required by these laws, rules and regula-

<sup>73</sup> *People ex rel. v. Creelman*, 135 N. Y. S. 718, 720, 721, 150 App. Div. 746.

Power of civil service commissioners to correct errors and irregularities in an eligible list. Capricious or arbitrary action will not be countenanced. *People ex rel. v. McBride*, 226 N. Y. 252, 123 N. E. 374.

<sup>74</sup> May prescribe minimum age limit of 25 years for inspector of the bureau of fire prevention. *People ex rel. v. Creelman*, 206 N. Y. 570, 100 N. E. 446, reversing 152 App. Div. 147, 136 N. Y. S. 811.

<sup>75</sup> *People ex rel. v. Creelman*, 135 N. Y. S. 718, 720, 150 App. Div.

746; *People ex rel. v. Dalton*, 61 N. Y. S. 263, 46 App. Div. 264; *Kay v. Portland*, 79 Or. 146, 154 Pac. 750.

<sup>76</sup> *Slavin v. McGuire*, 205 N. Y. 84, 98 N. E. 405, affirming 128 N. Y. S. 1146, 144 App. Div. 910.

<sup>77</sup> *Nammack v. Creelman*, 130 N. Y. S. 211, 145 App. Div. 289, reversing *Re Nammack*, 123 N. Y. S. 1063, 66 Misc. Rep. 523; *Jenkins v. Gronen*, 98 Wash. 128, 167 Pac. 916.

Error in certification. *McLaughlin v. Green*, 96 Kan. 641, 152 Pac. 661.

<sup>78</sup> *Kay v. Portland*, 79 Or. 146, 154 Pac. 750.

tions. In such case the past records of the probationers may be investigated and on the result of such investigation permanent appointments may be refused, notwithstanding the duties during the probationary period were well performed. The application is generally made to officers of the police force.<sup>79</sup>

A broad discretion is generally conferred relating to the ascertainment of merit and fitness to be ascertained by examination. The commission may decline to certify an applicant guilty of infamous or disgraceful conduct in business transactions. In brief, the fitness and character, mental equipment, etc., are discretionary matters with the commission, and are without judicial interference in the absence of oppressive or arbitrary action.<sup>80</sup>

#### § 461. Preferences in appointments and promotions—veteran acts.<sup>81</sup>

##### § 461a. Preference of citizens of state.

In construction of public work by the state, county, city or town and in all work of any branch of the service of the state or of any city or town therein, laws giving preference to citizens of the state have been held valid and constitutional.<sup>82</sup>

#### § 463. Manner of appointment to office.<sup>83</sup>

<sup>79</sup> *People ex rel. v. Woods*, 153 N. Y. S. 872, 168 App. Div. 3, police officer case.

<sup>80</sup> *People ex rel. v. Moscovitz*, 150 N. Y. S. 571, 87 Misc. Rep. 448.

<sup>81</sup> Applies to entire term of office. *Matter of Stutzbach*, 168 N. Y. S. 416, 62 App. Div. 219.

Volunteer firemen entitled to preference in employment and reinstatement. *People ex rel. v. Williams*, 213 N. Y. 130, 107 N. E. 49, affirming 164 App. Div. 900, 148 N. Y. S. 1136.

Veterans to be transferred to other position they are fitted to fill when their offices are abolished. Held, they need not necessarily be best-equipped men to justify transfer. *People v. Ward*, 162 N. Y. S. 744.

<sup>82</sup> *Lee v. Lynn*, 223 Mass. 109, 111 N. E. 700, following *Heim v. McCall*, 239 U. S. 175; *Crane v. New York*, 239 U. S. 195; *Elkan v. Maryland*, 239 U. S. 634.

<sup>83</sup> A law requiring a public office, as that of city treasurer, to be "let by contract to the highest

**§ 464. Commission.<sup>84</sup>****§ 465. When appointment is complete it cannot be revoked.<sup>85</sup>****§ 466. Confirmation of appointment.<sup>86</sup>**

and best bidder," of course, is vicious. *Corpus Christie v. Mireur* (Tex. Civ. App. 1919), 214 S. W. 528.

If the law requires the appointment to be by ordinance an appointment by "motion" is insufficient. *Connors v. Hillman*, 86 N. J. L. 490, 92 Atl. 59; *Eckerson v. Englewood*, 82 N. J. L. 298, 81 Atl. 1070.

Mayor cannot make a testamentary or revocable appointment. *Brogan v. Kane*, 223 Mass. 196, 111 N. E. 865.

<sup>84</sup> The governor addressed a communication advising one of his appointments as commissioner for a term of three years. The appointee qualified as required by law, and the governor was duly notified of this action. The governor thereupon endorsed on such notice to send the commission which was filed as an official paper in his office. Held, a complete appointment without a commission which could not thereafter be revoked. *Draper v. State*, 175 Ala. 447, 57 So. 772.

**Certificate of election** of alderman to fill a vacancy is not necessary, although the law prescribes that it shall be issued. *State v. Willis*, 47 Mont. 548, 133 Pac. 962.

**Failure of clerk to issue certificate** of one selected by the council to office, as law requires, held duty being ministerial, omission did not affect right to hold the office. *State*

*ex rel. v. Tyrrell*, 158 Wis. 425, 149 N. W. 280.

<sup>85</sup> "It is true that an appointment is complete when the last act required of the appointing power has been performed and the authority to make the appointment has then been exhausted. In such case the appointing power cannot revoke the appointment, and the one appointed can only be removed by lawful authority." *People ex rel. v. Lower*, 251 Ill. 527, 96 N. E. 346.

<sup>86</sup> **Confirmation by council.** *Uhr v. Lancaster* (Tex. Civ. App.), 187 S. W. 379; *Gansser v. Vander Veen*, 176 Mich. 517, 142 N. W. 744; *Felker v. Monroe* (Ga. App. 1918), 95 S. E. 1023; *People v. Welsh*, 260 Ill. 532, 103 N. E. 578; *State v. Paynter*, 197 Ill. App. 78, 81; *Grush v. Bishop*, 46 Mont. 97, 126 Pac. 619.

**Marshal as employee as to appointment and tenure.** *Uhr v. Lancaster* (Tex. Civ. App.), 187 S. W. 379; *Brown v. Uhr* (Tex. Civ. App.), 187 S. W. 381.

**Under law requiring council to act in good faith in refusing to confirm appointee of the mayor** the council need not give the mayor the reasons for its action. *State v. Lander*, 87 Kan. 474, 124 Pac. 364.

**Law providing that members of a named board shall be elected by the board of mayor and aldermen,** held mayor had power to veto the



§ 468. Mandamus as to appointment.<sup>87</sup>

§ 469. Title to office is determined by quo warranto not by mandamus.<sup>88</sup>

§ 470. Proceedings by quo warranto to determine title to office.<sup>89</sup>

election by the aldermen. *Attorney General v. Hayes*, 77 N. H. 358, 92 Atl. 166.

<sup>87</sup> Filling vacancy in a municipal office may be compelled by mandamus in a suit brought by citizens and taxpayers of the city. *Commonwealth v. Livingston*, 171 Ky. 52, 186 S. W. 916.

Mandamus to compel recognition of appointment as a member of licensing board. *Brogan v. Kane*, 223 Mass. 196, 111 N. E. 865.

Mandamus to compel the record of vote by which an alderman who was elected by the board to fill a vacancy, and to issue to him a certificate of election, and also to compel the clerk to file record of the oath taken in writing. *State ex rel. v. Willis*, 47 Mont. 548, 133 Pac. 962.

<sup>88</sup> *Martin v. White*, 74 W. Va. 628, 82 S. E. 505; *People v. Paynter*, 197 Ill. App. 78; *Santspre v. Cohoes*, 145 N. Y. S. 281, 83 Misc. Rep. 317; *Sumner v. Henderson* (Miss. 1917), 76 So. 829; *Commonwealth v. Clark*, 249 Pa. 109, 94 Atl. 473; *Commonwealth v. Durkin*, 245 Pa. 507, 91 Atl. 918; *Commonwealth v. James*, 214 Pa. 319, 63 Atl. 743; *Ludlam v. Dallas*, 82 N. J. L. 122, 81 Atl. 489.

*Laches. People ex rel. v. Bailey*, 30 Cal. App. 581, 158 Pac. 1036; *State ex inf. v. Koeln*, 270 Mo. 174, 192 S. W. 748.

Quo warranto proper to de-

termine the eligibility of one elected to public office. *Franklin v. Westfall*, 273 Ill. 402, 112 N. E. 974.

Quo warranto to recover an office will not lie in behalf of one not entitled to the office and who had been ousted therefrom, even against one whose title is illegal. *Florey v. Lanning* (N. J. L.), 100 Atl. 183.

In New Jersey, an ordinance which created a new position or office is reviewed by certiorari, if the object of the ordinance is to abolish the office and not oust the incumbent. In such case, quo warranto will not lie. *Loughran v. Jersey City*, 86 N. J. L. 442, 92 Atl. 55.

A city attorney's right cannot be raised by plea in abatement to information drafted by him. *Bush v. State*, 10 Ga. App. 544, 73 S. E. 697.

Two trying to exercise duties, by statute, court may enjoin one, pending trial of title. *People ex rel. v. Zeeh*, 148 N. Y. S. 111, 85 Misc. Rep. 151.

<sup>89</sup> Title to public office may not be tried in a suit for an injunction. But the possession of officers de facto will be protected by injunction pending a litigation in the nature of quo warranto to determine their title. Quo warranto to recover possession of an office where the officer was ousted by an in-

### § 470a. Certiorari.

One who seeks the remedy by writ by *certiorari* to review proceedings in the selection of an officer, alleging illegality of the selection of another to the office to which he claims he is entitled must show that he himself is lawfully entitled to the office, that is, it must appear that he is an officer *de jure*, not merely *de facto*.<sup>90</sup>

### § 471. Power of municipal legislative body to judge of the election and qualification of its own members and other municipal officers.<sup>91</sup>

Apart from the usual provision making the council the judge of the election and qualifications of its own

truder. *Barendt v. McCarthy*, 160 Cal. 680, 118 Pac. 228.

<sup>90</sup> *Slater v. Burk*, 83 N. J. L. 152, 83 Atl. 973; *Volk v. Burk*, 83 N. J. L. 204, 83 Atl. 978; *Wilson v. Burk*, 83 N. J. L. 205, 83 Atl. 977.

<sup>91</sup> May judge of the election and qualification of its own members. *Martin v. White*, 74 W. Va. 628, 82 S. E. 505.

The legislative body to which a member is elected, whose right to hold the office is contested, is the tribunal to try the contest, and not the body in office at the time of the election. *Price v. Fitzpatrick* (W. Va. 1919), 100 S. E. 872; *Trunick v. Northview*, 80 W. Va. 9, 91 S. E. 1081.

Laws authorizing, held valid and action thereunder conclusive. *Sinclair v. Grand Rapids Common Council*, 181 Mich. 186, 147 N. W. 942; *Naumann v. Board of City Canvassers*, 73 Mich. 252, 253, 254, 41 N. W. 267, 268.

The law prescribed that the council shall be "sole judge." In a contest in the council over the election of a member, the court has

supervisory jurisdiction, by *certiorari*. *Taylor v. Carr*, 125 Tenn. 235, 141 S. W. 745; *Staples v. Brown*, 113 Tenn. 643, 85 S. W. 254.

If the council has no rules or method of conducting a contest, as required by law, its jurisdiction cannot be invoked. *Taylor v. Carr*, 125 Tenn. 235, 141 S. W. 745; *Veile v. Funck*, 17 Ia. 365.

A council in deciding an election contest between rivals claiming seats in the body acts in a judicial capacity. Review by court. *Broderick v. Hunt*, 77 N. H. 139, 89 Atl. 302.

Law provided that three fourths of the members voting affirmatively may, for good cause, expel any member. A member was interested in furnishing supplies to city. Statute said, if so, "he shall thereby vacate his office." Ordinance said, if so, council shall declare the office vacant and proceed to fill the vacancy. A bare majority vote is insufficient to expel. *Powell v. Hambrick*, 164 Ky. 340, 175 S. W. 633.

Where power is given to the council by charter, a state statute

members, judicial decisions affirm that in every legislative body that body is the sole judge of these questions.<sup>92</sup>

### § 472. Contesting elections in courts.<sup>93</sup>

### § 474. Qualifying to perform duties of office.<sup>94</sup>

In one case three members elected to a city council failed and refused for a period of ten months to qualify

giving any one claiming to be elected to a municipal office a right to proceed as in equity against the holder or claimant of such office, does not take away such power, and one so proceeding does not deprive the council of the power conferred by charter. *Pelletier v. O'Connell*, 111 Me. 38, 88 Atl. 55.

Council sitting as a judge, etc., is pro tempore a judicial tribunal. If no regulation by statute it proceeds as at common law and, of course, there must be notice and opportunity to be heard. Resolution unseating a member without hearing, of course, is void. *Pelletier v. O'Connell*, 111 Me. 38, 88 Atl. 55.

Certiorari to review determination of a contest for seat in board of aldermen. *People ex rel. v. Smith*, 176 N. Y. S. 608.

<sup>92</sup> *Spitzer v. Martin*, 130 Md. 428, 100 Atl. 739.

<sup>93</sup> Court has jurisdiction in contest for mayor. *Taylor v. Carr*, 125 Tenn. 235, 141 S. W. 745.

Statutes give one claiming to be elected to a municipal office, a right to proceed as in equity against the holder or claimant of such office. *Pelletier v. O'Connell*, 111 Me. 38, 88 Atl. 55.

"If a person usurps an office or

franchise, the person entitled thereto, or the commonwealth, may prevent the usurpation by an ordinary action." In Kentucky one illegally expelled as a member of a city council may bring an ordinary action against the one elected to fill the vacancy. On hearing, if facts support, the judgment may be that the one elected is a usurper, he may be ousted, and it may be adjudged the one illegally expelled is entitled to the office. *Powell v. Hambrick*, 164 Ky. 340, 175 S. W. 633.

<sup>94</sup> Sworn statement of election expenses as preliminary to being sworn in and drawing salary, held directory. *Commonwealth v. Schrotnick*, 240 Pa. 57, 87 Atl. 280.

Failure to qualify within time prescribed does not operate to vacate the office. He may qualify within a reasonable time after the date fixed for taking the oath, if he has a reasonable excuse for the delay. *Lewin v. Ft. Mitchell*, 148 Ky. 816, 818, 147 S. W. 922. See *State ex rel. v. Koeln*, 270 Mo. 174, 192 S. W. 748.

Permitting alderman to qualify after time limit, held was a waiver of the time limit or constituted under particular law a filling of a vacancy. *State ex rel. v. Wharton*, 104 Miss. 8, 61 So. 2.

and serve, and thus prevented a quorum in the council and precluded the transaction of municipal business. An action in equity instituted by the mayor in the name of the municipality was allowed, to determine whether by such conduct, the offices were not abandoned and forfeited. "Equity will not suffer a wrong to be without a remedy."<sup>95</sup>

### § 475. Same—oath, failure to take.

Concerning the result of failure of the officer to take the official oath, within the time prescribed or prior to entering upon his public duties the judicial utterance are not uniform. The requirement under particular laws has been viewed as mandatory, and under others as directory merely.<sup>96</sup>

<sup>95</sup> Williamsburg v. Weesner, 164 Ky. 769, 176 S. W. 224.

<sup>96</sup> Before entering upon the office all officers elected or appointed must take and subscribe the constitutional oath of office. Oath to be taken within a named time (10 days—20 days) after receiving notice of his election or appointment. Sometimes if one fails, etc., "then such office becomes vacant."

Police officers appointed for probationary term of six months took oath, and at end of six months he was appointed to permanent service, as law specified, held that as the latter appointment was a confirmation of the original appointment only, and not the beginning of a new term, the official oath need not be taken again. State ex rel. v. Duncan, 47 Mont. 447, 133 Pac. 109.

If policeman continues service, he need not take oath on appointment each year. Frederick v. Peoria, 203 Ill. App. 486.

A member of the police force need not take an oath when pro-

moted. People v. Bailey, 30 Cal. App. 581, 158 Pac. 1036.

Failure to take oath by one re-elected after the beginning on the new term, held mere irregularity. Rowe v. Tuck (Ga. 1919), 99 S. E. 303.

Oath not always required of certain officers. Brogan v. Kane, 223 Mass. 196, 111 N. E. 865.

Oath prescribed by the constitution, held to apply to state and not to municipal officers. State ex rel. v. Lane, 181 Ala. 646, 62 So. 31, 36.

Failure to take oath, does not result in officer losing power. Sumrall v. Polk (Miss.), 79 So. 847.

Failure to take, de facto officer. Edwards v. Kirkwood, 162 Mo. App. 576, 142 S. W. 1109.

Requirement as to taking oath, held directory, and a failure, not to work forfeiture of the office. Maxwell v. Smith, 87 Wash. 629, 152 Pac. 530; Murphy v. Spokane, 64 Wash. 681, 117 Pac. 476.

Qualifying oath may be filed at any time before entering upon the

**§ 476. Same—bond—failure to give.<sup>97</sup>****§ 478. When vacancy in office exists.<sup>98</sup>**

duties of the office. *Ludlam v. Dallas*, 82 N. J. L. 122, 81 Atl. 489.

Taking oath the day following day fixed by law constitutes the officer a de jure officer. *Lewin v. Ft. Mitchell*, 148 Ky. 816, 147 S. W. 922.

Oath, before whom to be taken, depends upon controlling law. Sometimes provisions held directory, etc., and may be taken before notary. *Commonwealth v. Zalewski* (Pa. 1918), 104 Atl. 683.

**Mandamus** to compel the administration of the oath to one claiming election as councilman, will lie. *Spitzer v. Martin*, 130 Md. 428, 100 Atl. 739.

<sup>97</sup> Whether required, as to particular officers, depends upon the proper construction of the applicable law. *Johnson v. Milwaukee*, 147 Wis. 476, 133 N. W. 627.

**Form of bond** not as prescribed, held valid. *Henriod v. Church* (Utah 1918), 172 Pac. 701; *Lake Charles v. Carlson* (La. 1919), 81 So. 877.

**Surety company bond**, held good although not formally approved by city. *Frederick v. Peoria*, 203 Ill. App. 486, 489.

Two bonds instead of one, dates of approval, form different from statutory bond, held obligation good. *Bath v. McBride*, 142 N. Y. S. 1014, 81 Misc. Rep. 618.

**Common law bond**, held good. *Newburyport v. Davis*, 209 Mass. 126, 95 N. E. 110.

**Marshal** whose bond did not comply with the law, held de facto officer but not de jure. *People v. Paynter*, 197 Ill. App. 78, 83.

**Approval.** The authority empowered to approve the bond only may act. Thus where the bonds of officers are to be approved by a majority of the board of trustees, the village president although a member of such board, acting alone, cannot legally approve such bonds. Bonds held necessary to invest title to offices. *People v. Paynter*, 197 Ill. App. 78, 83.

Failure to approve or reject the bond, and permitting the officer to discharge the duties of the office, held sufficient evidence of acceptance and approval. *Henriod v. Church* (Utah 1918), 172 Pac. 701.

Failure to approve bond will not deprive officer of his salary. *Bartholomew v. Springdale*, 91 Wash. 408, 157 Pac. 1090; *Douglass v. Rights* (Ind. App. 1918), 119 N. E. 1017.

**Mandamus** to compel approval of bond will lie. *State ex rel. v. Bentley*, 96 Kan. 344, 150 Pac. 218.

**Mandamus** to compel cancellation of inscription on bond of surety company, constituting such bond a mortgage lien on property of the officer (principal) sustained, since the mortgage provision was limited to personal bonds, meaning one with individual sureties. *State ex rel. v. St. Julien*, 140 La. 258, 72 So. 956.

<sup>98</sup> Much doubt frequently arises as to existence of a vacancy. Under some laws, in the event of the absence or inability of the mayor to act, the council is authorized to select one of their number to preside at the council meet-

This is determinable by the applicable law in view of the facts.

ings and act as mayor. It was held under a particular law that in case of the death of the mayor, such presiding officer succeeded to the office of mayor; consequently, no vacancy existed. *State ex rel. v. Kirkpatrick*, 76 Or. 8, 148 Pac. 51.

**Vacancies under particular laws.** *Attorney Gen. v. Loomis*, 225 Mass. 372, 114 N. E. 676; *Schwab v. Boyle*, 160 N. Y. S. 894, 174 App. Div. 442, affirmed (N. Y.), 114 N. E. 1083; *Hollar v. Cornet*, 144 Ky. 420, 138 S. W. 298.

**Consolidation of municipalities.** In office of aldermen under particular law on consolidation of Pittsburgh and Allegheny. *Commonwealth v. McAfee*, 237 Pa. 320, 85 Atl. 413.

**Failure to elect the requisite number of councilmen** creates a vacancy which, if the law so authorizes, the council may fill. *Herrmann v. Guttenberg*, 87 N. J. L. 261, 93 Atl. 889.

**Refusal to qualify.** Where a sufficient number of councilmen refuse to qualify as such councilmen for a period of ten months and thus prevent a quorum in the council and deprive the city from carrying on its ordinary business, a suit in equity to have the offices declared vacant will lie. In this case the court applied the maxim that equity will not suffer a wrong to be without a remedy. *Williamsburg v. Weesner*, 164 Ky. 769, 176 S. W. 224.

**Failure to file sworn statement of election expenses;** as required by law, held requirement directory only, and did not work forfeiture

of office and create vacancy. *Commonwealth v. Schrotnick*, 240 Pa. 57, 87 Atl. 280.

**Power to declare a vacancy** in any office is purely statutory and if the statute does not confer power it does not exist. *Commonwealth v. Schrotnick*, 240 Pa. 57, 87 Atl. 280.

**Removal from city.** *Bredin v. Roosma*, 81 N. J. L. 307, 80 Atl. 21.

**Abandonment.** Where facts disclose removal of councilman and abandonment of office a vacancy exists, although law does not expressly provide that in event of removal a vacancy exists. *Commonwealth v. Kelly*, 255 Pa. 475, 100 Atl. 272.

A vacancy created by removal from the boro is unlike that arising from resignation. The first arises instantly from the act of removal, the latter only by acceptance by council. *Commonwealth v. Clark*, 249 Pa. 109, 94 Atl. 473; *Commonwealth v. Krapf*, 249 Pa. 81, 94 Atl. 553.

**Resignation.** Mere presentation of resignation does not work; acceptance is required. *Dostie v. Lewiston*, 114 Me. 62, 95 Atl. 353.

The resignation of an officer, although not accepted, creates a vacancy under a law declaring every office vacant on the resignation of the incumbent. *State ex rel. v. Kotecki*, 155 Wis. 66, 144 N. W. 200.

Alderman, who accepts the office of purchasing agent, which is incompatible with that of alderman, thereby resigns as alderman within the meaning of a law declaring that the office becomes va-

§ 479. What authority to fill vacancy.<sup>99</sup>

## VI. DE FACTO OFFICERS.

## § 480. De facto officer described.

A *de facto* officer is one where the duties of the office are exercised under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public.<sup>1</sup>

cant by resignation. State ex rel. v. Wittmer, 50 Mont. 22, 144 Pac. 648.

**On change of wards** under particular law, held no vacancies in offices of aldermen, since they continued to represent pre-existing ward areas until their terms expired. Wood v. Bosset, 85 N. J. L. 113, 88 Atl. 853.

**The summary removal** of an officer, whose tenure is at the will of the appointing board creates a vacancy. State v. Kilmartin, 86 Conn. 56, 84 Atl. 100.

**Where decree of court ousts an officer** from his office, and vacancy is thereby created, e. g., city marshal, the board of trustees of the city, under the law, may fill such vacancy by appointment. McKamy v. Bakersfield, 26 Cal. App. 315, 146 Pac. 910.

**Guilty of malfeasance ipso facto** vacates office. Humphreys v. Pratt City Board of Comrs., 93 Kan. 413, 144 Pac. 197.

**Expiration of term of office**, creates a vacancy. Commonwealth v. Samuel, 238 Pa. 155, 85 Atl. 1101.

<sup>99</sup> City council may fill vacancy. State ex rel. v. Wittmer, 50 Mont.

22, 144 Pac. 648; McKamy v. Bakersfield, 26 Cal. App. 315, 146 Pac. 910; Doughty v. Scull (N. J. L.), 96 Atl. 564.

Council may elect to vacancy in office of mayor. Blake v. Trout, 127 Ark. 299, 192 S. W. 179.

Sometimes the governor is authorized to fill a vacancy, e. g., collector of revenue for city and state. State ex inf. v. Koeln, 270 Mo. 174, 192 S. W. 740.

Under particular law members of the city council, held not municipal officers, but rather state officers, as to filling vacancies. Lambert v. Barrett, 115 Va. 136, 78 S. E. 586.

Filling vacancies until the "next regular city election"—phrase construed. State ex rel. v. Kerkow, 31 S. D. 491, 141 N. W. 377.

When vacancies occur in the position of subordinates or clerks usually the head of the department is authorized to make a new appointment; but where civil service laws control, the appointment is required to be made from the eligible list. Savage v. Detroit, 190 Mich. 144, 155 N. W. 1031.

<sup>1</sup> Manefee v. Taubman, 159 Mo.

A *de facto* officer is one who has the reputation or ap-

App. 318, 324, 140 S. W. 604, following *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409.

*Edwards v. Kirkwood*, 162 Mo. App. 576, 142 S. W. 1109, failing to take oath of office.

Marshal whose bond was not in compliance with the law, held a *de facto* officer. *People v. Paynter*, 197 Ill. App. 78, 83.

Policemen irregularly appointed, held *de facto* officers. *Uhr v. Lambert* (Tex. Civ. App.), 188 S. W. 946.

Certificates of election from the proper authority as members of a city council constitute such members *de facto* members. *Pelletier v. O'Connell*, 111 Me. 38, 88 Atl. 55.

Although delinquent in payment of poll tax rendering incumbent ineligible to serve as alderman, he may be a *de facto* officer. *Faucette v. Gerlach* (Ark.), 20 S. W. 279.

Officers of a *de facto* municipal corporation, created under an unconstitutional charter, are *de facto* officers and the acts of such officers are valid. *Albuquerque v. Water Supply Co.* (N. M.), 174 Pac. 217, 223, et seq.

But contra as to creation of a board, see *New Orleans Board of Public Utilities v. New Orleans Ry. & Light Co.* (La. 1919), 82 So. 280, 285.

One who presents his resignation, which is declined acceptance, but who continues to perform the duties of the office, is a *de facto* officer. *State ex rel. v. Kotecki*, 155 Wis. 66, 144 N. W. 200.

One duly appointed to an office, who is thereafter removed but who

refuses to surrender the office and obtains an order of court preventing interference, and who continues to discharge the duties appertaining to the office is a *de facto* officer. *Terre Haute v. Burns* (Ind. App.), 116 N. E. 604.

One guilty of malfeasance which ipso facto vacates the office, but who continues in office, and exercises duties with acquiescence of the public is a *de facto* officer. *Humphrey v. Pratt City Board of Comrs.*, 93 Kan. 413, 144 Pac. 197.

One ousted from the office of councilman by court decree, because disqualified, he being a stockholder in a corporation which furnished supplies to the city, who subsequently sells his stock in good faith and is re-elected, has colorable title and becomes a councilman *de facto* and his acts as such councilman are valid. *Warner v. Coatsville Borough*, 231 Pa. 141, 80 Atl. 576.

One illegally appointed and who fails to take the oath of office, who takes possession of the office and performs the duties under color of right, although disqualified under the particular law, is a *de facto* officer. A *de facto* officer is one who has the possession of an office and performs the duties thereof under color of right, without being actually qualified in law so to act. A usurper is one who has neither legal title nor color of right. *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809, 812.

As it is against public policy for a council to elect one of its own members to an office, e. g., member of a board of assessors, the ap-



pearance of being the officer he assumes to be but who, in fact, under the law, has no right or title to the office he assumes to hold. A *de facto* officer is distinguished from a mere usurper or intruder by the fact that the former holds by some color of right or title while the latter intrudes upon the office and assumes to exercise its functions without either the legal title or color of right to such office. Where one is actually in possession of a public office and discharges the duties thereof, the color of right which constitutes him a *de facto* officer, may consist in an election or appointment, holding over after the expiration of his term, or by acquiescence by the public for such a length of time as to raise the presumption of a colorable right by election, appointment, or other legal authority to hold such office.<sup>2</sup>

An officer *de jure* and an officer *de facto*, cannot be in possession of the same office at the same time.<sup>3</sup>

### § 481. Mere intruders are not *de facto* officers.

A usurper is one who has neither lawful title nor color of right.<sup>4</sup> One who, in violation of a constitutional provision, forbidding one to fill two municipal offices at the same time, who vacated his office, as mayor of a city, and accepted the office of city engineer, was held to be a usurper under the Kentucky law which defined a usurper to be a person who continues to exercise an office after having committed an act, or omitted to do an act, the com-

pointee is not a *de facto* officer. *Felker v. Monroe* (Ga. App.), 95 S. E. 1023; *Parrish v. Adel*, 144 Ga. 242, 86 S. E. 1095.

Where, on a change of form of government, it was provided that certain of the existing officers should hold over, among them being the city attorney. The mayor, newly elected, appointed another to this office under the provisions of the former charter; it was held

that he was not even a *de facto* officer, because, of course, there was no vacancy. *North v. Battle Creek*, 185 Mich. 592, 152 N. W. 194.

<sup>2</sup> *Terre Haute v. Burns* (Ind. App.), 116 N. E. 604, 607.

<sup>3</sup> *Barter v. Rockland*, 114 Me. 466, 96 Atl. 773; *Ardmore v. Sayre* (Okl.), 154 Pac. 356.

<sup>4</sup> *Smith v. Jefferson*, 75 Or. 179, 146 Pac. 809, 812, § 480, ante.

mission or omission of which, by law, creates a forfeiture in his office.<sup>5</sup>

**§ 482. There can be no de facto officer where there is no corresponding office known to the law.<sup>6</sup>**

**§ 484. Acts of de facto officers are valid.<sup>7</sup>**

The rule is generally recognized that the public and third parties may deal with a *de facto* public officer with-

<sup>5</sup> Commonwealth v. Livingston, 171 Ky. 52, 186 S. W. 916.

<sup>6</sup> See § 581, vol. 2, ante.

"There can be no office, de facto where no officer de jure is provided by law. There may be officers de facto, but cannot be an office de facto under a constitutional government." Oakland Paving Co. v. Donovan, 19 Cal. App. 488, 126 Pac. 388, 390.

Members of a board sought to be created by an unconstitutional legislative act are not de facto officers. New Orleans Board of Public Utilities v. New Orleans Ry. & Light Co. (La. 1919), 82 So. 280, 285.

But contra, see Albuquerque Water Supply Co. (N. M. 1918), 174 Pac. 217, 223 et seq.

<sup>7</sup> Arkansas. Eureka Fire Hose Co. v. Furry, 126 Ark. 231, 190 S. W. 427; Board of Improvement v. Carman (Ark. 1919), 211 S. W. 170.

Kansas. Humphreys v. Pratt City Board of Comrs., 93 Kan. 413, 144 Pac. 197.

Kentucky. Lewin v. Fort Mitchell, 148 Ky. 816, 147 S. W. 922.

Mississippi. Sick v. Bay of St. Louis, 113 Miss. 175, 74 So. 272.

Missouri. Boonville v. Stephens, 238 Mo. 339, 356, 141 S. W. 1111.

Oregon. Smith v. Jefferson, 75

Or. 179, 146 Pac. 809, 812, acts of de facto recorder.

Acts of one holding two offices forbidden by law are sometimes by statute declared "valid as the acts of a de facto officer." Christopher v. State (Ga. App.), 94 S. E. 72.

De facto mayor, held could vote for selection of city attorney (as applicable law permitted). Markham v. Simpson (N. C.), 95 S. E. 106.

Vote of de facto councilman valid. McAvoy v. Trenton, 82 N. J. L. 101, 80 Atl. 950.

De facto alderman, held could vote legally on impeachment trial of municipal judge. Faucette v. Gerlach (Ark.), 200 S. W. 279.

Approval of ordinance by de facto president of a borough council, held valid on grounds of public policy. Harrison v. Madison Borough, 81 N. J. L. 21, 78 Atl. 665.

Act of de facto police commissioner in removing a police officer, held valid. State ex rel. v. Canavan, 155 Wis. 398, 145 N. W. 44, 47.

Act of de facto superintendent of streets concerning street improvement, held valid. Oakland

out inquiring into the validity of his title to the office he assumes to fill, and that in so doing they will be as fully protected as though such officer had been both a *de facto* and a *de jure* officer as to all acts within the scope and apparent authority of such officer.<sup>8</sup> "The rule is based on sound policy and is designed to protect the public."<sup>9</sup>

"The rule regarding *de facto* officers has been adopted merely with the idea of protecting the public; and *de facto* officers are not permitted to benefit personally from what is legally a usurpation of office." Thus *de facto* officers elected under an unconstitutional law, it was held, could not approve legally provisions of laws validating elections under earlier laws where such act would result to their own personal advantage, and enable them to become *de jure* officers with an extended tenure.<sup>10</sup>

### § 485. Questioning title of *de facto* officer.

Late decisions sustain the general well settled rule that the right of a *de facto* officer to perform the acts appertaining to the office cannot be collaterally questioned.<sup>11</sup>

Paving Co. v. Donovan, 19 Cal. App. 488, 126 Pac. 388.

<sup>8</sup> Terre Haute v. Burns (Ind. App.), 116 N. E. 604, 608.

<sup>9</sup> Sumrall v. Polk (Miss.), 79 So. 847.

"Acts of public officers, whether they be state, county, district or municipal, created by an act of the legislature, are valid as to the public and all persons having dealings with the officers antecedent to the time when the legislative act under which they were exercising authority was declared unconstitutional." Wendt v. Berry, 154 Ky. 586, 596, 157 S. W. 1115, 45 L. R. A. (N. S.) 1101, Ann. Cas. 1915C, 493, approving Nagel v. Bosworth, 148 Ky. 807, 147 S. W. 940, holding that the acts of a circuit judge appointed under an unconstitu-

tional statute, performed before the statute was declared unconstitutional were valid.

<sup>10</sup> People ex rel. v. Vroman, 166 N. Y. S. 923, 101 Misc. Rep. 233, affirmed in 168 N. Y. S. 1124.

<sup>11</sup> Vote by *de facto* mayor for selection of city attorney, held could not be attacked collaterally in quo warranto between rival claimants of the office. Markham v. Simpson (N. C.), 95 S. E. 106.

Right of councilmen as *de facto* officers to act, held could not be questioned collaterally. Pelletier v. O'Connell, 111 Me. 38, 88 Atl. 55.

In suit to restrain municipal officers from enforcing street paving ordinances, and the assessments levied thereunder, the right of the mayor *de facto* to discharge the

But a councilman, filling a vacancy by illegal appointment, who assumes the office and is, in fact, a *de facto* officer, it has been held, is not legally entitled to hold possession against the remonstrance of the municipality.<sup>12</sup>

#### VII. TENURE OF OFFICERS, SUBORDINATE AND EMPLOYEES.

##### § 486. Tenure of office of officer.<sup>13</sup>

##### § 487. Same—holding over—no successor.

The general rule is that an incumbent of a public office will hold over after his term expires until his successor

duties of the office, can not be attacked. *Cole v. Forto* (Tex. Civ. App.), 155 S. W. 350.

In a mandamus to compel the mayor to execute and sign contracts required by ordinance enacted over his veto, the right of *de facto* aldermen who voted for the ordinance and whose votes were necessary to serve, cannot be questioned. *McClendon v. Hot Springs* (Ark.), 195 S. W. 686.

In an action by a taxpayer to restrain the issuance and sale of bonds, authorized by an election, the right of one of the commissioners under the commission form of government to act as such commissioner, who is, in fact, a *de facto* officer, cannot be questioned. *Humphrey v. Pratt Board of Commissioners*, 93 Kan. 413, 144 Pac. 197.

The right of *de facto* officers to hold office, discharge the duties appertaining thereto, and obtain salaries, held could not be questioned in action by a taxpayer to restrain payment of such salaries on the theory that it constituted a misuse of the public moneys.

*Kucharski v. Harrison*, 264 Ill. 563, 106 N. E. 488, 490.

<sup>12</sup> *Florey v. Lanning* (N. J. L. 1917), 100 Atl. 183.

<sup>13</sup> "Term" discussed. *Wilson v. McCarron*, 112 Me. 181, 91 Atl. 839.

Definite term. *McLaughlin v. Green*, 96 Kan. 641, 152 Pac. 611.

The Kansas constitution forbids the creation of any office, the term of which is longer than four years. *Jager v. Green*, 90 Kan. 153, 133 Pac. 174.

Prescribed and changed by constitution. *Commonwealth v. Mallans*, 240 Pa. 37, 87 Atl. 301; *Commonwealth v. Samuel*, 238 Pa. 155, 85 Atl. 1101.

Permanent tenure for officers does not exist, similar to tenure intended by civil service acts. *Biddle v. Atlantic City* (N. J. L.), 103 Atl. 386.

Tenure may be fixed by the legislature, e. g., collector of revenue of city and state. *State ex inf. v. Koeln*, 270 Mo. 174, 192 S. W. 748.

Where the tenure of office is not provided by the constitution it may be declared by law, and some

is elected or appointed and qualified,<sup>14</sup> even though there

laws provide, that even if so declared, the office shall be held during the pleasure of the appointing power. *Terre Haute v. Burns* (Ind. App.), 116 N. E. 604.

Terms of office as fixed by ordinance. *Schneider v. Atkinson*, 86 N. J. L. 392, 92 Atl. 81.

In Kansas terms of police officers of first class cities under the commission form of government are designed to be fixed by ordinance, to expire with the term of the appointing board. *Haney v. Cofran*, 95 Kan. 335, 148 Pac. 640, 94 Kan. 332, 146 Pac. 1027.

Mayor in commission form, held had fixed term of four years and did not hold at pleasure of board. *Woolly v. Flock* (N. J. L. 1919), 105 Atl. 489.

Term of mayor extended by constitution in changing time of election. *Meisel v. O'Neil*, 233 Pa. 213, 82 Atl. 71.

Legislature, of course, cannot change the term fixed by the constitution. *Commonwealth v. O'Neil*, 233 Pa. 218, 82 Atl. 73.

A term fixed by law, clearly cannot be lengthened or shortened, or made indefinite by city commissioners by resolutions or otherwise. *Slater v. Burk*, 83 N. J. L. 152, 83 Atl. 973, 975.

Extending and shortening terms on adoption of new form of city government. *North v. Battle Creek*, 185 Mich. 592, 152 N. W. 194.

Legislature may extend term of office. Held, particular act did not do so. *State v. Dumser*, 132 La. 987, 61 So. 994.

In the absence of a constitu-

tional prohibition, the legislature may change the term of an office, even after the election or appointment of the incumbent thereof. *O'Laughlin v. Carlson*, 30 N. D. 213, 219, 152 N. W. 675, citing § 486, vol. 2, ante.

As the legislature has power to lengthen or shorten the tenure of an office, it is competent by appropriate legislation to extend the provisions of the civil service act to chiefs of police of certain cities and towns, relating to removals, suspensions and transfers. Such law does not violate the constitution. *Barnes v. Rivers*, 213 Mass. 1, 99 N. E. 464.

An appointment to fill an unexpired term under a law limiting the term of such appointment is void. *Florey v. Lanning* (N. J. L. 1917), 100 Atl. 183.

Laws authorize local boards to fix the terms of subordinates. Under such law a subordinate appointed for a term of three years with privilege of holding until a successor was selected, held such subordinate had a "term fixed by law," and could not hold during good behavior, nor under the provisions of the civil service act. *Browne v. Hagen* (N. J. L.), 104 Atl. 207.

<sup>14</sup>*State ex rel. v. Kellaher* (Or. 1919), 177 Pac. 944; *Oklahoma City v. Saunders*, 11 Okl. Cr. 714, 147 Pac. 1191; *Uhr v. Lancaster* (Tex. Civ. App.), 187 S. W. 379; *Markham v. Simpson* (N. C.), 95 S. E. 106.

The status of one whose term of office has expired is that of a

is no express provision of law to that effect.<sup>15</sup> Civil service laws sometimes make different provisions as to holding over but they usually do not apply to officers with definite terms.<sup>16</sup>

### § 488. Same—during good behavior.<sup>17</sup>

Courts will not countenance evasions of laws to compass the removal of officers and employees whose tenure is during good behavior.<sup>18</sup>

holdover. *Biddle v. Atlantic City* (N. J. L.), 103 Atl. 386.

During the change in form of government, held officers usually hold until new are selected and the new government organized. *Woodbridge v. Duluth*, 121 Minn. 99, 140 N. W. 182.

On changing ward lines, some laws provide for the alderman representing pre-existing wards to hold until the end of their terms. *Woods v. Bosset*, 85 N. J. L. 113, 88 Atl. 853.

Attempt to dissolve a municipal corporation under an unconstitutional statute, which is a mere nullity, it was held, did not create vacancies in municipal offices although there had been no election for ten years. *Ringling v. Hempstead*, 193 Fed. 598, 113 C. C. A. 464.

Mayor may hold over till his successor is elected and qualified where omission to elect was due to failure to order the election at the time prescribed by law. *State ex rel. v. Cresswell* (Miss. 1918), 78 So. 770.

Law recited that mayor should hold office until the election and qualification of his successor. No election of successor was held. Held, governor could not appoint

successor by making a provisional appointment to fill vacancy under the constitution authorizing such action in case of emergency. Failure to elect mayor's successor is not such emergency. *State v. Cresswell* (Miss. 1918), 78 So. 770.

Right of appointive officer to hold after the expiration of his term, held to depend on observance of law in his appointment. *People v. Paynter*, 197 Ill. App. 78.

A member of a council appointed to fill a vacancy due to failure to hold an election, holds until his successor is chosen and qualified. *State v. Perkins*, 35 Okl. 317, 129 Pac. 730.

One appointed to vacancy usually holds until the next succeeding election only and not for the full term. *Geer v. Earle*, 94 S. C. 473, 78 S. E. 326.

<sup>15</sup> *Henriod v. Church* (Utah), 172 Pac. 701, 704, citing § 487, vol. 2, ante.

<sup>16</sup> *Fagen v. Morris*, 83 N. J. L. 3, 84 Atl. 1067.

<sup>17</sup> *State ex rel. v. Martin*, 195 Mo. App. 366, 191 S. W. 1064.

"Shall serve during good behavior;" held fixed tenure. *Shira v. State* (Ind.), 119 N. E. 833.

<sup>18</sup> Police shall hold offices and continue in their employment "dur-

**§ 489. Same—tenure at will of authority which confers office.**

The employment of one to serve the city at a fixed compensation may be terminated at the pleasure of the municipality.<sup>19</sup> If no definite term is prescribed, in the absence of legal restrictions, as civil service regulations, the incumbent holds subject to discharge at any time.<sup>20</sup> Where a board has power to discharge an employee at pleasure the mere designation that the term is to be for one year is not such an expression of the pleasure of the board as will preclude his discharge prior to that time.<sup>21</sup> Under some laws subordinate officers of departments

ing good behavior, efficiency and residence in the municipality;" forbids removal for "political reasons or for any other cause than incapacity, misconduct, non residence or disobedience of just rules and regulations," etc. Removal only on charges and trial, etc. Such laws are intended "for the protection of incumbents while the offices continue." The power to declare an office vacant cannot be exercised under such law "for the purpose of appointing another to the vacated office unless it be for good cause shown against the incumbent, for this would be a removal within the prohibition of the law." However, the power exists to abolish useless and antiquated offices, since the tenure of the officer is qualified by the continuance of the office. But a resolution which removes an officer and creates a vacancy which may be filled at any time thereafter is a mere evasion of the law. Of course, the office may be abolished in the public interest, even where the incumbent is protected by the tenure

of office act. *Cahill v. West Hoboken*, 90 N. J. L. 398, 101 Atl. 417.

<sup>19</sup> *Jacobs v. Elmira*, 132 N. Y. S. 54, 147 App. Div. 433.

<sup>20</sup> *Chestnut v. Kansas City*, 171 Mo. App. 327, 157 S. W. 656, district superintendent of streets.

An officer whose tenure is at the will of the appointing board may be summarily dismissed at any time. *State v. Kilmartin*, 86 Conn. 56, 84 Atl. 100.

Civil engineer, at pleasure of mayor. *Douglass v. Rights* (Ind. App. 1918), 119 N. E. 1017.

An incumbent, e. g., assistant city counselor appointed for a period of two years, but subject to removal at any time by a vote of four-fifths of all the commissioners, held, he holds at the will of the appointing power and has no term of office, within the purview of the constitution forbidding change of salary during term. *State ex rel. v. Oklahoma City*, 38 Okl. 340, 134 Pac. 58.

See § 558, vol. 2, ante.

<sup>21</sup> *Hay v. Springfield Pleasure Driveway*, 181 Ill. App. 23, 26.

are removable at will and are not entitled to notice, hearing or chance to explain.<sup>22</sup>

§ 490. Same—change of class or grade, or, of municipal organization.<sup>23</sup>

§ 492. Tenure of assistants, etc.

Aside from legal restrictions, the rule is that the power of appointment implies the power of removal.<sup>24</sup> Where a state civil service law conferred upon the head of a principal department power to appoint his subordinates and remove them, it was held, this authority could not be changed by charter, and such law superseded all charter provisions on the subject.<sup>25</sup>

A mere change in the names of positions,<sup>26</sup> or of the officer or board authorized to make the appointments,<sup>27</sup>

<sup>22</sup> *Dumphy v. Kingsbury*, 159 N. Y. S. 389, 173 App. Div. 49.

<sup>23</sup> New charter. *Jackson v. State*, 102 Miss. 663, 59 So. 873; *Morris v. Fagan*,<sup>85</sup> N. J. L. 617, 90 Atl. 267; *Larsen v. Salt Lake City*, 44 Utah 437, 141 Pac. 98; *Rome v. Reese*, 19 Ga. App. 559, 91 S. E. 880; *Cleveland v. Watertown*, 222 N. Y. 159, 118 N. E. 500; *Foster v. Hindley*, 72 Wash. 657, 131 Pac. 197.

*Ipso facto* abolished old offices. *Langhran v. Jersey City*, 86 N. J. L. 382, 92 Atl. 54.

Established commission form, special provisions, usually old hold till new form of government goes into operation. *Snyder v. Murray*, 170 Cal. 654, 151 Pac. 128.

Legislative amendment of charter. "All persons holding office at the time of the passage of this act shall continue," etc., until new government, etc., held words "at the time of the passage of this act" relates to the time when the

act takes effect. *State ex rel. v. Pinson*, 76 W. Va. 572, 85 S. E. 786.

<sup>24</sup> *Kydd v. San Francisco* (Cal. App.), 174 Pac. 88.

Appointments of mayor, terminate with term of mayor. *Waldron v. Rowe* (N. J. L. 1919), 106 Atl. 212.

<sup>25</sup> *State ex rel. v. Arnold*, 151 Wis. 19, 138 N. W. 78.

<sup>26</sup> Where ordinance changes names of positions merely and does not create new positions, new appointments of those in positions need not be made. *Gilmur v. Seattle*, 69 Wash. 289, 124 Pac. 919.

<sup>27</sup> Where a clerk was to continue at the pleasure of a board, an entire change of membership in such board does not terminate his tenure of office. *Raymond v. Fish*, 51 Conn. 80, 101, 50 Am. Rep. 3; *People v. Foley*, 148 N. Y. 677, 43 N. E. 171.

"Until the board in some sufficient manner should indicate that



or an increase in the duties or salaries,<sup>28</sup> or permitting a continuance in the service,<sup>29</sup> does not work a removal of subordinates.

### § 493. How offices may be lost.<sup>30</sup>

### § 494. Officer has no vested right in office—office may be changed or abolished.<sup>31</sup>

The abolition of an office, of course, can be accomplished

its pleasure was that his existing relations to it should cease he would be no intruder." *State v. Goodrich*, 86 Conn. 68, 84 Atl. 99.

Fieldman in health department, held a subordinate whose employment did not terminate with the term of office of the commissioners appointing him. *Jager v. Green*, 90 Kan. 153, 133 Pac. 174.

<sup>28</sup> Where the duties of an employee, e. g., cement tester, are increased in volume but not in kind with a raise of salary, held not to create a new office. *McArdie v. Chicago*, 172 Ill. App. 142.

<sup>29</sup> Under particular law the retention of clerk after the expiration of the probationary period for which he was appointed, held equivalent to a permanent appointment. *People ex rel. v. New York City Board of Education*, 217 N. Y. 470, 112 N. E. 167, reversing 156 N. Y. S. 66, 170 App. Div. 395, 155 N. Y. S. 181.

<sup>30</sup> The Kansas law provides that a commissioner under commission form who is guilty of malfeasance, ipso facto vacates his office. *Humphrey v. Pratt Board of Comrs.*, 93 Kan. 413, 143 Pac. 197.

**Ceasing to possess qualifications,** resident of ward, etc. *Williams v.*

*Commonwealth*, 116 Va. 272, 81 S. E. 61.

<sup>31</sup> Georgia. *Rome v. Reese*, 19 Ga. App. 559, 91 N. E. 880.

Montana. *State ex rel. v. Wittmer*, 50 Mont. 22, 144 Pac. 648.

Mississippi. *Jackson v. State*, 102 Miss. 663, 59 So. 873.

Missouri. *Sanders v. Kansas City*, 175 Mo. App. 367, 372, 373, 162 S. W. 663 (quoting with approval part of § 494, vol. 2, ante).

New York. *Cleveland v. Watertown*, 222 N. Y. 159, 118 N. E. 500.

New Jersey. *Morris v. Fagen*, 85 N. J. L. 617, 90 Atl. 267; *Loudenslager v. Heston*, 86 N. J. L. 382, 92 Atl. 54; *Langhran v. Jersey City*, 86 N. J. L. 442, 92 Atl. 55.

N. Dakota. *O'Laughlin v. Carlson*, 30 N. D. 213, 219, 152 N. W. 675 (citing § 494, vol. 2, ante).

Utah. *Larsen v. Salt Lake City*, 44 Utah 437, 141 Pac. 98.

"No one can acquire a vested right in an office or position created by the legislative department of the nation or of a state or municipality thereof." *Gregory v. Kansas City*, 244 Mo. 523, 548, 149 S. W. 466.

State may change form of municipal government and create com-

only by the authority possessing the requisite power.<sup>32</sup> An office created by charter cannot be abolished by ordinance.<sup>33</sup> Nor can an office created by statute or ordinance be abolished by mere resolution.<sup>34</sup>

"It is a general rule that when not qualified or restricted by positive law that the power which creates an office may abolish it in its discretion, and this rule applies to municipal offices. The salaries of such officers may be reduced or otherwise regulated as the municipality may decide. Even though an officer be appointed for a fixed period, yet where he cannot be compelled to serve the whole time such appointment cannot be considered a contract of hire for a stipulated term. Ordinances fixing salaries are not contracts with officers for the full term of their office."<sup>35</sup>

To abolish an office some affirmative act is required.<sup>36</sup>

mission form and abolish all old offices. *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, L. R. A. 1917A, 1244.

The state may abolish municipal offices by charter amendment. *Van Dyke v. Thompson*, 136 Tenn. 36, 150-152, 189 S. W. 62; *Malone v. Williams*, 118 Tenn. 462, 103 S. W. 798, 121 Am. St. Rep. 1002; *Cooley, Const. Lim.* (7th ed.) 388.

Office of judge may be abolished. *Halsey v. Gaines*, 70 Tenn. (2 Lea) 316; *McCully v. State* (The Judges' Case), 102 Tenn. 509, 538.

As there are no vested rights in an office, in absence of constitutional limitation to the contrary, charter amendment may abolish an office and its tenure and create another of like character with different tenure and salary. Constitutional provision forbidding changing salary of an office during term has no application. *Bridgman v. Roberts*, 40 Okl. 495, 139 Pac. 518.

<sup>32</sup> *Fenet v. McCuiston*, 105 Tex. 299, 147 S. W. 867, reversing (Tex. Civ. App.), 144 S. W. 1155.

If it is to be by the council, a discontinuance of, by the mayor and head of the department in which the officer was employed, is a nullity. *Foster v. Hindley*, 72 Wash. 657, 131 Pac. 197.

Enactment of new charter, abolishing offices. *Attorney-Gen. v. Loomis*, 225 Mass. 372, 114 N. E. 676.

<sup>33</sup> *Savannah v. Monroe* (Ga. App.), 96 S. E. 500; *Wilson v. Dalton*, 135 Ga. 240, 69 S. E. 163.

<sup>34</sup> *Cahill v. West Hoboken*, 90 N. J. L. 398, 101 Atl. 417.

<sup>35</sup> *Gatheman v. Chicago*, 263 Ill. 292, 104 N. E. 1085, affirming 183 Ill. App. 210.

<sup>36</sup> Transfer of water system to park department, and thus abolish offices of water commissioners. *Commonwealth v. Elbert*, 244 Pa. 535, 91 Atl. 227.

An ordinance declared an office

However, as to places and positions in the municipal service, failure to make appropriations therefor, may result in abolishing them.<sup>37</sup>

An office may be abolished in the public interest although the incumbent is protected by a tenure of office act. But this cannot be done by his mere removal contrary to such act when such removal leaves the office in existence and only results in the creation of a vacancy to which another may be appointed.<sup>38</sup>

Offices, places or positions in the public service, of course, may be abolished in good faith in the interest of economy. Civil service laws, and laws to protect veterans, soldier's preference laws, etc., do not forbid.<sup>39</sup>

"There is a real and fundamental distinction between the lawful abolition of an unnecessary position and the discharge of a faithful employee in violation of the rights secured to him by statute; and the latter action can neither be concealed nor protected by a pretense that it was in the exercise of the former right."<sup>40</sup>

abolished in one clause, and in another reinstated it, held no interruption in the term of the officer. *Christenson v. Portland*, 89 Or. 609, 175 Pac. 135.

Changing the name of an office or place and enlarging the duties thereof, does not oust the incumbent. *Christenson v. Portland*, 89 Or. 609, 175 Pac. 135.

<sup>37</sup> *People ex rel. v. Higgins*, 144 N. Y. S. 157, 159 App. Div. 226.

<sup>38</sup> *Cahill v. West Hoboken*, 90 N. J. L. 398, 101 Atl. 417.

<sup>39</sup> *Randolph v. Smith*, 155 N. Y. S. 991, 92 Misc. Rep. 291; *People ex rel. v. Board of Education*, 156 App. Div. 930; *State ex rel. v. Seattle*, 74 Wash. 199, 133 Pac. 11, reviewing many cases; *State ex rel. v. Seattle*, 82 Wash. 464, 144 Pac. 695; *Foley v. Oakland* (Cal. App. 1917), 164 Pac. 419.

"The Soldier's Preference Law is not intended to take from municipal governments the power, in the honest administration of their affairs, to do away with positions created by the municipality." *Babeock v. Des Moines*, 180 Ia. 1120, 162 N. W. 763.

Unless restricted a legislative department may reduce the number of municipal employees. *Kessler v. Seattle*, 93 Wash. 192, 160 Pac. 423.

<sup>40</sup> *Murphy v. Justices of Municipal Court*, 228 Mass. 12, 116 N. E. 969, quoting with approval from *Garvey v. Lowell*, 199 Mass. 47, 50, 85 N. E. 182, 127 Am. St. Rep. 468.

If ordinance abolish certain places or positions under the classified civil service and creates new places and positions in their stead

### § 495. Resignation of officer.

The resignation of an office is the act of giving it up and is synonymous with surrender, relinquishment, abandonment or renunciation.<sup>41</sup>

Laws require the resignation of municipal officers to be in writing.<sup>42</sup> But a parol resignation will be held good if the law does not require it to be in writing.<sup>43</sup>

A resignation to take effect on a specified date, becomes effective at midnight of the prior day, the rule being that the law does not recognize fractions of a day.<sup>44</sup>

A resignation accepted and acquiesced in by the resigning officer is effectual, although addressed to the wrong officers, and so accepted.<sup>45</sup>

A resignation may be withdrawn before acted upon.<sup>46</sup>

### § 496. Resignation by implication or abandonment of office.

An office may be vacated by abandonment.<sup>47</sup> A resignation of a public office may be either express or implied. A resignation by implication may take place by an abandonment of official duty without leave of absence or without good cause shown.<sup>48</sup> But in the absence of affirmative action on the part of the incumbent, mere neglect of offi-

with different names and titles from the old, and the civil service commission on inquiry finds the new positions substantially identical with the old, those who filled the old positions are not thereby legally ousted, and if removed may be reinstated. *Barry v. Jackson*, 30 Cal. App. 165, 157 Pac. 828.

<sup>41</sup> *Jacobson v. Chicago*, 191 Ill. App. 511.

**Duress or coercion** in compelling resignation of police officer considered and denied in the particular case. *Kramer v. San Francisco Board of Police Comrs.* (Cal. App. 1919), 179 Pac. 216.

<sup>42</sup> *Taylor v. Johnson*, 148 Ky. 649, 147 S. W. 375; *Shacklett v. Town of Island*, 146 Ky. 798, 143 S. W. 369.

<sup>43</sup> *Jacobsen v. Chicago*, 191 Ill. App. 511.

<sup>44</sup> *Loughran v. Jersey City*, 86 N. J. L. 442, 92 Atl. 55.

<sup>45</sup> *Byrne v. St. Paul*, 137 Minn. 235, 163 N. W. 162.

<sup>46</sup> *Dostie v. Lewiston*, 114 Me. 62, 95 Atl. 353.

<sup>47</sup> *Page v. Hardin*, 8 B. Mon. (Ky.) 666.

<sup>48</sup> *Jacobsen v. Chicago*, 191 Ill. App. 511.

cial duties is not invariably sufficient to constitute an abandonment.<sup>49</sup>

The action of an officer, e. g., city marshal, in surrendering the insignia of his office and the public property in his possession, after receiving a written request from the mayor for such resignation, and making no attempt thereafter to discharge the duties of the office, was held a resignation of the office.<sup>50</sup> So in case of one elected to an office, as councilman, who fails to qualify, attend meetings and perform the duties appertaining thereto, and declares publicly such is his intention, abandonment is established.<sup>51</sup>

**§ 497. Resignation or abandonment of office by election to, or acceptance of, another office.**

Acceptance of a second office incompatible with the first *ipso facto* vacates the first.<sup>52</sup> A like result follows from the acceptance of a second office under a law forbidding the holding of two offices at the same time.<sup>53</sup> Acceptance by a district attorney of the office of attorney for a municipality was held not to constitute an abandonment of the first office, where the law did not forbid holding two offices.<sup>54</sup>

The fact that one wrongfully removed from office failed to bring suit to test the legality of his removal until the expiration of his term, was held not to constitute conclusive evidence of abandonment of the office so as to deprive him of the salary appertaining thereto.<sup>55</sup>

<sup>49</sup> Mere neglect of official duties, held not an abandonment of the office, as relates to forfeitures of salary. *People ex rel. v. Bradford*, 267 Ill. 486, 108 N. E. 732.

<sup>50</sup> *Howell v. Gillespie*, 202 Ill. App. 447.

<sup>51</sup> *Williamsburg v. Weesner*, 164 Ky. 769, 176 S. W. 224.

<sup>52</sup> *Howard v. Harrington*, 114 Me. 443, 96 Atl. 769; *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251; *Wescott*

*v. Scull*, 87 N. J. L. 410, 96 Atl. 407; *Commonwealth v. Bennett*, 233 Pa. 286, 288, 82 Atl. 249; *State v. Wittmer*, 50 Mont. 22, 144 Pac. 648; *Hermann v. Lampe*, 175 Ky. 109, 194 S. W. 122, 127.

<sup>53</sup> *Darling v. Brunson*, 94 S. C. 207, 77 S. E. 860.

<sup>54</sup> *State v. Phenix*, 134 La. 329, 64 So. 129.

<sup>55</sup> However, if the evidence shows an abandonment it will pre-

Merely qualify to take the second office prior to the beginning of the term, does not constitute a vacation of first office, as where an alderman qualified to become city treasurer, an office to which he had been elected.<sup>56</sup>

Laws providing that the acceptance of the second office shall be deemed to be a vacation of the first are construed to relate to public offices only, officers having definite terms, and not to employees or subordinates.<sup>57</sup>

### § 498. Acceptance of a resignation.

Apart from legal provision, a resignation is not complete until accepted by the proper authority.<sup>58</sup> Mere presentation of a resignation does not work a vacancy.<sup>59</sup>

Laws provide that resignations of appointive officers shall be made to the "body, board, court or officer that appointed them." In view of such statute it was held that the resignation of an officer appointed by the mayor with the approval of the council, although presented to and accepted by the mayor, was not effective until presented for acceptance to the council.<sup>60</sup>

Under a statute providing that all resignations of the office shall be "tendered to the court or officer who is required to fill the vacancy," the resignation of an elective or appointive officer, it was held, must be tendered to the person who has the power to appoint his successor, and a resignation tendered to any other person or body is a nullity.<sup>61</sup>

clude the recovery of the salary. *San Antonio v. Steingruber* (Tex. Civ. App.), 177 S. W. 1023, 1026, 1029.

<sup>56</sup> *Taylor v. Johnson*, 148 Ky. 649, 147 S. W. 375.

<sup>57</sup> *People ex rel. v. McAneny*, 144 N. Y. S. 121.

<sup>58</sup> *State ex rel. v. Kerkow*, 31 S. D. 491, 141 N. W. 377.

A resignation is not effective until it is accepted. *Commonwealth v. Krapf*, 249 Pa. 81, 84, citing § 498, vol. 2, ante.

Under a statute declaring an office vacant upon resignation of the occupant, held statute operative without acceptance of resignation. *State ex rel. v. Kotecki*, 155 Wis. 66, 144 N. W. 200.

<sup>59</sup> *Dostie v. Lewiston*, 114 Me. 62, 95 Atl. 353.

<sup>60</sup> *State ex rel. v. Kerkow*, 31 S. D. 491, 141 N. W. 377.

<sup>61</sup> Where the county court or judge alone has power to fill vacancies in the board of trustees of a town, the trustees have no au-

Acceptance should occur within a reasonable time after the resignation is tendered. Thus a chief of police required a police officer with whom he was dissatisfied to submit his resignation, "to take effect on its acceptance by the chief of police." At the time the chief informed the officer that he "wanted the resignation to hold over him and that if he behaved himself it could be given back to him, but if he did not the chief would accept it at any time." Here it was held that "if the resignation ever had any validity it had been lost completely by the efflux of time. That seems an almost irresistible inference from the circumstances. If the resignation be treated as valid originally it can only be construed as intended to be open for acceptance for a reasonable time. There was no pretense that it was accepted until more than six years after its delivery. That was not within a reasonable time."<sup>62</sup>

VIII. POWERS AND FUNCTIONS OF OFFICERS, SUBORDINATES AND EMPLOYEES, AND MISCELLANEOUS MATTERS INCIDENT THERETO.

§ 499. Powers and functions of officers in general.

Municipal officers may perform executive or administrative, legislative and judicial functions, and judicial officers may exercise both legislative and executive functions.<sup>63</sup> The state may impose duties upon municipal officers.<sup>64</sup>

Officers of the municipality are required to enforce the

thority to accept the resignation of a trustee, and appoint another. *Shacklett v. Town of Island*, 146 Ky. 798, 143 S. W. 369.

<sup>62</sup> *Larrivee v. Mitchell* (Mass.), 119 N. E. 654.

<sup>63</sup> There is no constitutional objection to attaching executive, administrative or legislative duties to a municipal officer, and "the mere fact that he was a judicial

officer in no way precludes him from serving the town as an executive officer." Judicial officer of town may exercise both legislative and executive functions. *State ex rel. v. Lane*, 181 Ala. 646, 62 So. 31.

<sup>64</sup> On police department, to enforce laws of the municipality. *State ex rel. v. Linn* (Okl.), 153 Pac. 826.

law within the range of their duties,<sup>65</sup> but, of course, they cannot pass beyond it.<sup>66</sup>

The municipality is bound by the acts of its officers within the scope of their authority,<sup>67</sup> and those dealing with them must take notice thereof.<sup>68</sup>

<sup>65</sup> Must enforce law, etc., if ground for honest difference of opinion as to whether law violated, e. g., Sunday baseball, it cannot be said there was a willful refusal or neglect to perform duty. Mayor may rely, to some extent, on advice of legal department, etc. *State v. Roth*, 162 Ia. 638, 144 N. W. 339.

Mandamus to compel performance of duties where not discretionary, if there is no other specific and legal remedy, e. g., ministerial duties imposed by ordinance on mayor and city solicitor. Ordinance, of course, is the law to the officers as to the humblest citizen. *Cheltenham Trust Co. v. Blankenburg*, 241 Pa. 394, 88 Atl. 664.

<sup>66</sup> Officer has no other or greater powers than those prescribed by law, and of course, necessarily implied. Thus where an ordinance creates an office and prescribes its power, for example, corporation counsel, he has no power to waive and release errors in litigation which has previously passed into judgment. *O'Neill v. Chicago*, 169 Ill. App. 546.

Must have authority to make contracts. *Higginson v. Fall River*, 226 Mass. 423, 115 N. E. 764.

Controlled by law applicable, cannot go beyond, must act within law, etc., e. g., investigation of municipal affairs, books and accounts, compelling attendance of witnesses, oath and examination.

*Re Wallstein*, 165 N. Y. S. 90, 178 App. Div. 140.

<sup>67</sup> Not bound by ultra vires contracts of officers. *McCormick v. Hanover Tp.*, 246 Pa. 169, 92 Atl. 195.

City bound by acts of, e. g., bound by honest acts of its officers who are conducting a litigation in consenting to matters pertaining to the procedure of the court in which the litigation is pending, irrespective of advantage to the city. *Erie Elevator Co. v. Jersey City*, 83 N. J. Eq. 71, 90 Atl. 8.

<sup>68</sup> Attorney employed without authority by municipal board is chargeable with knowledge that board had no power to employ him. *Higginson v. Fall River*, 226 Mass. 423, 115 N. E. 764; *Bartlett v. Lowell*, 201 Mass. 152, 155, 87 N. E. 195.

Persons dealing with officers of a public or municipal corporation must learn the nature and extent of their authority. May be established to an extent by course of conduct permitted by city. *Mottin v. Leavenworth County*, 89 Kan. 742, 133 Pac. 165; *Roberts v. St. Marys*, 78 Kan. 707, 98 Pac. 211; *Hetherington-Berner Co. v. Spokane*, 75 Wash. 660, 133 Pac. 484.

Unauthorized statements, e. g., by councilman and city treasurer, as to legal effect of ordinance to purchaser of local improvement bonds, not binding on city. *State*



## § 500. Power of officer to select subordinates, employees, agents, etc.<sup>69</sup>

## § 501. Power to employ attorneys.<sup>70</sup>

ex rel. v. Tacoma, 97 Wash. 190, 166 Pac. 66.

<sup>69</sup> Cannot employ assistance if law does not authorize. Officer must himself perform duties. Towle v. Mobile, 4 Ala. App. 502, 58 So. 668.

Only entitled to appoint such assistants, subordinates and employees as law allows, etc. Cannot go beyond and bind city. Colihan v. Miller, 131 N. Y. S. 99, 72 Misc. Rep. 140; McLaughlin v. New York, 143 N. Y. S. 819, 158 App. Div. 517.

Council held to have power to employ outside consulting engineer in connection with the constructing of a bridge by city. Burrell v. Portland, 61 Or. 105, 121 Pac. 1.

City clerks sometimes have power with consent of council to appoint assistants, without the concurrence of the mayor. Byrne v. Raymond, 89 N. J. L. 96, 97 Atl. 773.

Expert accountants to examine books, accounts, etc., when council thinks essential. Ward v. DuQuoin, 173 Ill. App. 515.

Humane officer, no such officer named in charter. "We think it within the police power granted to this city to employ and pay a person for the well known purposes indicated in the title given him." Osburn v. Stone, 170 Cal. 480, 150 Pac. 367, 372.

Grade crossing commission may employ engineers, attorneys, etc., and fix pay. Kimball v. Buffalo,

145 N. Y. S. 529, 84 Misc. Rep. 170.

Rapid transit commission for cities in Ohio, may select employees, attorneys, etc. Cincinnati v. Rogers (Ohio), 120 N. E. 839.

<sup>70</sup> Courts are reluctant to imply power to employ attorneys. Jackson v. Minneapolis, 112 Minn. 167, 127 N. W. 569.

Where the city attorney is the legal adviser of the various departments, a department, held to have no power to employ its own attorney, and bind the city to pay, etc. State v. Gorman, 117 Minn. 323, 136 N. W. 402.

Usually it is the duty of the city attorney or chief law officer to defend municipal officers, board and commissions, and ordinarily other attorneys to perform such service at the expense of the city may not be employed, especially where the city attorney is able, ready and willing to act. Thus it was held under a particular charter that a civil service commission had no power to engage at the expense of the public an attorney to defend it, where it appeared that the city attorney was available for such service. Rafael v. Boyle, 31 Cal. App. 623, 161 Pac. 126.

Fire commissioners have not power to employ an attorney to file charges against chief. Higginson v. Fall River, 226 Mass. 423, 115 N. E. 764.

City authorized to employ aid for city attorney, when necessary.

## § 502. Who authorized to employ attorney.<sup>71</sup>

## § 503. Same—method of employment.<sup>72</sup>

Topeka v. Ritchie (Kan. 1919), 124 Pac. 728, 731.

Has power as an incident to its very corporate existence to employ an attorney, although the charter is silent. Springs from power to sue and be sued, to contract and be contracted with. "The power is indispensable to the proper exercise of the ordinary general powers of municipal bodies." May employ as many as necessary, etc. Cheesebrew v. Point Pleasant, 71 W. Va. 199, 76 S. E. 424.

As townships may sue and be sued, power to employ counsel is implied, as occasion arises. McCormick v. Hanover Tp., 246 Pa. 169, 92 Atl. 195.

City may employ expert attorneys to pass on validity of bond issue. Davis v. San Antonio (Tex. Civ. App.), 160 S. W. 1161, 1166.

Town, held to have no power to employ an attorney. Tharp v. Blake (Tex. Civ. App.), 171 S. W. 549.

Attorney employed to assist town attorney in a special court proceeding is entitled to receive a reasonable fee. Oak Creek v. Wiley (Colo.), 170 Pac. 190; Oak Creek v. Bornier (Colo.), 170 Pac. 190.

Attorney's fees cannot be recovered of one who did not employ him, especially if person was not a party to the suit. Forman v. New Orleans Sewerage & Water Board, 119 La. 49, 43 So. 908, 12 Ann. Cas. 773.

An attorney although not em-

ployed by formal ordinance or resolution, who performed legal service with knowledge of the council and town and which were accepted, with the benefits, held town liable for services. Holdenville v. Lawson, 40 Okl. 38, 135 Pac. 405.

<sup>71</sup> Mayor when in his opinion the interest of the city require it. Mosher v. Elmira, 145 N. Y. S. 964, 83 Misc. Rep. 328.

Council. Cheesebrew v. Point Pleasant, 71 W. Va. 199, 76 S. E. 424.

The Cleveland rapid transit commission, held to have power to employ an attorney and fix his term of service and compensation. State ex rel. v. Leimann (Ohio), 120 N. E. 174.

In Ohio rapid transit commissions may employ attorneys. Cincinnati v. Rogers (Ohio), 120 N. E. 839.

Grade crossing commission may employ. Kimball v. Buffalo, 145 N. Y. S. 529, 84 Misc. Rep. 170.

Fire commissioners held to have no power to employ an attorney to file charges against fire chief. General power, is insufficient to give such authority. Higginson v. Fall River, 226 Mass. 423, 115 N. E. 764.

<sup>72</sup> A contract to employ an attorney may rest in parol and may be proved by parol. Rochester v. Campbell, 184 Ind. 421, 111 N. E. 420, 422; Loganport v. Dykeman, 116 Ind. 15, 17 N. E. 587.

An attorney may be allowed to perform a special service orally,

§ 506. Classification of employees—civil service.<sup>73</sup>

§ 507. Promotions in office and public place.

Laws as to promotions differ widely. Usually a civil service commission makes rules and regulations relating thereto. Ordinarily courts refrain from interfering, as the matter is largely discretionary with the commission, especially where there is no evidence of abuse of power.<sup>74</sup>

What constitutes a promotion, of course, must depend upon the conditions and the applicable law.<sup>75</sup>

in the absence of a law requiring the contract to be in writing or evidenced by resolution or ordinance. *Charleston v. Littlepage*, 73 W. Va. 156, 80 S. E. 131.

Only by ordinance or resolution. *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.

<sup>73</sup> Classified list. *Maxwell v. San Francisco Civil Service Com.*, 169 Cal. 336, 146 Pac. 869.

Binding effect of classification. *Blatz v. Esser*, 179 N. Y. S. 143.

Commission usually has broad discretion as to classification. *Pratt v. Rosenthal* (Cal.), 183 Pac. 542.

Eligibles classified, and commission certifies to appointing officer some three eligibles and from these he makes appointment, having no discretion. *People ex rel. v. Chicago* (Ill.), 119 N. E. 599.

The civil service commission promulgated a list of eligibles for promotion, held it could not annul such action. *People ex rel. v. McBride*, 172 N. Y. S. 11.

The general rule is that "officers of special and limited jurisdiction cannot sit in review of their own orders or vacate or annul them." *People ex rel. v. Wemple*, 144 N. Y. 478, 482, 39 N. E. 397, 398.

Judicial notice of different classes of service will be taken, e. g., that rendered by a fire chief and his assistance from that rendered by other officers of the department. *State v. Lincoln*, 98 Neb. 634, 154 N. W. 217.

<sup>74</sup> *Maxwell v. San Francisco Civil Service Com.*, 169 Cal. 336, 146 Pac. 869.

Promotion to be based, of course, upon "ascertained merit" or "meritorious action;" as applied to police it means same thing. *Uhte v. Rosenthal* (Cal. App.), 174 Pac. 83.

Promotions controlled by rules of civil service legally promulgated, etc. *Christenson v. Portland*, 89 Or. 609, 175 Pac. 135.

Promotion by increase of salary under particular law denied. *People ex rel. v. Creelman*, 132 N. Y. S. 176, 148 App. Div. 121.

"Positions" as applied to civil service examiners, held to refer to places in the classified list, and not to office titles not included therein. *People ex rel. v. Moskowitz*, 162 N. Y. S. 453, 175 App. Div. 710.

<sup>75</sup> Under a constitutional provision requiring that so far as practicable, all promotions in the civil service shall be made by examina-

### § 508. Reduction in office and public place.

In reduction in rank, civil service laws and legal rules promulgated thereunder are required to be observed in good faith.<sup>76</sup>

### § 509. Transfers of officers and employees.

If no restrictions exist in the applicable law, clearly transfers of officers and employees in the public service may be made, but such action must conform in substance to essential requirements, if any.<sup>77</sup>

### § 510. Power to grant leave of absence and vacation.<sup>78</sup>

### § 511. Pensions for officers and employees.<sup>79</sup>

A system of pensions to municipal officers and employees injured or disabled while on duty, or retiring after a term of service, is quite generally established, and such benefits are being gradually extended. Laws so providing are sustained as valid and constitutional.<sup>80</sup>

tion, it was held that raising an employee from second assistant electrical engineer to chief engineer, at a small increase of salary, where both positions were under the civil service rules and classified under the same group and grade, was not a promotion. *Murray v. Lockport Water Board*, 151 N. Y. S. 419, 88 Misc. Rep. 625.

<sup>76</sup> Thus where notice is to be given with reasons for reduction, and public hearing, if employee demands it in writing. If law does not prescribe time of notice, a reasonable time is required. *O'Brien v. Cadogan*, 220 Mass. 578, 108 N. E. 363.

Reduction in salary of employee made in good faith is not in violation of the Iowa Soldiers' Preference Law. *Babcock v. Des Moines*, 180 Ia. 1120, 162 N. W. 763.

<sup>77</sup> Transfers must conform to

civil service law where it operates. *People ex rel. v. Smith*, 154 N. Y. S. 288, 91 Misc. Rep. 131.

Competitive examination required under civil service laws. *Re Owen*, 137 N. Y. S. 308, 76 Misc. Rep. 610.

<sup>78</sup> Ordinance allowed skilled laborers in the service at least once a year to a vacation of eleven working days each year, and provided that the periods should not be cumulative; held, omission to take a vacation one year did not give employee double time in vacation, namely, twenty-two days. *Vaughn v. Chicago*, 198 Ill. App. 100.

<sup>79</sup> *Policemen and firemen*, § 2422, post; § 2422, vol. 5, ante.

<sup>80</sup> *Hughes v. Traeger*, 264 Ill. 612, 106 N. E. 431.

"The constitutionality of statutes establishing such pension sys-

Pensions are not regarded in the nature of increased compensation to public servants, as forbidden by the constitution,<sup>81</sup> nor do they involve a "gift" of the city's money, as prohibited by the constitution.<sup>82</sup>

"The rule is that in construing and applying statutes on conferring pensions, as in construing other statutes, they are not to be given retroactive effect in the absence of express language in the statute requiring it."<sup>83</sup>

### § 512. Same—granting of pensions, how far discretionary.<sup>84</sup>

tem is sustained upon the ground that 'these annuities are in the nature of compensation for services previously rendered for which full and adequate compensation was not received at the time of the rendition of the services. It is, in effect, pay withheld to induce long continued and faithful service, and the public benefit approves in two ways: by encouraging competent employees to remain in the service, and by retiring from the public service those who have become incapacitated from performing the duties as well as they might be performed by younger or more vigorous men. (1 Dillon on Municipal Corporations—5 Ed.—§ 430). This court in *Hughes v. Traeger*, 264 Ill. 612, upheld the constitutionality of a pension act and approved the doctrine just quoted from Dillon. Such pensions generally are not considered donations or gratuities. The rule in the majority of jurisdictions is, that the legislature has power to require municipalities to pension their employees and raise the funds for that purpose." *People ex rel. v. Abbott*, 274 Ill. 380, 384-5, 113 N. E. 696, 698, citing § 2422, vol. 5, ante.

Valid pension act can confer pension only on officers or employees of city who are such when they receive them. *People ex rel. v. Abbott*, 274 Ill. 380, 113 N. E. 696, 698, 699.

<sup>81</sup> Pensions may be given to city employees, as they are not "public officers" within the New York Constitution forbidding the increasing the allowance of public officers by local laws. *Hammit v. Gaynor*, 144 N. Y. S. 123.

<sup>82</sup> *Hammit v. Gaynor*, 144 N. Y. S. 123, 127, 82 Misc. Rep. 196. Not gratuities or gifts. *O'Dea v. Cook* (Cal.), 169 Pac. 366.

<sup>83</sup> *People ex rel. v. Abbott*, 274 Ill. 380, 113 N. E. 696, 698, citing § 511, vol. 2, ante.

For policemen, held retroactive. *Bentel v. Foreman* (Ill. 1919), 123 N. E. 270.

Right may be taken away by amendment. *Ibid.*

<sup>84</sup> Employee injured while at work on the streets, held hurt in line of his employment. *Engstrom v. Seattle*, 92 Wash. 568, 159 Pac. 816.

Recover by such employee against the person who negligently caused his injury, will not bar recovery of pension. *Ib.*

**§ 513. Municipal officers cannot be interested in contracts of any character with the city.<sup>85</sup>**

**§ 514. Reimbursing or indemnifying officers.<sup>86</sup>**

**IX. SALARIES AND COMPENSATION, FEES AND COMMISSIONS.**

**§ 515. Express legal provision is necessary to entitle an officer to salary or compensation.<sup>87</sup>**

Any sort of claim as salary, compensation or expenses

<sup>85</sup> *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, citing § 513, vol. 2, ante.

Councilmen-aldermen. *Commonwealth v. Kelly*, 255 Pac. 475, 100 Atl. 272.

Such contracts declared void by the law forbidding. *Alderman furnished teams. Bangor v. Ridley* (Me. 1918), 104 Atl. 230.

Trustee of village was a member of firm that sold supplies to village, the bills therefor were audited by a committee of the trustees of which he was a member, held violation of charter, and officer was subject to removal. *Re Morgan*, 130 N. Y. S. 432, 145 App. Div. 642.

Councilman who is a stockholder of a corporation which makes a contract with the city, renders it void. *Hartley v. Floete Lumber Co.* (Iowa 1919), 171 N. W. 183; *James v. Hamburg*, 174 Iowa 310, 156 N. W. 394.

A contract made by a councilman acting for the city, with himself, or with corporations in which he is pecuniarily interested is against public policy, and not enforceable against the municipality because of the temptation it places before such officer to profit in double dealing. *Bay v. Davidson*, 133 Iowa 690, 111 N. W. 25, 9 L. R.

A. (N. S.), 1014, 119 Am. St. Rep. 650.

Law held inapplicable under the facts in particular case. *Collman v. Wanamaker*, 27 Idaho 342, 149 Pac. 292.

Violation results in forfeiture of office on conviction. *Betskouski v. Los Angeles Superior Court* (Cal. App.), 166 Pac. 1027.

Law that no member of the council shall be interested in any contract with the city, etc., held not to include contracts between a general contractor and a materialman who was a councilman. *Finn v. McDaniel* (Ind. App.), 114 N. E. 9.

Contract by health officer with board of health to treat smallpox patients, held not violation of the law forbidding public officers from being interested in public contracts. *New Carlisle v. Tullar* (Ind. App.), 110 N. E. 1001, 1003, citing § 513, vol. 2, ante.

<sup>86</sup> Cannot reimburse police officer to pay judgment rendered against him for assault by him in making an arrest, as this would be a "gift to an individual" expressly forbidden by the state constitution. *Millnow v. Rafter*, 152 N. Y. S. 110, 89 Misc. Rep. 495.

<sup>87</sup> *Rockwood v. Cambridge*, 228 Mass. 249, 117 N. E. 312; *Baxter*

must be authorized by some law, or some legal contract,

v. Venice, 271 Ill. 233, 111 N. E. 111, affirming 194 Ill. App. 62; People ex rel. v. Coffin, 282 Ill. 599, 119 N. E. 54; Laughlin v. Joplin, 161 Mo. App. 161, 142 S. W. 786.

At common law, the rule was that where the law imposes a duty upon an officer, he cannot claim a remuneration for fulfilling it unless the law has expressly conferred such right. Croftins v. Brandt, 58 N. Y. 106.

The right to compensation for the discharge of official duties is purely a creature of the statute, and the public officer is entitled to none for services he may perform as such officer unless the statute gives it. Such compensation is not the creature of contract, nor dependent upon the fact, or value of services actually rendered, and cannot be recovered upon quantum meruit. Sanderson v. Pike County, 195 Mo. 598, 605.

The office must exist and the claimant of the salary must be a legal incumbent, and some cases hold that he must be a *de jure* officer. San Antonio v. Coteltress (Tex. Civ. App.), 169 S. W. 917.

Law did not provide for salary for civil service commissioners when appointed, held a charter amendment allowing them salaries during their term was void. Bar-rus v. Engel, 186 Mich. 540, 152 N. W. 950.

The officer is entitled to the salary, although not fixed at the time as required by charter or statute applicable. State ex rel. v. Kotecki, 155 Wis. 66, 114 N. W. 200; State ex rel. v. Kelly, 154 Wis.

482, 143 N. W. 153; Uvalde v. Burley (Tex. Civ. App. 1914), 145 S. W. 311.

"A person acting in the capacity of a public officer is entitled to only such compensation as may be given by some provision of law. This rule is founded upon a sound public policy and should be rigidly adhered to." Rockley v. Purcell, 40 Okl. 186, 137 Pac. 100.

"Ordinances fixing salaries are not contracts with officers for the full term of their office." An appointment to office is not a contract of hire for a stipulated term. Gatheman v. Chicago, 263 Ill. 292, 104 N. E. 1085, affirming 183 Ill. App. 210.

A public officer is not entitled to payment for duties imposed upon him by statute, in the absence of an express provision for such payment. Borden v. Goldsboro, 173 N. C. 661, 92 S. E. 694.

Where an assistant city solicitor is duly designated by the city solicitor pursuant to law to act as prosecuting attorney of the police court, and he so acts, held entitled to receive compensation. Thomas v. Hamilton County Comrs., 88 Ohio St. 489, 104 N. E. 536.

A public officer cannot recover for compensation based upon a quantum meruit. Borden v. Goldsboro, 173 N. C. 661, 92 S. E. 694.

If no power exists to employ an attorney there can be no recovery for legal services on a quantum meruit. Tharp v. Blake (Tex. Civ. App.), 171 S. W. 549.

Ordinances providing for salaries must conform to charter pro-

either express or implied.<sup>88</sup> A public officer is not entitled to his salary by virtue of a contract, express or implied. The right to the salary which the statute, charter or ordinance prescribes, exists as a creature of law, and as an incident to the office. The salary is to be paid him whether or not he neglects his official duties, or performs services for which it is no fair compensation.<sup>89</sup> Without

visions. *State ex rel. v. Brodie*, 161 Mo. App. 538, 143 S. W. 69.

Ordinance cannot allow salary greater than that fixed by the charter or statute applicable. *Johnston v. Carrico*, 38 Okl. 804, 135 Pac. 11.

On consolidation of a city and county government, the treasurer is not entitled to recover salary as treasurer of the county and also as treasurer of the city. *Elder v. Denver*, 53 Colo. 496, 127 Pac. 949.

Where the officer holds until his successor is elected and qualified, he is entitled to the compensation attached to the office during the time. *Henriod v. Church (Utah)*, 172 Pac. 701.

The city's unqualified acceptance of services performed by an incumbent of an office estops it to invoke any rule of law to defeat payment of the sum so earned. *Thompson v. Denver*, 61 Colo. 470, 158 Pac. 309.

Injunction by taxpayer to restrain paying salaries in absence of appropriation by ordinance. *Thiel v. Philadelphia*, 245 Pa. 406, 91 Atl. 490.

<sup>88</sup> *Zeigler v. Grant County Comrs.*, 46 Okl. 728, 144 Pac. 380; *Ticer v. State*, 35 Okl. 4, 128 Pac. 495; *Washita County v. Brett*, 32 Okl. 853, 124 Pac. 57.

<sup>89</sup> *Bates v. St. Louis*, 153 Mo.

18, 54 S. W. 439, 77 Am. St. Rep. 701.

"The right of a public officer to his salary is not a matter of contract, and is not dependent on the fact that he performed the duties of his office." *State ex rel. v. Gilbert*, 163 Mo. App. 679, 686, 147 S. W. 505.

"The salary of a public office belongs to the person occupying or holding the office as an incident thereto, and does not depend upon his performance of the duties of such office." *Terre Haute v. Burns (Ind. App.)*, 116 N. E. 604; *Leonard v. Terre Haute*, 48 Ind. App. 104, 114, 93 N. E. 872.

"It is a basic principle of law and one of general application" that "the right to the salary is attached to and follows the legal title to the office. This is true, irrespective of the question by whom the services were, in fact, actually performed." *People ex rel. v. Bradford*, 267 Ill. 486, 108 N. E. 732.

"The legal title to the office carries with it the right to the salary or emolument of the office. The salary follows the legal title. This doctrine is so generally held by the courts that authorities hardly need be cited." *Chicago v. Luthardt*, 191 Ill. 516, 61 N. E. 410.

"The right of compensation



affirmative action, therefore, indicating abandonment of the office mere neglect of official duties will not deprive the incumbent of the salary attached thereto.<sup>90</sup> However, it is often said as applied to municipal corporations, the general rule is that it is against public policy and sound morals to pay for constructive service.<sup>91</sup>

Laws relating to salaries and compensation are strictly construed in favor of the public.<sup>92</sup>

While there must be express legal provision to authorize payments to employees for services,<sup>93</sup> a per diem employee can recover pay only on proof of actual work. In such case labor performed or services rendered is the foundation of the right to receive.<sup>94</sup>

### § 516. Power to fix salaries, compensation, etc.<sup>95</sup>

Where the compensation of employees is prescribed by

grows out of the rendition of services and not out of any contractual relation." *Gathemann v. Chicago*, 263 Ill. 292, 104 N. E. 1085, affirming 183 Ill. App. 210; *People v. Chicago*, 242 Ill. 561, 90 N. E. 259.

<sup>90</sup> *People ex rel. v. Bradford*, 267 Ill. 486, 108 N. E. 732.

The compensation is not based on the amount of service rendered by the officer. He may neglect to perform the duties but if there is no actual abandonment of the office, he may recover the salary since it is incident to the office and attaches to it by virtue of the law. *Bartholomew v. Springdale*, 91 Wash. 408, 157 Pac. 1090.

<sup>91</sup> *Fisher v. Mechanicville*, 158 N. Y. S. 908, 172 App. Div. 426; reversing 157 N. Y. S. 518, 98 Misc. Rep. 134; *Higgins v. New York*, 131 N. Y. 128, 132, 30 N. E. 44; *Howard v. Daly*, 61 N. Y. 362, 373, 19 Am. Rep. 285.

<sup>92</sup> *Holman v. Macon*, 155 Mo. App. 398, 402, 403, 137 S. W. 16; *State v. Patterson*, 152 Mo. App. 264, 269, 132 S. W. 1183.

Construction of an ordinance relating to salary, held not binding on courts. *Laughlin v. Joplin*, 161 Mo. App. 161, 167, 142 S. W. 786.

In case of doubt in the construction of a resolution, fixing salaries, the particular construction followed by the officers whose duty it is to enforce it, is entitled to be considered. *Blau v. New York*, 151 N. Y. S. 819, 166 App. Div. 573.

<sup>93</sup> *Smith v. New York*, 144 N. Y. S. 676, 83 Misc. Rep. 98; *Williamson v. New York*, 157 N. Y. S. 336, 171 App. Div. 439.

<sup>94</sup> *Doyle v. New York*, 132 N. Y. S. 774.

<sup>95</sup> Section 430, ante; section 634, post; sections 430, 634, vol. 2, ante.

*Carterville v. Cardwell*, 152 Mo. App. 32, 38, 132 S. W. 745; *War-*

ordinance a city officer, as a street commissioner, has no power by contract to fix a greater or a less sum.<sup>96</sup>

**§ 517. Salary or compensation of de facto officer—defect in law or election or appointment.<sup>97</sup>**

rensburg v. Simpson, 22 Mo. App. 695.

Unless restricted, the appropriate authorities of a municipal corporation have the power to regulate salaries, make appropriations therefor, work out their budgets, etc., without interference of the courts. *People v. Dooley*, 155 N. Y. S. 326, 169 App. Div. 423.

Commissioners under commission form of government cannot vote to increase their own salaries. "The public policy of the state, found in the statutes and judicial decisions has been pronounced against permitting one to sit in judgment on his own cause, or to act in a matter affecting the public when he has a direct pecuniary interest, and this is a principle of the common law which has existed for hundreds of years." *Kendall v. Stafford* (N. C. 1919), 101 S. E. 15.

Board of aldermen may fix salaries, and allow employees, as janitors, pay for extra work. *Mathoney v. New York City Board of Education*, 167 N. Y. S. 222, 179 App. Div. 782.

Council may fix. *Kendricks v. Machin* (Ark. 1918), 205 S. W. 815.

**Firemen** in cities of metropolitan class; salaries fixed by state; city cannot. *Adams v. Omaha*, 101 Neb. 690, 164 N. W. 714.

**Fixing of salaries is a legislative act.** An ordinance fixing sal-

aries of employees is not in the nature of a contract between the city and the employees. *Schurtz v. Grand Rapids* (Mich. 1919), 171 N. W. 463, citing § 516, vol. 2, ante.

An office not of statutory or common law origin can be created only by ordinance. *People v. Coffin*, 279 Ill. 401, 405, 117 N. E. 85, 87, affirming, 202 Ill. App. 100; *San Antonio v. Coultrass* (Tex. Civ. App.), 169 S. W. 917, 919.

May be by resolution. *Brown v. Amarillo* (Tex. Civ. App.), 180 S. W. 654.

Right to salary is fixed by law or in the manner prescribed by law. Right to, does not rest upon contractual relations between him and city. *Bartholomew v. Springdale*, 91 Wash. 408, 157 Pac. 1090.

**Agreement by an officer** at the time of his appointment or prior thereto to accept a less salary than that fixed by law is void as against public policy, and does not preclude him from recovering the full amount. *Rhodes v. Tacoma*, 97 Wash. 341, 166 Pac. 647.

<sup>96</sup> *Orthwein v. St. Louis*, 265 Mo. 556, 565, 178 S. W. 87.

<sup>97</sup> "A de facto officer has no legal right to the emoluments of an office, the duties of which he may have performed under color of an appointment but without legal title." *Ducharme v. Biddeford*, 110 Me. 6, 85 Atl. 157.

De facto who performs duties of

**§ 518. Salary as between de jure and de facto officer.**

The late decisions, as the earlier ones, are not in harmony as to whether payment of the salary or compensation of the office to a *de facto* officer will preclude recovery thereof from the municipality by a *de jure* officer.<sup>98</sup> Some courts hold that a *de jure* officer cannot recover from the employing municipality when the duties of the office have been performed by a *de facto* officer, and the salary has been paid to him without notice of the claim of the *de jure* officer.<sup>99</sup> The remedy of the *de jure* officer, in

office in good faith is entitled to salary. *State ex rel. v. Kelly*, 154 Wis. 482, 143 N. W. 153.

One who resigns an office but his resignation is refused acceptance, and who continued to perform the duties of the office is entitled to his salary as a *de facto* officer. *State ex rel. v. Kotecki*, 155 Wis. 66, 144 N. W. 200.

<sup>98</sup> *Ardmore v. Sayre* (Okl.), 154 Pac. 356; *Luth v. Kansas City* (Mo. App. 1920), 218 S. W. 901.

<sup>99</sup> Payment to *de facto*, holding and performing duties precludes recovery by *de jure*. *Wilkerson v. Albuquerque* (N. Mex. 1919), 185 Pac. 547. *De jure* must sue *de facto*. *Ib.*

Payment of salary by city to *de facto* alderman who discharged the duties of the office, held good defense in action by *de jure* officer against municipality for the salary. *Denver v. Marselis* (Colo. 1919), 176 Pac. 951.

"The payment of the official salary to a *de facto* officer having the legal indicia of title is a defense to a claim against a public corporation or its disbursing officer made by the *de jure* officer." *North v. Battle Creek*, 185 Mich. 592, 152 N. W. 194.

An officer *de jure* cannot recover from a municipal corporation salary paid by it to an officer *de facto* during the period the officer *de jure* was deprived of his office, i. e., payment of salary by a municipality to an officer *de facto*, who discharges the duties of the office, is a good defense to an action therefor against it by the officer *de jure*. *Thompson v. Denver*, 61 Colo. 470, 158 Pac. 309, following *El Paso County v. Rohde*, 41 Colo. 258, 95 Pac. 551, 16 L. R. A. (N. S.) 794, 124 Am. St. Rep. 134, and *Henderson v. Glynn*, 2 Colo. App. 303, 30 Pac. 265.

A *de facto* officer discharged the duties of the office and received the salary attached thereto during his occupancy. In such case the municipality is not liable to the *de jure* officer for such salary, notwithstanding he obtained legal possession and demonstrated that he was illegally kept out of it. *Terre Haute v. Burns* (Ind. App.), 116 N. E. 604, 609. Same case, 117 N. E. 519, distinguishing *Worrell v. Carr*, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 63.

In quo warranto against a city and an incumbent claiming the of-

such case, it is held, is against the *de facto* officer.<sup>1</sup> Other courts apply the contrary rule.<sup>2</sup>

Statutes provide that in event of contest, the municipality shall withhold payment until final determination thereof, and that any payment made by the municipality prior thereto in violation of the prohibition shall be at its peril.<sup>3</sup>

### § 519. Salary or compensation where the office or position is legally abolished.<sup>4</sup>

Office, if the city has paid the salary to the incumbent, it need not pay to the complainant. *State ex rel. v. Fassett*, 69 Wash. 555, 125 Pac. 963.

<sup>1</sup> Where the *de facto* officer receives the salary, the action of the *de jure* officer for the salary is against the usurper and not against the city. *Savannah v. Monroe* (Ga. App. 1918), 96 S. E. 500, citing § 518, vol. 2, ante.

Where there is a conflict between two persons as to who is entitled to the office and the city pays the salary to the *de facto* officer prior to adjudication, the *de jure* officer cannot recover the salary so paid from the city. *Damerest v. New York*, 147 N. Y. 203, 208, 41 N. E. 405. The *de jure* officer must sue the *de facto* officer to recover as for damages suffered by reason of his usurpation of the office. *New York v. Voorhis*, 129 N. Y. S. 832.

<sup>2</sup> "Most courts hold that the simple fact that an officer *de jure* has not performed the duties of his office is no defense to an action to recover the salary attached to the office." *Barker v. Nashua*, 77 N. H. 347, 91 Atl. 872.

"It has been held that payment of the salary to a *de facto* officer

is a good defense to an action by the *de jure* officer to recover the same salary after he has acquired or regained possession. The courts so holding base their action upon the ground that it is in accord with public policy.

"We have considered the cases cited, and conclude that in a case like this the fact alone that the salary is paid to a *de facto* officer should not affect the rights of the party legally entitled to the office. In a case where the *de jure* officer is wrongfully ousted, to hold that the mere fact that the salary is paid to a *de facto* officer should deprive the *de jure* officer of his right to recover the same, regardless of whether or not such payment was made over his protest and despite reasonable efforts to prevent it, would be unjust, and we do not think such a rule should be announced by our courts. For an interesting discussion of this question see the case of *Rasmussen v. Commissioners*, 8 Wyo. 277, 56 Pac. 1098, 45 L. R. A. 295." *San Antonio v. Steingruber* (Tex. Civ. App.), 177 S. W. 1023, 1026, citing § 518, vol. 2, ante.

<sup>3</sup> *Wynne v. Butte*, 45 Mont. 417, 123 Pac. 531.

<sup>4</sup> *State ex rel. v. Seattle*, 82

**§ 520. Salary or compensation in case of removal or suspension from office.<sup>5</sup>**

A legal removal of an officer or discharge of an employee usually precludes further right to the salary or compensation of the office or position. The rule is otherwise, if such removal or discharge is unlawful. The same general doctrine is applicable to suspensions, controlled, of course, by the circumstance of the case presented for determination.<sup>6</sup>

Wash. 464, 144 Pac. 695; *Thompson v. New York City Board of Education*, 201 N. Y. 457, 94 N. E. 1082, affirming 121 N. Y. S. 491, 136 App. Div. 721.

Merging municipal corporations may abolish offices. *Fisher v. Mechanicville*, 158 N. Y. S. 908, 172 App. Div. 426, reversing 157 N. Y. S. 518, 94 Misc. Rep. 134.

Abolition by change of form of government. *Rome v. Reese*, 19 Ga. App. 559, 91 S. E. 880.

Repeal of law authorizing cities to maintain liquor dispensaries ends term of city liquor agent. *Dingley v. Bath*, 112 Me. 93, 90 Atl. 972.

Where the abolition of the office is invalid and the incumbent in good faith was willing to perform the duties thereof, he is entitled to its emoluments. *Rome v. Reese*, 19 Ga. App. 559, 91 S. E. 880.

**Office illegally discontinued:** If one deprived of office held himself in readiness, etc., he may recover salary. *Foster v. Hindley*, 72 Wash. 657, 131 Pac. 197; *Bringgold v. Spokane*, 27 Wash. 202, 67 Pac. 612; *United States v. Wickersham*, 201 U. S. 390, 26 Sup. Ct. 469, 50 L. ed. 798.

"The fact he declined a temporary employment tendered by

the city does not militate against the enforcement of this right." *Foster v. Hindley*, 72 Wash. 657, 131 Pac. 197; *Reising v. Portland*, 57 Or. 295, 111 Pac. 377, Ann. Cas. 1912D, 895.

<sup>5</sup> *San Antonio v. Newman* (Tex. Civ. App. 1920), 218 S. W. 128; *Braden v. San Antonio* (Tex. Civ. App. 1919), 216 S. W. 282.

<sup>6</sup> *Cantwell v. New York*, 137 N. Y. S. 1113, 152 App. Div. 906; *Carew v. New York*, 137 N. Y. S. 1114, 152 App. Div. 906, affirming 135 N. Y. S. 285, 75 Misc. Rep. 335.

Where an officer has been wrongfully removed, he is nevertheless entitled to his salary. *San Antonio v. Steingruber* (Tex. Civ. App. 1915), 177 S. W. 1023.

"The right to the emoluments attaches to and follows the legal title to the office. A de jure officer cannot be deprived thereof without due process of law. Such officer may recover his salary, after an attempted removal which fails for illegality." *Finneran v. Burlington*, 89 Vt. 1, 5, 93 Atl. 254, citing § 520, vol. 2, ante.

City may decline to pay an intruder, and thus protect the public. *Barendt v. McCarthy*, 160 Cal. 680, 118 Pac. 228.

Reinstatement or restoration to an office or position after illegal removal or dismissal therefrom, requires payment of the emoluments appertaining thereto,<sup>7</sup> which

Entitled to salary until final dismissal. *Koester v. Philadelphia*, 46 Pa. Super. Ct. 110, 116; *Hay v. Springfield Pleasure Driveway*, 181 Ill. 23.

Policeman wrongfully discharged may recover pay. *Sclawr v. St. Paul*, 132 Minn. 238, 156 N. W. 283.

Employee wrongfully discharged, when ready, willing and able to perform duties may recover pay. *Tucker v. Boston*, 223 Mass. 478, 112 N. E. 90.

One not a public officer, as a superintendent of highways, although illegally discharged, cannot recover from the one receiving the salary who performed the duties. *Collins v. Scannell*, 168 N. Y. S. 720.

**Suspension.** May recover during wrongful suspension. *Forster v. Hindley*, 72 Wash. 657, 131 Pac. 197.

Policeman suspended on charges which are not sustained may receive pay from date of suspension. *People ex rel. v. Woods*, 218 N. Y. 124, 112 N. E. 915, reversing 115 N. Y. S. 431, 169 App. Div. 649.

An employee, suspended pending investigation of charges against him and which result in his dismissal from the city service, cannot recover pay during the time he was under suspension. *Vaughn v. Chicago*, 198 Ill. App. 100.

Although the office of one illegally removed is filled by another

who receives the salary incident thereto, the one wrongfully removed may recover the salary belonging to the office irrespective of the solvency or insolvency of the one who received the salary unless the facts show an abandonment of the office. *San Antonio v. Steingruber* (Tex. Civ. App.), 177 S. W. 1023, 1027, 1029.

7 One reinstated after wrongful dismissal is entitled to the salary attached to the position. *People ex rel v. Coffin*, 282 Ill. 599, 119 N. E. 54.

Teacher transferred to lower grade cannot recover salary of higher grade during period of transfer. Reinstatement by direct proceedings is a condition precedent, as the question is not triable in salary action. *Thompson v. New York City Board of Education*, 201 N. Y. 457, 94 N. E. 1082, affirming 121 N. Y. S. 491, 136 App. Div. 721.

Suspended policemen performing no duties, held not entitled to recover salary until by appropriate proceeding he has established his right to the office. *Humburg v. San Jose Board*, 27 Cal. App. 6, 148 Pac. 802.

Officer wrongfully discharged cannot recover his salary accruing after his discharge until he secures his reinstatement by appropriate litigation or otherwise. *Gersch v. Chicago*, 192 Ill. App. 190, 192; *Chicago v. People*, 210 Ill. 84, 71 N. E. 816.

according to the circumstance, may or may not include those accruing in the interim.<sup>8</sup>

A *de jure* officer need establish his title to the office only, as a condition to the maintenance of a suit for salary where there is another in actual possession of the office.<sup>9</sup>

<sup>8</sup> Reinstatement gives right to back salary. *People ex rel. v. Coffin*, 282 Ill. 599, 119 N. E. 54.

Salary for period between removal and reinstatement, less amount earned, if any. *Cantwell v. New York*, 135 N. Y. S. 285, 75 Misc. Rep. 335.

Wrongful discharge on restoration entitled incumbent to salary during the time suspended, though he was reinstated voluntarily without court action. *O'Neill v. New York*, 143 N. Y. S. 431, 81 Misc. Rep. 453.

Reinstatement on *vertiorari* a year after removal gives officer salary during the interim, as salary is an incident to office. *People ex rel. v. Waldo*, 147 N. Y. S. 848, 62 App. Div. 345.

Wrongful discharge, reinstatement by *mandamus* gives salary during whole time out. *Bailey v. Edwards*, 47 Mont. 363, 133 Pac. 1095; *State v. Seattle*, 88 Wash. 589, 153 Pac. 336.

One (officer) wrongfully discharged need not tender his services to recover salary from date of his discharge until the expiration of his term. *San Antonio v. Newman* (Tex. Civ. App.), 201 S. W. 191; *Paris v. Cabiness*, 44 Tex. Civ. App. 587, 98 S. W. 927.

One found guilty and discharged, and subsequently reinstated, held he could not recover salary between the discharge and reinstatement, as the discharge terminated

the employment, and the subsequent employment created a new contract. "The legality of the discharge and the proceedings which led up to it were never challenged." *Winch v. Philadelphia* (Pa. 1919), 107 Atl. 217.

**Acquiescence** in an unlawful removal, it has been held, bars salary during the period the officer performed no services. *Thompson v. New York Board of Education*, 201 N. Y. 457, 94 N. E. 1082, affirming 121 N. Y. S. 491, 136 App. Div. 721.

**Credit in other employment.** Wrongfully discharged. City not entitled to credit on salary claim for sum he earned in other employment during the time of his wrongful exclusion from office. "His claim does not rest upon contract. He was not an employee, but an officer. The salary is an incident to the office, and if entitled to the office his right to the salary follows." *Wynne v. Butte*, 45 Mont. 417, 123 Pac. 531; *Reising v. Portland*, 57 Or. 295, 111 Pac. 377.

<sup>9</sup> "When there is a *de facto* officer in possession there is good reason for saying that the *de jure* officer should first establish his title; for otherwise there would be a determination of that question in a suit in which a rival claimant was not a party, and the interests of the city might be jeopardized. But when as here no

**§ 521. Fees and commissions.<sup>10</sup>**

No fees or commissions are authorized to be paid un-

successor has been appointed there is no advantage to any one in requiring two suits, for one will do as well." *Finneran v. Burlington*, 89 Vt. 1, 5, 93 Atl. 254.

<sup>10</sup>In addition to salary, the fee of a city attorney for prosecuting violations of ordinances was fixed at one-half of the judgment recovered by the city for fine, penalty or forfeiture; held entitled to such fee, irrespective of collection of judgment. *Peavler v. Mt. Vernon*, 158 Ill. App. 610.

In addition to specified salary a city treasurer was to receive 5% of amount of all delinquent taxes collected by him for the city, held collections on delinquent assessments for public improvements, were not included, since in Indiana it is the settled policy to deny constructive fees and salaries. *Bartholomew v. Tipton* (Ind. App.), 118 N. E. 700.

City treasurer "allowed one per centum on all moneys received and paid by him as such treasurer," held percentage should be computed only upon the amount paid out by him from that which he had received, and it should not be computed upon the amount received by him, and also in addition, upon the amount paid out. *Sierra Madre v. Lehmer*, 20 Cal. App. 377, 129 Pac. 287, following *Corona v. Merriam*, 20 Cal. App. 231, 128 Pac. 769.

Compensation fixed by fees and commissions, in whole or in part. *Brown v. Amarillo* (Tex. Civ. App.), 180 S. W. 654.

City solicitor, in addition to salary is entitled to docket fees, in second class cities in Pennsylvania. *Pittsburgh v. O'Brien*, 239 Pa. 60, 86 Atl. 651.

Clerk to board of aldermen, held entitled to fees for issuing marriage licenses, under particular law, and not the city. *Paterson v. Gall*, 87 N. J. L. 189, 94 Atl. 594.

Sometimes municipal corporations have power to fix by ordinance, fees of officers in prosecutions for violations of ordinances which may be taxed and collected as costs in the case. *Carterville v. Cardwell*, 152 Mo. App. 32, 38, 132 S. W. 745.

Supervising and advising engineer in installing waterworks and electric light systems, compensations of 5% on total costs of plants. *Woodville v. Jenks*, 104 Miss. 184, 61 So. 172.

**Change in office.** Where there is change of office in assessor and collector, the commissions should be prorated in proportion to the amount of service rendered by each. *Cameron v. Moore* (Tex. Civ. App.), 142 S. W. 964.

**Fees, etc., to be paid to city.** Where salaried policemen earn fees for arrests, serving subpoenas, etc., they must pay them to city. *State v. Oshkosh*, 166 Wis. 391, 166 N. W. 37.

Law forbidding fee as witness to officer attending court when state, county or other municipality is a party to the suit, held constitutional as a law affecting the compensation of public officers and



less definitely fixed by law,<sup>11</sup> by the officer, board or municipal body duly authorized in the manner provided.<sup>12</sup>

**§ 522. Expenses appertaining to public office.<sup>13</sup>**

**§ 523. Accepting a less sum than that allowed by law.<sup>14</sup>**

not one relating to witness fees; "the legislative purpose being to cut off pay for attending court when recompense for the time consumed is made by way of official salary or fees. The statute governs in all cases to which the reason for its enactment extends. It is peculiarly applicable to police officers who may be called as witnesses in state cases." *Anderson v. Shawnee County Comrs.*, 91 Kan. 262, 137 Pac. 799; *Claffin v. Wyandotte County*, 81 Kan. 57, 105 Pac. 19, 19 Ann. Cas. 168.

<sup>11</sup> *Brown v. Amarillo* (Tex. Civ. App.), 180 S. W. 654.

<sup>12</sup> A committee of a city council authorized to employ an attorney may not fix his fee, as this is a function of the council which may not be delegated. *Oglesby v. Ft. Smith*, 105 Ark. 506, 152 S. W. 145.

<sup>13</sup> Automobile hire allowed to commissioners. *Re Bensel*, 130 N. Y. S. 689.

City cannot indemnify policemen for expenses incurred by them to prevent their removal. They were held to be state officers. *Gilbert v. Berlin*, 76 N. H. 470, 84 Atl. 235.

Reimbursement to officer for expenses after notice, e. g., none to city engineer for service of rodman after notice by city that it would not pay, etc. *Towle v. Mobile*, 4 Ala. App. 502, 58 So. 668.

Ordinance fixing the salary of a city attorney provided that he should not be entitled to any fee or prerequisites of office in addition to his salary, except "actual expenses while engaged in the discharge of his official duties when out of the city," held a sum allowed for office expenses was neither a fee nor a prerequisite within the meaning of the ordinance. *Ware v. Battle Creek* (Mich. 1918), 167 N. W. 891.

<sup>14</sup> **Officer.** Acceptance of a lower salary than that established by law is not a waiver of a claim of full salary, notwithstanding during his employment, the officer signed the municipal pay rolls, containing a statement to the effect that the moneys received by him were in full payment. "The law is well settled that the acceptance of a salary less than that fixed by law is not a waiver of a statutory salary at a higher rate." *Golding v. New York*, 140 N. Y. S. 1020. Acceptance under protest and claim of full salary is not a waiver. *State ex rel. v. Player* (Mo. 1920), 218 S. W. 859.

**Employees.** Circumstances held not to show waiver by taking less. *Smiddy v. Memphis* (Tenn.), 203 S. W. 512.

Draftsman received and receipted for salary without protest. Long time thereafter on learning the salary was more, he sought to

### § 524. Assignment of salary.<sup>15</sup>

### § 525. Extra compensation not allowed.<sup>16</sup>

Extra compensation to the incumbent of an office or position in the municipal service cannot be based on a

recover by suit which was denied. *Lazinsk v. New York*, 163 App. Div. 423.

Employee accepting less wages without protest cannot recover additional compensation on quantum meruit on the ground that he could not be legally required to work more than eight hours. *Woods v. Woburn*, 220 Mass. 416, 107 N. E. 985.

A bricklayer employed at an annual salary, receipting regularly on obtaining wages without objection, for five years, held constituted a waiver of statute providing that pay shall not be less than wages prevailing in his occupation, although the wages received were less than those prevailing. *Byrnes v. New York*, 134 N. Y. S. 759, 150 App. Div. 338, following *Ryan v. New York*, 177 N. Y. 271, 69 N. E. 599; *McCarthy v. New York*, 96 N. Y. 1, 48 Am. Rep. 601, and *Grady v. New York*, 182 N. Y. 18, 74 N. E. 488.

Employee accepted wages for a period of three years, held a waiver of any statutory right to obtain any advance during such time. *Walsh v. New York*, 144 N. Y. S. 8, stating, "We think that the case of *Ryan v. New York*, 177 N. Y. 271, 69 N. E. 599, which is binding upon us, precludes the possibility of a recovery in this case."

Similar cases—*Lazinsk v. New York*, 148 N. Y. S. 808, 163 App.

Div. 123; *Farrell v. Buffalo*, 103 N. Y. S. 340, 118 App. Div. 597; *O'Connor v. New York*, 165 N. Y. S. 625, 178 App. Div. 550.

Salary during time promotions were delayed. *O'Connor v. New York*, 165 N. Y. S. 625, 178 App. Div. 550.

To prevent a reduction of the force an employee may agree to receive only his proportionate share of the money available. *Collins v. New York*, 136 N. Y. S. 648, 151 App. Div. 618.

Agreement by an employee to waive compensation for part of a year, to avoid suspension and re-employment, because of lack of funds is valid, and such employee is estopped to claim wages contrary to agreement. *Kirk v. New York*, 136 N. Y. S. 1061.

<sup>15</sup> A fireman, held to be a public officer to whom the rule forbidding the assignment of unearned salary applied. "Such assignments, if countenanced would tend to impair the efficiency of the public service." *Schmitt v. Dooling*, 145 Ky. 240, 140 S. W. 197, 36 L. R. A. (N. S.) 881, Am. & Eng. Ann. Cas. 1913B, 1078.

<sup>16</sup> *Evans v. Sandersville*, 14 Ga. App. 54, 80 S. E. 219; *Holman v. Macon*, 155 Mo. App. 398, 137 S. W. 16; *Ludlow Board of Education v. Ritchie*, 149 Ky. 674, 149 S. W. 985.

Law will not raise implied prom-

promise,<sup>17</sup> contract,<sup>18</sup> custom or usage,<sup>19</sup> increase of duties,<sup>20</sup> doubtful implication,<sup>21</sup> or by indirect methods,

ise to pay. *Chappell v. Newkirk* (Okl.), 149 Pac. 140.

Extra compensation after expiration of term disallowed for work not within scope of duties of office. *Flugrath v. Patchogue*, 132 N. Y. S. 520, 147 App. Div. 931.

Some laws forbid compensation other than salary. Clerk and stenographer receiving an annual salary as a city officer cannot receive pay extra for services as expert in preparing tax roll. *Milwaukee v. Reiff*, 157 Wis. 226, 146 N. W. 1130.

City solicitor is not entitled to extra pay for drafting a bill and presenting it to a state legislative committee in behalf of the city, and such work was included in his professional duties. *May v. Auburn*, 112 Me. 143, 91 Atl. 177.

City attorney required "to perform all professional services incident to his office," held he could not recover extra pay for revising the city ordinances. "We think the preparation of ordinances whether it be one or a complete set is a service incident to the office of city attorney." *Hosford v. Platte City*, 39 S. D. 162, 163 N. W. 714, citing § 525, vol. 2, ante.

Ordinance providing extra compensation for extra time to employees performing manual labor, held not to include foremen receiving a fixed annual salary, although manual labor was performed by them with the employees under them. The ordinance was construed as putting

foremen, superintendents and others in authority in one class and employees in another class. Moreover, the foreman was held to be a "municipal officer," under the civil service law applicable. *Gathemann v. Chicago*, 263 Ill. 292, 104 N. E. 1085, affirming 183 Ill. App. 210.

<sup>17</sup> Promise to pay extra compensation by an officer, e. g., chairman of the finance committee, is not binding on the city, "even though he rendered the services and exercised a greater degree of diligence than could legally have been required of him." *Gathemann v. Chicago*, 263 Ill. 292, 104 N. E. 1085, affirming 183 Ill. App. 210; *May v. Chicago*, 222 Ill. 595, 78 N. E. 912.

<sup>18</sup> Municipal authorities cannot contract with an officer to pay him extra compensation for services covered by his duties as such officer. *Edwards v. Kirkwood*, 162 Mo. App. 576, 142 S. W. 1109.

<sup>19</sup> The fact that during a certain period a city marshal was paid additional compensation for serving as night watchman, and that some of his predecessors, were in like manner so paid, pursuant to resolution of the legislative body, was held not to entitle him to such extra compensation after his services as night watchman were dispensed with. *State ex rel. v. Appling*, 191 Mo. App. 589, 593, 177 S. W. 751.

<sup>20</sup> One claiming a public office with a fixed salary must perform the duties of the office for the salary. "He cannot legally claim

although provided by statute or ordinance,<sup>22</sup> or charter provision.

Laws seldom prescribe with much detail and particularity the duties relating to public office, "and it requires but little ingenuity to run nice distinctions between what duties may and what may not be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse."<sup>23</sup>

**§ 526. Same—when extra compensation may be received.<sup>24</sup>**

additional compensation for the discharge of those duties even though the salary be inadequate. Nor does it alter the case that by subsequent statute or ordinance his duties within the scope of the charter pertaining to the office are increased and not his salary. Whenever he considers the compensation inadequate he is at liberty to resign." *Gathemann v. Chicago*, 263 Ill. 292, 104 N. E. 1085, affirming 183 Ill. App. 210.

City treasurer cannot obtain the salary of a clerk, when no clerk has been appointed, because heavier duties were cast upon him which he performed. "Such fact under no conditions would give the treasurer any right to the salary of the clerk. The increased labors would not be in diminution of his own salary. It is universally recognized that a change in the duties of an office during the term of the incumbent does not affect the compensation." *Bovaird v. Branford*, 232 Pa. 600, 81 Atl. 719.

<sup>21</sup> In case of doubt, extra compensation cannot be sustained. Doubtful implication will not do; public money must be protected. *Bridges v. Sierra Madre*, 27 Cal. App. 93, 148 Pac. 965.

<sup>22</sup> Extra pay cannot be secured by indirect method provided by ordinance. *Wolcott v. Wilmington* (Del. Ch. 1915), 93 Atl. 364.

Statute giving extra pay to municipal officers, held to confer gratuity to private and not public purpose, in violation of state constitution. *Wolcott v. Wilmington* (Del. Ch. 1915), 95 Atl. 303, 305, quoting with approval nearly all of § 525, vol. 2, ante.

<sup>23</sup> *Evans v. Trenton*, 24 N. J. L. 764, 767.

No extra pay allowed for official duties or duties incident to office. What services is to be classified as official is not always easy to determine. "Public policy requires that courts should not indulge in refinements too nicely drawn in the construction" of law relating to this matter, to the end that a particular service may be classed as non-official or extra official. *Indianapolis v. Lamkin* (Ind. App.), 112 N. E. 833.

<sup>24</sup> Extra pay when employees work more than eight hours a day in case of emergency, held not applicable to employee's ordinary and usual duties. *Robinson v. Perry*, 35 Okl. 475, 130 Pac. 276.

In addition to annual salary of

§ 527. Illegal salaries or fees may be recovered.<sup>25</sup>

§ 528. Changing salaries or compensation of officers and employees.<sup>26</sup>

§ 529. Laws forbidding change of salary during term.<sup>27</sup>

Some laws of this character apply only to elective

attorney, the law authorized allowance of reasonable sums for extraordinary services, held to include services in the preparation on bonds in behalf of the municipality. *Todd v. Cormier*, 84 Or. 11, 163 Pac. 974.

<sup>25</sup> *Hosford v. Platte City*, 39 S. D. 162, 163 N. W. 714, citing § 527, vol. 2, ante.

Money illegally paid to officer or employee as extra compensation is recoverable by city in an action for money had and received. *Milwaukee v. Reiff*, 157 Wis. 226, 146 N. W. 1130, holding that as the payment having been made in violation of law which forbids them renders the equitable doctrine such as ruled in the case of *Frederick v. Douglas County*, 96 Wis. 411, 71 N. W. 798, inapplicable.

<sup>26</sup> Employees under the civil service act and subject to pension fund laws, held not to prevent change in salaries in absence of legal restriction. *Hughes v. Traeger*, 264 Ill. 612, 106 N. E. 431.

The constitutional provision forbidding the increase of allowances of public officers, held not applicable to city employees who were granted pensions, since such employees are not public officers; nor does such action violate the constitutional provision forbidding the

award of extra compensation to a public officer, servant, agent or contractor; nor does it violate the constitution forbidding a municipality from giving public money to any person. *Hammett v. Gaynor*, 144 N. Y. S. 123.

Unless the law forbids salaries, of course, may be reduced and such reduction does not violate civil service laws or laws giving preference to veterans, and in such case courts will not interfere. *People v. Prendergast*, 164 N. Y. S. 1042.

If law does not forbid, salaries of officers and employees may be reduced in good faith and it is not in violation of Soldier's Preference Law, etc. *Babcock v. Des Moines*, 180 Ia. 1120, 162 N. W. 763.

<sup>27</sup> *Kindricks v. Machin* (Ark.), 205 S. W. 815; *Schurtz v. Grand Rapids* (Mich.), 171 N. W. 463.

By constitution, evasions disfavored. *Cameron v. Richmond* (Cal. App.), 183 Pac. 604.

If the law forbids, the salary of an officer cannot be reduced during his term. *Brownsville v. Kinder* (Tex. Civ. App.), 180 S. W. 623 (Tex. Civ. App.), 204 S. W. 446.

Under a law forbidding change of salaries and emoluments of city employees during their term of office, an ordinance providing a sal-

officers;<sup>28</sup> others only to officers with a definite term.<sup>29</sup> These laws have no application, it is held, where the

ary in lieu of a percentage basis was "held void, where it appeared that the salary was less than the compensation previously received." *Commonwealth ex rel. v. Grenet*, 238 Pa. 563, 86 Atl. 466.

**Police detective**, under state being both a state and municipal officer is not entitled to increase of salary during his term. *State ex rel. v. Jost*, 269 Mo. 248, 191 S. W. 38.

**Members of a board of election commissioners**, held to be municipal officers within the meaning of the constitution of Illinois, forbidding the increase or diminution of salaries of municipal officers having a definite term. *People ex rel. v. Cook County Commissioners*, 260 Ill. 345, 103 N. E. 282, affirming 177 Ill. App. 58.

**Ordinances are not laws** within the meaning of the provision of the constitution forbidding change of salary of officer during his term. *McCormick v. Fayette County*, 150 Pa. 190, 24 Atl. 667; *Baldwin v. Philadelphia*, 99 Pa. 164; *Davis v. Homestead Borough*, 47 Pa. Super. Ct. 444, 448.

A borough ordinance enacted pursuant to legislative act, prescribing the salary of the burghess, was held merely a municipal regulation and not a law within the meaning of the constitution of Pennsylvania, which declares that no law shall extend the term of any public officer or increase or diminish his salary or emoluments after his election or appointment, because a burghess is not a public officer, and, moreover, the consti-

tution was held to apply to acts of the legislature and not to municipal ordinances. *Davis v. Homestead Borough*, 47 Pa. Super. Ct. 444.

"The wisdom of a provision prohibiting any change either by increase or reduction of a public officer's salary during his term has been universally recognized. Such provisions are common in constitutions and statutes of the various states, and the courts have been firm in restraining attempts to evade them. This court has been in line with the general rule when deciding cases where phases of the question have arisen." *Barrus v. Engel*, 186 Mich. 540, 152 N. W. 950, per Steere, J.

<sup>28</sup> *Henriod v. Church* (Utah), 172 Pac. 701.

<sup>29</sup> The constitutional provision forbidding salaries of public officers to be increased or decreased, held to apply only to officers appointed for fixed terms. Where officers resigned and were re-appointed and served without any fixed term, an ordinance prescribing their salaries was held valid. "To hold that the inhibition would apply to officers whose terms were indefinite would render it impossible ever to increase or decrease the salary of such officers so long as they were retained in office." *Burton v. Detroit*, 190 Mich. 195, 156 N. W. 453.

One appointed for a period of two years, but subject to removal at any time at the will of the appointing power has no "term of office," within the meaning of the

office is legally abolished, and another office of like character with a different salary and tenure created.<sup>30</sup>

The prohibition cannot be evaded by a resignation and re-appointment.<sup>31</sup> But apart from such prohibitive law, an appointive officer may resign, the day preceding the effective date of an increase of his salary and be re-appointed the next day.<sup>32</sup>

### § 531. Certifying and paying salaries.<sup>33</sup>

constitution forbidding change of salary during term. *State ex rel. v. Oklahoma City*, 38 Okl. 349, 134 Pac. 58.

<sup>30</sup> An existing office may be abolished and another office of like character, with different tenure and salary, created, and such action is not in violation of a constitutional provision forbidding the increase of salaries or emoluments of public officers during the term. *Bridgman v. Richards*, 40 Okl. 495, 139 Pac. 518.

The office of town marshal and street commissioner may be abolished and the office of town marshal created, and the occupant of the former office may hold the latter with a change of salary, without violating the law forbidding change during term. *Luther v. Crossley*, 45 Okl. 611, 146 Pac. 583.

<sup>31</sup> Where an officer resigns and is re-appointed to fill out the balance of the term, a part of which he has already served, he cannot be paid an increase. The court said: "We are well satisfied that by fair implication and manifest intent of those who framed and adopted the constitutional provision under consideration, it comprehends in application both officer and term together where the term is fixed by

law, and after his election or appointment for a specified term, his relation to that term in the matter of compensation while an incumbent cannot be evaded by resignation and re-appointment." *Kearney v. Board of Auditors*, 189 Mich. 666, 155 N. W. 510.

<sup>32</sup> Some laws forbidding a change in salary during the term apply to elective officers only. In the absence of prohibitive law, an appointive city officer, e. g., city marshal, may resign on the day preceding the effective date of a raise in his salary and be re-appointed the next day. *Henriod v. Church* (Utah), 172 Pac. 701.

<sup>33</sup> *Mandamus to compel*. *Lynch v. New York*, 153 N. Y. S. 186, 90 Misc. Rep. 309; *Allen v. New York*, 145 N. Y. S. 1022, 160 App. Div. 534.

Suit for wages for a period when employee claims he was illegally laid off, where civil service laws are applicable, it must appear that claimant was duly certified by the civil service commission. *Fair v. Chicago*, 202 Ill. App. 53.

Approval where bill for doing special work is required to be approved by the mayor, an approval by a former mayor who held office during the year in which it is al-

**§ 532. Right to salary in case of absence.<sup>34</sup>****§ 533a. Salary after taking another office.**

One accepting another office is not entitled to the salary of the former office. Thus a commissioner who accepts the office of city engineer, and the office of commissioner is duly filled, is precluded from drawing a salary as commissioner.<sup>35</sup>

**§ 534. Action by officer or employee to recover salary or compensation.<sup>36</sup>**

Laws requiring the filing of claims as a condition to sue therefor, are held not applicable to claim for salary prescribed by ordinance.<sup>37</sup>

leged the service had been rendered, held not to be the approval required. *O'Neil v. Worcester*, 210 Mass. 374, 96 N. E. 1100.

<sup>34</sup> An employee on a per diem basis receives pay only when he works. *Ovens v. Marks*, 159 N. Y. S. 424, 173 App. Div. 138.

Head of department authorized to make ratable deductions from the salaries and wages of employees and subordinates on account of absence from duty without leave. *Devlin v. New York*, 149 N. Y. S. 1061.

Held, one absent without leave or notice, though his absence was due to sickness, was within the law, particularly where the sickness was not of such character as to prevent the employee from asking for leave of absence or giving notice. *Reilly v. New York*, 139 N. Y. S. 718.

Deduction for absence. *Glucksmann v. New York Board of Education*, 164 N. Y. S. 351.

Withholding from a police officer a part of his salary on account of absence due to sickness, held not

authorized. *Frederick v. Peoria*, 203 Ill. App. 486.

<sup>35</sup> *Lampe v. Newport*, 173 Ky. 177, 190 S. W. 678.

**Resignation**, no salary thereafter. *Ladd v. Newburyport* (Mass. 1919), 122 N. E. 874.

<sup>36</sup> Will lie, by attorney. *Mosher v. Elmira*, 145 N. Y. S. 964, 83 Misc. Rep. 328.

Occupant of office received less salary from a board of education by whom he was employed, than that fixed by the aldermen who were, duly authorized so to do by the charter, and the board of education had no power, either to increase or decrease the compensation. It was held that the officer was entitled to recover the balance due him running over a period of six years, irrespective of a release claimed by the board to have been given by the officer. *Pitt v. New York Board of Education*, 216 N. Y. 304, 110 N. E. 612, reversing 144 N. Y. S. 1140, 159 App. Div. 905.

<sup>37</sup> *Wynne v. Butte*, 45 Mont. 417,



As a condition to recover, legal liability on the part of the municipality must distinctly appear.<sup>38</sup>

In a suit for salary, where an illegal attempt had been made to remove the officer, if no other person had been appointed in his place, it has been held, it is not necessary as a condition precedent that he establish his right to the office.<sup>39</sup> In a case of a city attorney suing for his salary, it was held that he must show that he is an officer *de jure*, that is, that he is a licensed attorney.<sup>40</sup> In

123 Pac. 531; Dawes v. Great Falls, 31 Mont. 9, 77 Pac. 309; State v. Daggett, 28 Wash. 1, 68 Pac. 340; State v. Seattle, 88 Wash. 589, 153 Pac. 337; State ex rel. v. Kelly, 154 Wis. 482, 143 N. W. 153.

**Interest** allowed on salary wrongfully withheld. Rockwood v. Cambridge, 228 Mass. 249, 117 N. E. 312.

<sup>38</sup> Sufficiency of complaint in action by patrolman where wrongful dismissal is claimed. Selawr v. St. Paul, 132 Minn. 238, 156 N. W. 283.

Sufficiency of petition in suit by policeman claiming definite term, setting out ordinance, etc. San Antonio v. Rodeman (Tex. Civ. App.), 163 S. W. 1043.

One performing the duties of an office in good faith when there is no other claimant, may recover the salary attached thereto, although he may be only a *de facto* officer. State v. Kelly, 154 Wis. 482, 143 N. W. 153.

An officer wrongfully removed may recover the salary attached to the office, although another performed the duties. San Antonio v. Steingruber (Tex. Civ. App.), 177 S. W. 1023.

But *contra* where the office has been filled by a *de facto* officer who has received the salary attached

thereto, the *de jure* officer must sue for salary, not the city, but the usurper. Savannah v. Monroe (Ga. App.), 96 S. E. 500.

Suit for commissions where another officer claimed part of them, held both claimants should be made parties. Cameron v. Moore (Tex. Civ. App.), 142 S. W. 964.

Burden, held on claimant to prove existence of ordinance under which he claims salary. El Dorado v. Faulkner (Ark.), 155 S. W. 516.

In action for salary, where one claims appointment to a vacancy, the burden is upon him to show a legal vacancy. Ducharme v. Biddleford, 110 Me. 6, 85 Atl. 157.

<sup>39</sup> Tinneran v. Burlington, 89 Vt. 1, 93 Atl. 254.

Where officer sues for salary on the ground of removal, the burden is on the city to prove that the salary was paid to a *de facto* officer. San Antonio v. Steingruber (Tex. Civ. App.), 177 S. W. 1023.

<sup>40</sup> Baxter v. Venice, 271 Ill. 233, 111 N. E. 111, affirming 194 Ill. App. 62.

In the absence of power to engage an attorney, a town is not liable for the reasonable value of his service. Tharp v. Blake (Tex. Civ. App.), 171 S. W. 549.

an action by a patrolman it was held that he must show (1) the existence of the office, and (2) he had a legal right to hold it.<sup>41</sup> In case of an employee suing legal employment must be shown.<sup>42</sup>

One subject to removal at the will of an officer, board, or municipal body who is lawfully removed, cannot recover, for on removal the salary ceases.<sup>43</sup> A like rule applies to an employee lawfully dismissed under the civil service law and regulations.<sup>44</sup>

In suits by officers and employees, the usual defenses, are available to the municipality.<sup>45</sup>

**Estoppel.** Regular payments monthly to a police officer by a city deducting therefrom a certain percent as a

<sup>41</sup> *Wroblewski v. Chicago*, 199 Ill. App. 346.

<sup>42</sup> There must be employment by proper corporate officer or officers in his or their corporate capacity. *Sugar Valley v. Mills*, 146 Ga. 210, 91 S. E. 17.

<sup>43</sup> *Sykes v. Minneapolis*, 124 Minn. 73, 144 N. W. 453.

<sup>44</sup> Employee dismissed and served with notice stating the reasons therefor in accordance with the civil service law and regulations, has no cause of action for wages against the city. *Rush v. Philadelphia*, 62 Pa. Super. Ct. 80.

<sup>45</sup> Suit by inspector; defense of waiver and estoppel, absence of certification of pay roll, etc. *Clarkin v. New York*, 154 N. Y. S. 1019, 91 Misc. Rep. 98.

**Limitation as bar**, in particular law. *O'Connor v. New York*, 165 N. Y. S. 625, 178 App. Div. 550.

**Payment of salary to de facto officer as a defense.** *North v. Battle Creek*, 185 Mich. 592, 152 N. W. 194.

In action for salary during time wrongfully deprived of salary, it is no defense that salary had been

paid to a de facto officer. *Wynne v. Butte*, 45 Mont. 417, 123 Pac. 531.

**Set off.** Action by employee, held relation was contractual, set off of amount earned by claimant allowed. *La Chicotte v. New York*, 151 N. Y. S. 566.

**Counterclaim.** In an action for salary, the city may plead as a counterclaim a claim for money improperly paid to the officer. *Hosford v. Platte City*, 39 S. D. 162, 163 N. W. 714.

**Constructive service.** Suit by village attorney for salary, where village had been merged in city corporation, held failure of claimant to make offer to the city to perform the services which he had contracted to perform for the village, and where it appeared that another had performed the services for the city and had obtained compensation therefor, would bar recovery. The general rule is that it is against public policy and sound morals to pay for constructive services. *Fisher v. Mechanicville*, 158 N. Y. S. 908, reversing 157 N. Y. S. 518, 94 Misc. Rep. 134.

legal contribution for the pension fund, will estop the city from denying the officer was entitled to a salary.<sup>46</sup>

§ 535. Same—mandamus.<sup>47</sup>

#### X. LIABILITIES OF OFFICERS.

§ 536. General rules as to liability of public officers stated and illustrated.<sup>48</sup>

<sup>46</sup> Frederick v. Peoria, 203 Ill. App. 486.

<sup>47</sup> State ex rel. v. Gilbert, 163 Mo. App. 679, 147 S. W. 505; State ex rel. v. Brodie, 161 Mo. App. 538, 143 S. W. 69; Lynch v. New York, 153 N. Y. S. 186, 90 Misc. Rep. 309; Allen v. New York, 145 N. Y. S. 1022, 160 App. Div. 534.

To justify mandamus it is essential that the petitioner have a clear legal right to the salary or compensation. State ex rel. v. Appling, 191 Mo. App. 589, 592, 177 S. W. 751.

Police officer suspended and performing no duties cannot get salary until his right to office is settled. Humburg v. San Jose, 27 Cal. App. 6, 148 Pac. 802; Block v. San Jose, 17 Cal. App. 310, 119 Pac. 674.

<sup>48</sup> Liability of police officers. § 2424, post; § 2424, vol. 5, ante.

Liability of officers in letting contracts for public work, etc. § 1964, post; § 1964, vol. 4, ante.

A public officer engaged in the performance of a public duty in obedience to the command of a statute should not suffer personally for an error of judgment. "The judicial character of his act rather than the judicial character of his office furnishes the basis for the

exemption, if he is exempt." Act, of course, must be within the scope of the officer's authority. Roerig v. Houghton (Minn. 1919), 175 N. W. 542, 544, citing § 536, vol. 2, ante.

Discretion which in many matters is and of necessity must be vested in public officers; hence, for an honest, even though mistaken, exercise of discretionary powers, no public officer is responsible. Osburn v. Stone, 170 Cal. 480, 150 Pac. 367, 372.

**Imperative duty.** If the law imperatively requires a public officer to perform a ministerial duty refusal or neglect to do so create liability to the person damaged thereby. Neither mistake as to duty or an honest intention will excuse. Burton Machinery Co. v. Ruth, 194 Mo. App. 194, 197, 186 S. W. 737; Steadly v. Stuckey, 113 Mo. App. 582, 585, 87 S. W. 1014; State ex rel. v. Adams, 101 Mo. App. 468, 471, 74 S. W. 497.

**Oppression.** There may be personal liability if officer corruptly or oppressively refuses a license. Clinard v. Winston-Salem, 173 N. C. 356, 91 S. E. 1089.

**Costs of suits against.** Officers not liable personally for costs in suits against them growing out

**§ 538. Personal liability on contracts.**

In the absence of fraud or misrepresentation, an officer contracting in behalf of a municipal corporation, and intending so to contract, is not personally liable on his contract, where the person with whom he contracts has the same means of knowing the extent of his authority as he has; and this is true, notwithstanding he exceeds his authority, and does not in fact bind the corporation.<sup>49</sup>

**§ 539. Liability for loss of public funds.**

In New York it is held that a public officer having the custody of public moneys is liable unqualifiedly for loss thereof. In an action on his official bond, therefore, it is

of their public acts. They are city agents in such relation. For example, a chief of police in suit to enjoin him from making arrests of taxicab drivers who are soliciting business contrary to ordinance. *Seattle Taxicab & Transfer Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134.

**Unlawful arrest: excesses.** One unlawfully arrested and beaten by a city marshal renders the marshal liable where the act was done in his official capacity by virtue of his office. "Official acts in the performance of the duties of an office do not mean simply the lawful acts of the officer holding that office, but include all acts done in his official capacity under color and by virtue of said office." *People v. Morgan*, 188 Ill. App. 250.

**Seizing property.** Officer seizing intoxicating liquor under an ordinance authorizing their destruction under specified conditions and after surrendering them on an order of delivery in replevin, and obtaining judgment for their value in default

of their return, on collecting the judgment, is liable to the city for its amount, less his necessary expenses. *Topeka v. Stahl*, 86 Kan. 681, 121 Pac. 910.

If in seizing liquor, under a search warrant the warrant is fair and legal on its face, if it proceeds from a court or officer having authority of law to issue process of that nature and contains nothing to appraise the officer that it is issued without jurisdiction or authority, it protects the officer, although the complaint may fail to state an offense. *Ingraham v. Booten*, 117 Minn. 165, 134 N. W. 505.

If on the other hand, the process shows on its face that the court was without jurisdiction to issue process of that nature the officer is not protected. *Ib.*

**Interest** on funds deposited by treasurer belongs to city. *Bath v. McBride*, 142 N. Y. S. 1014, 81 Misc. Rep. 618.

<sup>49</sup> *Martin v. Schuermeyer*, 30 Okl. 735, 121 Pac. 248.

no defense that the money was lost without fault or neglect on the part of the officer.<sup>50</sup>

### § 540. Liability for wrongful disbursement of public funds.<sup>51</sup>

### §§ 546-547. Action on official bonds.<sup>52</sup>

Statutory bonds must conform to prescribe conditions

<sup>50</sup> *Bath v. McBride*, 219 N. Y. 92, 113 N. E. 789, reversing 163 App. Div. 714, 148 N. Y. S. 836, and following *Tillinghast v. Merrill*, 151 N. Y. 135.

Liability of city treasurer for failure to present check to bank for payment the next day after receipt where bank failed. *Babcock v. Rocky Ford*, 25 Colo. App. 312, 137 Pac. 899.

City treasurer, held liable for loss of funds due to failure of bank. *Bath v. McBride*, 142 N. Y. S. 1014, 81 Misc. Rep. 618.

Under some statutes when the funds are delivered to the city treasurer he is bound to account for them at his peril, notwithstanding the failure of the bank where deposited. Power of the mayor and aldermen to manage and control such funds, is not authority to relieve the treasurer of liability and constitute him an agent. *University City v. Schall*, 275 Mo. 667, 205 S. W. 631.

<sup>51</sup> "It would be such a breach of duty as to amount practically to malfeasance in office for an officer of a municipality to pay moneys from the municipal treasury to an individual when that individual was owing a like sum to the municipality." *State v. Seattle*, 73 Wash. 396, 401, 402, 132 Pac. 45, 47.

<sup>52</sup> Actions against police officers, see § 2424, post.

City treasurer is trustee of the funds for the use of the city, and of course must account for and pay over any profits derived from the use of the trust fund including interest. Failure to pay to city is breach of bond. *Butte v. Goodwin*, 47 Mont. 155, 134 Pac. 670.

Interest cannot be charged against a city collector and treasurer for money deposited where none is collected and the law did not require the funds to be deposited at interest. *Lowell v. Stiles* (Mass. 1919), 122 N. E. 412.

Action on bond of city treasurer for withdrawing money, which had been set aside by ordinance. *Newport v. Lobstroh*, 171 Ky. 700, 188 S. W. 761.

Wrongful refusal of city treasurer to pay warrant. *Intermela v. Perkins*, 123 C. C. A. 619, 205 Fed. 603.

Action against city treasurer and sureties on account of shortage in funds arising from tax collections, proved by receipts and reports of treasurer, etc. *Dickinson v. White*, 25 N. D. 523, 143 N. W. 754.

Fraudulent payments by city treasurer due to conspiracy of him, city engineer and city clerk. *Hill-*

and be in form substantially as specified in the law.<sup>53</sup>

Liability on a general bond was held not to be affected by the fact that another bond was given for the specific fund for the loss of which recovery is sought.<sup>54</sup> Where an officer is a defaulter and has held office under different elections or appointments with several sets of sureties, the sureties will be responsible who were on the bond at the time the defalcation occurred.<sup>55</sup>

A bond given to cover an unexpired term of an officer, it was held, did not cover defalcation during a succeeding term, because under the particular law, the bond was not continuing.<sup>56</sup>

yard v. Carabin, 96 Wash. 366, 165 Pac. 381.

**City commissioners.** No liability for statutory penalties on the part of city commissioners for illegally permitting payments of city money on claims arising from fraudulent contracts. State ex rel. v. Oklahoma City (Okl.), 168 Pac. 227; State ex rel. v. Muskogee (Okl.), 172 Pac. 796.

**Comptroller.** Action against a city comptroller on his bond for embezzlement on bonds deposited with him as official custodian by contractors to insure performance of their work. National Surety Co. v. Louisville, 165 Ky. 38, 176 S. W. 364.

**Tax collector.** A charge that the officer neglected and refused to pay over on demand money which he had collected as taxes and licenses, is a charge of embezzlement, and is an act of fraud or dishonesty, and sufficient under the particular bond. Lake Charles v. Carlsson (La. 1919), 81 So. 877.

**Surety of policeman** is liable for negligent performance of duty, but not liable for acts beyond. Taylor v. Shield (Ky. 1919), 210 S. W. 168.

<sup>53</sup> Tax collector being a "public officer," held bond should be limited and conditioned as required by statute, and failure in these respects did not make it binding on the municipality. Bankers' Surety Co. v. Newport, 162 Ky. 473, 172 S. W. 940.

Bond of marshal, held good although not conditioned as law prescribed. Henriod v. Church (Utah), 172 Pac. 701.

Bond need not detail city treasurer's duties. Larceny. Seaside v. Oregon Surety & Casualty Co., 87 Or. 624, 171 Pac. 396.

Liability where a city secretary and treasurer executes separate bonds as secretary and treasurer. Brown v. Amarillo (Tex. Civ. App.), 180 S. W. 654, 660.

<sup>54</sup> Bath v. McBride, 221 N. Y. 231, 236, 116 N. E. 980, reversing 163 App. Div. 714, 148 N. Y. S. 840.

<sup>55</sup> State ex rel. v. United States Fidelity & G. Co., 188 Mo. App. 700, 704, following State to use v. Atherton, 40 Mo. 209, 220.

<sup>56</sup> Dunn v. Foraker, 44 Okl. 212, 144 Pac. 353.

The responsibility of the sureties is limited to the performance of duties assigned by law.<sup>57</sup> It sometimes becomes a question whether the act complained of is a duty appurtenant to the office when the character and bounds of the officer's duty are left to be determined by the nature of the office, the general principles of convenience, policy and public security, by usage and by such matters of express legislation as may be connected with the subject.<sup>58</sup>

The fact that the money was lost without neglect or fault on the part of the officer is no defense to an action on the bond.<sup>59</sup> Negligence of an officer of the city in failing to ascertain the defalcation of the officers will not relieve the sureties on his official bond.<sup>60</sup>

### § 550. Criminal liability of municipal officers, agents and servants.<sup>61</sup>

Laws are uniformly held valid and constitutional which

<sup>57</sup> *Pittsburgh Buffalo Co. v. Schmidt*, 236 Pa. 569, 85 Atl. 20; *State ex rel. v. Schaper*, 152 Mo. App. 538, 542, 134 S. W. 671.

No liability on bond for arrest by police officer without warrant for misdemeanor not committed within his view. *State ex rel. v. Dierker*, 101 Mo. App. 636, 74 S. W. 153; *State ex rel. v. McDonough*, 9 Mo. App. 63.

Beyond scope of duties, e. g., collecting taxes by marshal, no liability on bond. *Woodland v. Leech*, 20 Cal. App. 15, 127 Pac. 1040.

Money received by city clerk not under color of his office, creates no liability on bond. *United States Fidelity & Guaranty Co. v. Yazoo City* (Miss. 1918), 77 So. 152.

Recovery by the city against the sureties of a ward inspector for a loss due to alleged negligence of the inspector in overseeing the construction of a sewer denied, un-

der the particular facts. *Erie v. Englehart*, 50 Pa. Super. Ct. 378.

<sup>58</sup> *Pittsburgh Buffalo Co. v. Schmidt*, 236 Pa. 569, 85 Atl. 20; *McCaraher v. Commonwealth*, 5 Watts & S. (Pa.), 21, 39 Am. Dec. 506.

<sup>59</sup> *Bath v. McBride*, 219 N. Y. 92, 113 N. E. 789, reversing 163 App. Div. 714, 148 N. Y. S. 836.

<sup>60</sup> *Newburyport v. Davis*, 209 Mass. 126, 95 N. E. 110.

<sup>61</sup> *Police officers*, § 2425, post.

Indictment of mayor for violating statute requiring him to command the dispersal of riotous assemblies. Acting on advice of city attorney, held no defense. *Wright v. State* (Ark.), 201 S. W. 1107.

Indictment against mayor for neglect to enforce laws against gambling, etc. *Uzzell v. People*, 173 Ill. App. 257.

Councilman, corrupt misconduct, extortion of money as a condition

provide for the trial of public officers for crimes and misdemeanors in office otherwise than by impeachment.<sup>62</sup>

# XI. REMOVAL AND SUSPENSION OF OFFICERS.

## § 551. Exercise of the power—controlling law.<sup>63</sup>

In the removal of officers and employees it is essential that the mandatory provisions of the law applicable be substantially observed.<sup>64</sup> The fact that under the charter the authority to provide for and regulate removals of

to action. *Re Shepard*, 161 Cal. 171, 118 Pac. 513.

Alderman interested in a contract for the purchase of a draft on the town. The purchase of such draft by an alderman, held violative of the penal code and that ignorance of the law is no defense. *Collmorgen v. State* (Tex. Civ. App.), 168 S. W. 519.

If a municipality permits its street to get out of repair or obstructed so as to become a public nuisance the municipality and its officers are liable to indictment. *Southern Ry. Co. v. State*, 130 Tenn. 261, 169 S. W. 1173; § 2522, post.

Member of board of water commissioners, concerned in a contract made by board for water main. *State v. Kuehule*, 85 N. J. L. 220, 88 Atl. 1085, affirming 84 N. J. L. 164, 85 Atl. 1014.

Member of board of trustees of a town voted to approve a bill for supplies to the town presented by a copartnership of which he was a member, held not violative of particular statute, because only formal express contracts were meant. *People v. Brown*, 60 Colo. 276, 152 Pac. 1169.

Public officer forbidden from voting on or participating in any contract or transaction in which he is interested; penalty, forfeiture of office and misdemeanor. *Betskouski v. Los Angeles Superior Court* (Cal. App.), 166 Pac. 1027.

Approval of claim for extras corruptly by city engineer which claim was paid, held grand larceny. *People v. Murphy*, 129 N. Y. S. 523.

<sup>62</sup> *Re Shepard*, 161 Cal. 171, 118 Pac. 513.

<sup>63</sup> Police commissioners. § 2415, post.

Policemen and firemen. § 2420, post.

Power of city to create a tribunal to decide finally as to removal or retention of municipal employees sustained. *State ex rel. v. Boyington* (Wash. 1920), 188 Pac. 777.

<sup>64</sup> For cause, on charges, or court action. *State ex rel. v. Schlicker*, 57 Ind. App. 362, 103 N. E. 807.

Council cannot declare office with definite term vacant, and appoint another, etc. *Schneider v. Atkinson*, 86 N. J. L. 444, 92 Atl. 81; *McCrellis v. Curran*, 86 N. J. L. 398, 92 Atl. 84.



officers has never been exercised, it has been held, will not preclude the council from exercising the power.<sup>65</sup>

Power to remove may be vested by general law in the courts or by charter or state law applicable in an officer, board, or body of the local government, or in a state officer, as the governor, where the officer to be removed is a state officer, as chief of police. In such case the remedies are cumulative and concurrent.<sup>66</sup>

The fact that provision is made for the exercise of the power of recall by the electors does not conflict with the power of removal vested in the courts of a state officer, as the governor.<sup>67</sup> So the recall provision is not inconsistent with a general ouster act applicable to the removal by the courts of all municipal officers. Neither remedy is exclusive.<sup>68</sup>

Removals may result from the legal abolition of the office, place, or position.<sup>69</sup>

Obviously, constitutional restrictions concerning the removal of officers must be observed. Such limitations often embrace only a particular class of officers, as elective, and not appointive.<sup>70</sup> The office of city commissioners created by statute was held to be within the protection of the Alabama constitution forbidding removal of municipal officers, except for the causes specified therein and only by a judicial proceeding under such regulations as may be prescribed by law, and securing trial by jury and appeal. In that state, therefore, such commissioners

<sup>65</sup> *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953.

<sup>66</sup> *State ex rel. v. Linn* (Okl.), 153 Pac. 826, 830; *Coffey v. Superior Court*, 147 Cal. 525, 82 Pac. 75.

<sup>67</sup> *State ex rel. v. Frazier* (N. D. 1918), 167 N. W. 510.

<sup>68</sup> *State ex rel. v. Howse*, 134 Tenn. 67, 183 S. W. 510, L. R. A. 1916D, 1090, 132 Tenn. 452, 178 S. W. 1112.

<sup>69</sup> *State ex rel. v. Lanier*, 197 Ala. 1, 72 So. 320.

<sup>70</sup> The constitution vested in the legislature power to provide for the removal of inferior officers from office for malfeasance or nonfeasance in the performance of their duties. Held, applicable only to elective officers who may not be removed except for malfeasance or nonfeasance in office, but not to an office created by ordinance to assist in carrying on the business of a public utility. *Sykes v. Minneapolis*, 124 Minn. 73, 144 N. W. 453, 455.

cannot be removed from office during the term for which they are elected by recall or otherwise, except by the mode and for the causes prescribed in the constitution.<sup>71</sup>

Where power is given to remove an appointive officer, it must be one which is exercised either for cause in which case notice and a reasonable opportunity to be heard are indispensable, or at will, that is, without any other formality than the exertion of discretionary power. If the law conferring the power expressly authorizes the donee to act at will, or discretion, no question can ever arise except as to the fact of the removal. If the power to remove is given, expressly or by necessary implication by words or terms denoting that it may be exercised in discretion, such power, to the extent thus given, is *ex hypothesi*, one which may be exercised whenever in the mind and judgment of the donee of the power the fact or thing exists upon which his discretion is rested.<sup>72</sup> However, where the law does not in terms or by necessary implication grant discretionary power of removal, but limits the exercise of such power to cause only, recourse must be had to construction, to determine the precise nature of the power given, and its application to the facts of the particular case.<sup>73</sup>

Under many laws, removal may be exercised at the pleasure of the appointing power without limitations of any character.<sup>74</sup> The general rule is that where the term

<sup>71</sup> Williams v. State, 197 Ala. 40, 72 So. 330, holding unconstitutional a provision of a statute permitting a recall of any city commissioner by vote of the electors of the municipality.

<sup>72</sup> State ex rel. v. Crandall, 269 Mo. 44, 190 S. W. 889.

<sup>73</sup> State ex rel. v. Crandall, 269 Mo. 44, 190 S. W. 889 (per Bond, J.); State ex rel. v. Walbridge, 119 Mo. 383, 24 S. W. 457, 41 Am. St. Rep. 663; State ex rel. v. St. Louis, 90 Mo. 19, 1 S. W. 757.

<sup>74</sup> Jagger v. Green, 90 Kan. 133

Pac. 174; Darnell v. Mills, 75 Wash. 663, 135 Pac. 475; Chestnut v. Kansas City, 171 Mo. App. 327, 157 S. W. 656; Ulrich v. Coaldale Borough, 53 Pa. Super. Ct. 246, 252.

Officers and employees of fire department. State ex rel. v. Duluth, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595.

City marshal by council. State ex rel. v. Schram, 82 Minn. 420, 85 N. W. 155.

Power to remove at pleasure is not thwarted by the fact that the

of office is not fixed by law, the incumbent thereof may be removed at the pleasure of the appointing power, without notice, charges or reasons.<sup>75</sup> Constitutions provide, as that of Indiana, that where the duration of any office is not provided for by the constitution, it may be declared by law, and if it is not so declared, such office shall be held during the pleasure of the authority making the appointment.<sup>76</sup> The general rule that the power of removal is incidental to the power of appointment applies more particularly to appointive officers and not to those elected by the people.<sup>77</sup>

Where the constitution prescribes that if the term is not named the officers hold at the pleasure of the appointing authority, a charter provision forbidding removals except after trial is inconsistent and hence void. However, under a constitutional provision that in the case of any officer or employee of any municipality governed under a legally adopted charter, the provision of such charter with reference to tenure of office, or dismissal from office of any such officer or employee should control, it is held, the municipal charter relating to removals will prevail.<sup>78</sup>

Removals for cause only is the usual legal requirement, especially of officers with definite terms.<sup>79</sup>

### § 552. Removal of officers for cause.

The power to remove municipal officers, subordinates and employees for cause is usually exercised under express legal provisions.<sup>80</sup>

officer has a definite term. *Sykes v. Minneapolis*, 124 Minn. 73, 144 N. W. 453, 455.

<sup>75</sup> § 558, vol. 2, ante; § 558, post.

<sup>76</sup> *State ex rel. v. Curtis*, 180 Ind. 191, 102 N. E. 827.

<sup>77</sup> *State ex rel. v. Thompson*, 91 Minn. 279, 97 N. W. 887.

<sup>78</sup> *Spader v. Rolph*, 29 Cal. App. 774, 156 Pac. 977; *Craig v. Superior Court*, 157 Cal. 482, 108 Pac. 310.

<sup>79</sup> *State ex rel. v. Milwaukee*, 157 Wis. 505, 147 N. W. 50.

<sup>80</sup> *People v. Walsh*, 168 N. Y. S. 440; *Readdy v. Mallory*, 57 Okl. 499, 157 Pac. 742; *State ex rel. v. Harper*, 157 Wis. 421, 147 N. W. 633; *Pryzbylowski v. Board of Poor Comrs.*, 188 Mich. 279, 154 N. W. 117; *Sponenburgh v. Gillespie*, 203 Mich. 379, 168 N. W. 1031; *State ex rel. v. Baughn*, 162 Iowa 308,

Constitutions, as that of Michigan, often provide that any officer elected by a municipal corporation may be removed from office in such manner and for such cause as shall be prescribed by law, and charters usually provide that any elective or appointive officer of the city (sometimes excepting certain officers, as judges or justices of the peace) may be removed for official misconduct, etc.<sup>81</sup>

It is sometimes held that failure of the charter to provide for removal either expressly or by implication, precludes the removal of an officer with a definite term; however, the more reasonable rule is where the officer is guilty of malfeasance or maladministration in office, it is within the appointing power to remove him unless expressly prohibited by law.<sup>82</sup>

Unless mentioned in the constitution, municipal officers are corporate officers, not constitutional; and the power to remove such officers for just cause whether so declared in the charter or applicable legislative act or not, is inherent in municipal corporations.<sup>83</sup>

143 N. W. 1100; *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842; *State ex rel. v. Wilson*, 151 Mo. App. 723, 726, 132 S. W. 625.

*People ex rel. v. Bailey*, 30 Cal. App. 581, 158 Pac. 1036, holding cannot evade removal for cause only by a pretended reorganization of the department.

*Farish v. Young*, 18 Ariz. 298, 158 Pac. 845, containing many meanings of the phrase "for cause."

Where tenure is during good behavior or for definite term, only for cause. *Bannerman v. Boyle*, 160 Cal. 305, 116 Pac. 732.

Per diem wage for substreet foreman, held not a day laborer, who could be removed without cause shown. *State ex rel. v. Coates*, 74 Wash. 35, 132 Pac. 727.

Removal for cause "to be judged of by the mayor and aldermen."

*Smith v. Winder* (Ga. App.), 96 S. E. 14.

Mayor may discharge for any reason he may deem sufficient, filing his reasons, the discharge to be approved by a majority of the council. *San Antonio v. Newman* (Tex. Civ. App.), 201 S. W. 191.

Subordinate officers of the department of charities in New York City are not entitled to formal trial but merely to notice and opportunity to make explanations, etc. In such case, the commissioner may act on his own knowledge, and on information however received. *Dimphy v. Kingsbury*, 159 N. Y. S. 389, 173 App. Div. 49.

<sup>81</sup> *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953.

<sup>82</sup> *Ardmore v. Sayre* (Okl.), 154 Pac. 356, following *Cameron v. Parker*, 2 Okl. 277, 38 Pac. 14.

<sup>83</sup> "Their officers are corporate,

### § 553. Removal of elective officers—nature of power.

Where the charter or legislative act applicable is silent on the subject, it is sometimes held that the municipal corporation has no power to remove an elective officer, because in such case the method of removal for cause is by judicial proceedings.<sup>84</sup>

### § 554. Officer appointed for a definite term.

Officers, as distinguished from subordinates and employees, appointed for definite terms, are usually subject to removal for cause only, and the method prescribed for the exercise of the power must be followed.<sup>85</sup> However, it has been held that when the appointing power is authorized to remove at pleasure such power may be exercised although the removed officer has a fixed term.<sup>86</sup>

On the other hand, in absence of law conferring the power, in the case of officers whose terms are fixed by charter or statute, it is sometimes held that the right to remove even for cause is not incident to the power of appointment.<sup>87</sup>

legislative officers, not constitutional. The power to remove their officers is and was long before the adoption of the constitution, inherent in municipal corporations." *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953, 956.

"The power of a municipal corporation to institute proceedings against and remove from office for misconduct any of its corporate officers, whether so declared in the charter or not, is no longer open to question in this state." *Savannah v. Monroe* (Ga. App.), 96 S. E. 500, relying on *Savannah v. Grayson*, 104 Ga. 105, 30 S. E. 693; *Burney v. Boston* (Ga. App. 1919), 100 S. E. 28.

<sup>84</sup> *Legault v. Roseville Board of Trustees*, 161 Cal. 197, 118 Pac.

706, holding power to remove an elective officer could not be exercised by the board of trustees or council.

"Officer," in particular law relating to removal, held, elective officer, not appointive, or head of a department or member of a board, as a commissioner of public safety. *Cunningham v. Rockwood*, 222 Mass. 574, 111 N. E. 409.

Officer elected for definite term, to remove must prefer specific charges, give notice and hearing. *State ex rel. v. Strever*, 93 Neb. 762, 141 N. W. 820.

<sup>85</sup> *State ex rel. v. Brodie*, 177 Mo. App. 382, 164 S. W. 233.

<sup>86</sup> *Sykes v. Minneapolis*, 124 Minn. 73, 144 N. W. 453, 455.

<sup>87</sup> "Whatever may be the rule

**§ 555. Removal from office to be by agency authorized.<sup>88</sup>**

The power of removal is often viewed as judicial, and hence to be exercised by the courts. On the other hand, in the absence of express or implied grant to another governmental authority, the power may be exercised by the legislature or the legislature may delegate it to a specified authority. This is the constant practice. While the power of removal is not strictly judicial but rather administrative, it is obvious it should be exercised in a judicial manner. The exigencies of government often require the prompt removal of corrupt, unfaithful or incompetent officers, and it is no longer open to question that the legislature may make provision therefor.<sup>89</sup>

Under some laws the agency of removal is sometimes in doubt, due to frequent changes either in the shape of amendments or repeals, and often in the entire change in the form of municipal government, containing exceptions and saving clauses, necessitating court decisions.<sup>90</sup>

"Following the English decisions many authorities have held that in the absence of any express or implied restrictions in the statute, a common council possesses the incidental power, for just cause and under proper regulations, to remove a corporate officer, whether elected by it or the people. On the other hand this doctrine has been denied."<sup>91</sup>

If not restricted by the constitution, it has been held that the governor may be given the power to remove a mayor, president of a city commission, or chief of police of a city whenever it appears to him by competent evi-

with respect to municipal officers, it is the law of this state, and the generally accepted doctrine, that in the case of a state or other officer whose term is fixed by statute the right to removal even for cause is not an incident to the power of appointment in the absence of a statute conferring that right." *Commissioners v. Byars*, 167 Ky. 306, 180 S. W. 380.

<sup>88</sup> *State ex rel. v. Brodie*, 177 Mo. App. 382, 164 S. W. 233.

By council. *State ex rel. v. Conrad*, 45 Mont. 188, 122 Pac. 569.

<sup>89</sup> *State ex rel. v. Frazier* (N. D. 1918), 167 N. W. 510.

<sup>90</sup> *State ex rel. v. Canavan*, 155 Wis. 398, 145 N. W. 44.

<sup>91</sup> *Commissioners v. Byars*, 167 Ky. 306, 180 S. W. 380.

dence at a proper hearing that such officer has been guilty of misconduct, malfeasance, crime in office, habitual drunkenness or gross incompetency. It is held that such a law is constitutional, does not infringe upon the right of self government, and is not a delegation of judicial power, where on appeal to the courts a trial *de novo* is provided.<sup>92</sup>

Under a law allowing the removal by the mayor with the concurrence of a majority of the city council, or by the city council with the concurrence of the mayor, of course, neither agency alone may exercise the power without the concurrence of the other.<sup>93</sup>

### § 556. Sufficiency of cause for removal.

Common causes are malfeasance, misfeasance or misconduct, in office,<sup>94</sup> embracing a variety of acts, judicially

<sup>92</sup> State ex rel. v. Frazier (N. D. 1918), 167 N. W. 510, with two dissenting opinions.

Governor has power to remove elective city officers. Hawkins v. Grand Rapids, 192 Mich. 276, 158 N. W. 953.

<sup>93</sup> Henriod v. Church (Utah), 172 Pac. 701, 703.

By mayor with approval of a majority of the members of the city council. Cunningham v. Rockwood, 222. Mass. 574, 111 N. E. 409.

Where the law provides that a majority of the whole number of members of the council shall constitute a quorum, less than that number have no power to remove. Doughty v. Scull (N. J.), 96 Atl. 564.

Mayor may discharge for any reason he may deem sufficient, filing his reasons, the discharge to be approved by a majority of the council. San Antonio v. Newman (Tex. Civ. App.), 201 S. W. 191.

<sup>94</sup> Misconduct—misfeasance, malfeasance. "For official misconduct, or for unfaithfulness or improper performance of the duties of his office." Hawkins v. Grand Rapids, 192 Mich. 276, 158 N. W. 953.

Policeman, conscious false official statement. People ex rel. v. Waldo, 212 N. Y. 156, 105 N. E. 961, affirming 143 N. Y. S. 1138, 159 App. Div. 901; People ex rel. v. Woods, 157 N. Y. S. 606, 171 App. Div. 684.

Incompetency of fire chief. State ex rel. v. Butte (Mont. 1920), 188 Pac. 367.

Alderman by acting as attorney for one who was alleged by the town to have failed to pay an occupation tax, and by taking a retainer as an attorney to prosecute an action against the town for damages and injunction due to alleged defective sewer. The fact he acted in good faith is no excuse.

considered in construing the several laws quite similar

He disqualified himself from acting impartially as alderman in matters relating to the suits. *State ex rel. v. Conrad*, 45 Mont. 88, 122 Pac. 569.

Collection of money belonging to the city and failure to turn over to treasurer. *State ex rel. Lesser*, 94 Ohio St. 387, 115 N. E. 33.

Improper conduct, as incumbent engaged in private business requiring regulation at his hands, ground for dismissal. *State ex rel. v. Martin*, 195 Mo. App. 366, 191 S. W. 1064.

Laws are constitutional which prohibit political activity of office-holders. Office-holders have always been subjected to regulations and conditions. *Duffy v. Cooke*, 239 Pa. 427, 86 Atl. 1076.

Officer voting on or participating in any contract or transaction in which he is interested. *Betskouski v. Los Angeles Superior Court* (Cal. App.), 166 Pac. 1027.

Charging and collecting illegal fees for services rendered or to be rendered in his office. A municipal officer selling merchandise to the city, approving the claim as a member of the board of trustees and collecting therefor, held not misconduct. *Collman v. Wanamaker*, 27 Idaho 342, 149 Pac. 292.

Trustee of village was a member of a firm which sold supplies to the village, and such trustee was a member of the committee of trustees that audited the bills, held cause for removal. *Re Moran*, 130 N. Y. S. 432, 145 App. Div. 642.

Burgess of a borough, stockholder in a corporation which sells

supplies to the borough, although he was ignorant of the sales until made, held cause. *Commonwealth ex rel. v. Egan*, 235 Pa. 24, 82 Atl. 1098.

Law made it unlawful for a borough officer to be an employee of any one contracting with the borough; held where a chief burgess during his term of office was in the employ and pay of an owner of a newspaper furnishing supplies and material to the borough, it is sufficient cause for removal. *Commonwealth ex rel. v. Harris*, 248 Pa. 570, 94 Atl. 251.

The practice of a water commissioner of giving rebates not authorized is good cause for removal. *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842.

Violated the spirit and letter of the civil service law and had conspired and connived to defeat its ends and purposes in discharging and appointing subordinates in his department, etc. *State ex rel. v. Milwaukee*, 157 Wis. 505, 147 N. W. 50.

Board of fire commissioners illegally removing from office its chief engineer, without charges or trial after being advised by the city attorney they had no power to do so, and after they had been notified by the mayor that they must desist. "This constituted a deliberate and arbitrary violation of an express provision of the charter in a matter of grave importance, and undoubtedly afforded a sufficient ground for the exercise by the defendant (mayor) of his power to remove after trial



in language, and identical in purpose; gross incompetency; crime in office; wilful failure or neglect to enforce the law;<sup>95</sup> intoxication or habitual intoxication in

all the members of the board.”  
*Spader v. Rolph*, 29 Cal. App. 774, 156 Pac. 977.

That mayor had failed to recognize the validity of an ordinance providing for a deposition of municipal funds which was enacted over the mayor's veto. Subsequently the ordinance was declared void, held no cause. *State ex rel. v. Wilson*, 151 Mo. App. 723, 132 S. W. 625.

Removal of city comptroller sustained (1) for ignoring court order staying the payment of a judgment, although advised to do so by the city solicitor, and (2) for non-observance of law prescribing his duties. *Barrett v. Atlantic City Comrs.*, 85 N. J. L. 134, 88 Atl. 856, affirming 86 N. J. L. 675, 92 Atl. 1086.

**Misconduct by order.** Subordinate ordered to recommend the dismissal of a certain building violation, held insufficient cause, because act was not his, but that of his chief. *People ex rel. v. Miller*, 150 N. Y. S. 626, 165 App. Div. 219.

**95 Wilful neglect or refusal to enforce the law** as applied to chief of police. *State ex rel. v. Donahue*, 91 Neb. 311, 135 N. W. 1030.

Chief of police. *McCarthy v. Central Falls*, 38 R. I. 385, 95 Atl. 921.

Chief of police, failure to enforce state laws against liquor selling and gambling, held good cause. *State ex rel. v. Linn (Okl.)*, 153 Pac. 826.

Failure of mayor to enforce ordi-

nances directed against bawdy-houses. *Hodges v. Tucker*, 25 Idaho 563, 138 Pac. 1139.

Charters impose duty on mayor to see that ordinances are enforced. Mayor's wilful failure to enforce ordinance directed against gambling and sale of liquor, held ground of removal. *Wooden v. State (Okl.)*, 173 Pac. 829.

Failure of mayor to stop professional base ball on Sunday. *State v. Roth*, 162 Iowa 638, 144 N. W. 339.

Gross incompetency. *State ex rel. v. Frazier (N. D. 1918)*, 167 N. W. 510.

Who knowingly and wilfully misconducts himself in office, or neglects to perform any duty enjoined upon him by the laws of the state, or who shall become intoxicated, engage in gambling or violate any penal statute involving moral turpitude, shall forfeit his office and be ousted. *State ex rel. v. Crump*, 134 Tenn. 121, 183 S. W. 505, L. R. A. 1916D, 951.

As applied to the civil service and tenure of office act just cause is meant. *Brokaw v. Burk*, 89 N. J. L. 132, 98 Atl. 11.

“Let us assume that a candidate for the mayoralty of a city is elected on pledges personally given to the electorate to enforce the laws; that he is elected, and that in consequence he gains control of the police department and the machinery for law enforcement; that near the close of his term, in order to a re-election, he uses all the machinery entrusted to him to nul-

office;<sup>96</sup> and as relates to subordinates and employees, insubordination.<sup>97</sup>

Under a law giving the mayor unlimited power to remove by filing a written statement setting forth in detail his specific reasons for such removal, on removal of members of a board of appeals of the building department, the reasons in substance were that, the removed members by certain decisions referred to had acted contrary to sound public policy by failing to require in the construction of buildings suitable sanitary equipment and sufficient protection to life and property from danger by fire. The court said: "These reasons were adequate on their face. Although no provision is made for a review of the genuineness of these reasons, as in numerous other statutes, that is no ground for not giving full

lify the laws' effectiveness for the purpose of bringing to his support those interested in non-enforcement; that by use of other means known to the modern politician and shown in his record, he is elected. May it be said that the arm of the law is too short to reach and remedy this wrong; that a majority of the votes so secured operates to render immune the culprit? If so, the law itself holds out a reward, under the guise of condonation, for him who subverts the law, and a temptation to perpetuate himself in office by a repetition of the acts of subversion, whether they be acts of bribery, or the use of funds gathered from law violators as the price of their protection. We hold that the law is not to be thus made the instrument of its own undoing. Any doctrine that tends in that direction does not commend itself and should be rejected." *State ex rel. v. Howse*, 134 Tenn. 67, 79, 80, 183 S. W. 510, 513, L. R. A. 1916D 1090.

<sup>96</sup> Intoxication as ground of removal defined. *State ex rel. v. Baughn*, 162 Iowa 308, 143 N. W. 1100.

The constitution of Alabama specifies these causes: wilful neglect of duty; corruption in office; incompetency or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties; or for any offense involving moral turpitude while in office or committed under color thereof, or connected therewith. *Williams v. State*, 197 Ala. 40, 72 So. 330.

<sup>97</sup> "Insubordination" held good cause to remove a chief examiner of civil service commission. *Commonwealth v. Philadelphia*, 232 Pa. 5, 81 Atl. 59.

Insubordination due to extreme nervousness or mental affliction. *People ex rel. v. Connelly*, 175 N. Y. S. 48.

effect to the removal in substances within its scope. Great power is placed in the hands of the mayor.”<sup>98</sup>

It is often held that the misconduct of an officer who by re-election is his own successor committed during the preceding term may be inquired into and furnished ground for his removal.<sup>99</sup> However, decisions sustain the rule that the misconduct justifying removal must have occurred during the present term, that prior misconduct during a preceding term cannot afford a basis of removal especially of an elective officer on the theory that a re-election operates to condone his past offenses.<sup>1</sup>

<sup>98</sup> *Murphy v. Curley*, 220 Mass. 73, 107 N. E. 378.

Where “cause” is not defined by the law it is left in the first instance to the agency vested with power of removal to determine what is sufficient cause. *Farish v. Young*, 18 Ariz. 298, 158 Pac. 845.

<sup>99</sup> *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953.

“Is a public officer less unfit to hold his office, or are the people less injuriously affected by his holding it because the act demonstrating his unfitness was committed on the last day of one term of office rather than on the first day of the next succeeding term? There can be but one answer to that question.” *Territory v. Sanchez*, 14 N. Mex. 493, 94 Pac. 954, 20 Ann. Cas. 109.

“The protection of the public is involved in the proceeding and judgment. Nothing in the statute suggests that electors even can condone the misfeasance.” *Day v. Sharp*, 128 Tenn. 340, 345, 161 S. W. 994, 995.

“The very object of removal is to rid the community of a corrupt,

incapable or unworthy official. His acts during his previous term quite as effectually stamp him as such as those of that he may be serving. Re-election does not condone the offense. Misconduct may not have been discovered prior to election, and in any event had not been established in the manner contemplated by the statute.” *State v. Welsh*, 109 Ia. 19, 79 N. W. 369.

<sup>1</sup> *Thurston v. Clarke*, 107 Cal. 285, 40 Pac. 435; *State v. Jersey City*, 25 N. J. L. 536; *Conant v. Grogan*, 6 N. Y. St. Rep. 322.

While other well considered cases recognize the general rule and make an exception where the accused officer continuing in office by re-election was charged with official misconduct in the same office during a preceding term. *State v. Bourgeois*, 45 La. Ann. 1350, 14 So. 28; *Brackenridge v. Texas*, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360; *State ex rel. v. Me-gaarden*, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534. See note 50 L. R. A. (N. S.) 553.

## § 557. Restrictions as to removal—civil service—veterans.<sup>2</sup>

Civil service and veteran laws are to be applied according to their terms and spirit. Often they cover subordinate positions only. As a rule they have no application to elective officers, and do not always apply to those who have definite terms. Nor are judicial officers usually included. However, the proper construction and application of the law involved to the situation or position concerned, in view of the action taken of which complaint is made, must control.<sup>3</sup> Restrictions as to removal

<sup>2</sup>Gregory v. Kansas City, 244 Mo. 523, 149 S. W. 466; Folk v. Kansas City, 244 Mo. 553, 149 S. W. 473; State ex rel v. McColl, 127 Minn. 155, 149 N. W. 11; People ex rel. v. Prendergast, 132 N. Y. S. 115, 148 App. Div. 129.

Temporary suspension. Butler v. McSweeney, 222 Mass. 5, 109 N. E. 653.

Removal for cause. State ex rel. v. Fassett, 69 Wash. 555, 125 Pac. 963.

Probationary service. People ex rel. v. Woods, 153 N. Y. S. 872, 168 App. Div. 3; People ex rel. v. Whitehead, 157 N. Y. S. 563, 94 Misc. Rep. 360.

**Volunteer firemen.** Preference of volunteer firemen; when entitled to, and reinstatement under New York Law. People ex rel. v. Williams, 213 N. Y. 130, 107 N. E. 49, affirming 148 N. Y. S. 1136, 164 App. Div. 900; Re Dooley, 142 N. Y. S. 366, 81 Misc. Rep. 340.

Removal only for incompetency or misconduct. People ex rel. v. Foley, 172 N. Y. S. 279.

No protection to one illegally appointed. People ex rel. v. Schultze, 143 N. Y. S. 303, 81 Misc. Rep. 287.

Suspension for lack of work, held legal. People ex rel. v. Williams, 154 N. Y. S. 331, 91 Misc. Rep. 95.

Abolition of position, preference in transfer. People ex rel. v. Whitehead, 164 N. Y. S. 663, 99 Misc. Rep. 578.

**Veteran of Spanish American War.** Reduction of employee in his class, dismissal held legal. People ex rel. v. Williams, 156 N. Y. S. 977, 93 Misc. Rep. 296.

Abolition of positions and discharge, legal. Reilly v. Smith, 156 N. Y. S. 686, 92 Misc. Rep. 309; People ex rel. v. Whitehead, 164 N. Y. S. 663, 99 Misc. Rep. 578.

**Soldiers Preference Law.** Reduction of salary, legal. Abolition of position in good faith, legal, in bad faith, otherwise. Babcock v. Des Moines, 180 Iowa 1120, 162 N. W. 763.

**Veteran** under Massachusetts law. Phillips v. De Los Casas, 215 Mass. 502, 102 N. E. 717.

<sup>3</sup>Employee serving by virtue of contract before effective date of civil service law subject to removal at pleasure. Liegler v. Burk, 83 N. J. L. 207, 83 Atl. 976.

Civil service restrictions. Trus-

contained in civil service laws, veteran acts, and soldiers and sailors preferential laws are required to be observed in good faith.<sup>4</sup>

Dismissals may be made only for good, sufficient or just cause,<sup>5</sup> and generally written charges, with an op-

tees, *Free Public Library v. Civil Service Com.*, 83 N. J. L. 196, 83 Atl. 980.

Restrictions as to removal or discharge of officers, held inapplicable to de facto policeman. *Uhr v. Brown* (Tex. Civ. App.), 191 S. W. 379.

Veteran Act restriction. *Bell v. Atlantic City*, 89 N. J. L. 443, 99 Atl. 127.

Civil service laws in force at the time of the action involved, e. g., attempted discharge, are controlling. *Hornberger v. State* (Ohio), 116 N. E. 28.

Law applies to marshal, as to removal. *Barnes v. Rivers*, 213 Mass. 1, 99 N. E. 464.

Public utility operated by city, employees. *Kydd v. San Francisco* (Cal. App.), 174 Pac. 88.

Apply to all police officers below rank of commissioners. Superintendent, marshal or chief. Chief of police, except Boston. *Ellis v. Shepard* (Mass.), 118 N. E. 231.

Extending provisions of civil service law to chief of police of certain cities and towns, held constitutional in Massachusetts since such officer has no fixed tenure by the constitution and hence, legislature may regulate tenure. *Barnes v. Rivers*, 213 Mass. 1, 99 N. E. 464.

Poor commissioners in Detroit, held a municipal, not a state agency, as to removal of physician under classified civil service.

*Pryzbylowski v. Detroit Poor Comrs.*, 188 Mich. 270, 154 N. W. 117.

**New York veteran act applies to subordinate positions only.** "It was intended to create a privileged class entitled to preferential employment in subordinate positions in the public service, the foundation of the preference being meritorious service as soldiers and sailors in the war. The preference is given not only in clerical or other subordinate positions, but to every person seeking public employment as a laborer on the canals or on the streets of a city, or in any capacity however humble." *Christey v. Cochrane*, 211 N. Y. 333, 105 N. E. 419, quoting from *People ex rel. v. Morton*, 148 N. Y. 156, 162, 163, and approved in *People ex rel. v. Van Wyck*, 157 N. Y. 495, 503.

An independent officer charged with the performance of specific public duties, irrespective of any other officer of the city, does not hold a subordinate position and therefore is not protected by the Veteran's Act. *Christey v. Cochrane*, 211 N. Y. 333, 105 N. E. 419, reversing 147 N. Y. S. 1103, 145 N. Y. S. 685, 84 Misc. Rep. 172.

<sup>4</sup> *People ex rel. v. Coffin* (Ill. 1918), 119 N. E. 54.

<sup>5</sup> *Brokaw v. Burk*, 89 N. J. L. 132, 98 Atl. 11; *Re McGuire*, 142 N. Y. S. 426, 157 App. Div. 351.

portunity of an explanation or hearing is required,<sup>6</sup> or an entry of the ground of removal upon the records of the department,<sup>7</sup> or furnishing the discharged employee the reason therefor.<sup>8</sup>

Subordinates may be discharged or suspended in good faith,<sup>9</sup> or the positions occupied by them may in like

<sup>6</sup> Notice, copy of reasons of removal and reasonable opportunity given to prepare and present his defense. Absence of, order of removal of city council is void. *Stiles v. O'Donnell* (Mass.), 118 N. E. 347.

Laws give civil service commissions authority of their own motion to hear charges against certain officers. *O'Donnell v. Civil Service Com.* (Iowa 1919), 173 N. W. 43.

Opportunity of explanation allowed under civil service law before removal, to certain subordinates as "head of a bureau." *Re Garvey*, 149 N. Y. S. 805, 149 N. Y. S. 80, 86 Misc. Rep. 91, 164 App. Div. 344.

Opportunity to explain. *People ex rel. v. O'Keefe*, 141 N. Y. S. 82, 80 Misc. Rep. 344.

Honorably discharged soldier, without consenting, is entitled to trial before dismissal. *Caldwell v. New York*, 133 N. Y. S. 168, 148 App. Div. 304.

Every person holding office or place under civil service rules is entitled to hearing on suspension or removal, held foreman of street laborers entitled to hearing. Copy of charges or reason setting out cause, etc. *Gardner v. Lowell*, 221 Mass. 150, 108 N. E. 937.

Resolution removing an exempt fireman without charges and hearing, held illegal where he had a

"position," created by resolution for a term of one year with an annual salary. *McGrath v. Bayonne*, 85 N. J. L. 188, 89 Atl. 48, reversing 83 N. J. L. 224, 83 Atl. 780.

<sup>7</sup> Cannot remove without giving employee opportunity of making an explanation or entering the grounds of removal on the records of the department. *People ex rel. v. Purdy*, 221 N. Y. 396, 117 N. E. 609, reversing 163 N. Y. S. 1128, 177 App. Div. 887.

<sup>8</sup> *Philbrick v. Dust*, 178 Mich. 605, 146 N. W. 175.

<sup>9</sup> Suspension in good faith. *Thomas v. Chicago*, 273 Ill. 479, 113 N. E. 140, affirming 194 Ill. App. 526.

Abolition of position for economy. *State ex rel. v. Seattle*, 74 Wash. 199, 133 Pac. 11; *State ex rel. v. Seattle*, 82 Wash. 464, 144 Pac. 695; *Gardner v. Lowell*, 221 Mass. 150, 108 N. E. 937.

In interest of economy exercised in good faith may remove officers, e. g., policemen, of course, if law does not forbid. Here reconsidered resolution appointing extra policemen and rescinded it. Presumption in favor of resolution, in absence of evidence to the contrary. One who denies this must prove, etc. Does not violate tenure of office act. Court will not interfere, since council has discretion, to be exercised in the public in-

manner be abolished in the interest of economy,<sup>9a</sup> but such action cannot be taken to cover up the discharge of an employee in contravention of the law.<sup>10</sup>

The abolition by a municipality of an office or position held by one of the favored class designated in the law, when such action is taken in good faith, and for the betterment of the public service is held to be a legitimate exercise of municipal power notwithstanding the restrictive statute. The purpose of these laws is to prevent removals without cause, to prevent the class from being affected by political changes in municipal government, but not to interfere with economical administration of public affairs, and to carry into effect changes suggested from past experience or which new conditions demonstrate are necessary for the public welfare.<sup>11</sup>

terest "which unless palpably abused in its exercise, must stand as the result of the legislative delegation of power." *Runge v. West Hoboken*, 88 N. J. L. 301, 95 Atl. 972.

When necessary to retrench, subordinates may be dismissed, and no other appointed to fill place, etc. *Griffin v. Williams*, 153 N. Y. S. 926, 168 App. Div. 63.

Valid to remove unnecessary officers and abolish useless positions when done in good faith, in public interest, etc. *Gardner v. Lowell*, 221 Mass. 150, 108 N. E. 937.

<sup>9a</sup> Reduction of salary, is not a removal. *Saverbrunn v. New York City Board of Education*, 135 N. Y. S. 85, 150 App. Div. 407.

Reduction of positions and suspending employees done in good faith, justified. *Colligan v. Williams*, 154 N. Y. S. 329, 91 Misc. Rep. 128.

Abolition of position in good faith, held legal. *People ex rel.*

*v. Smith*, 154 N. Y. S. 288, 91 Misc. Rep. 131.

Preference in transfer when position is abolished. *People ex rel. v. Ward*, 162 N. Y. S. 744.

<sup>10</sup> *Murphy v. Justices of Municipal Court*, 228 Mass. 12, 116 N. E. 969.

Abolition in bad faith to evade the law and get rid of an employee is ineffectual. *State ex rel. v. Seattle*, 83 Wash. 91, 145 Pac. 61.

Abolishing certain old positions and creating new ones in substance identical with the old is an attempted evasion of the law. *Barry v. Jackson*, 30 Cal. App. 165, 157 Pac. 828.

<sup>11</sup> Abolition of office or place in good faith is no violation of law to protect honorably discharged sailors. *Harker v. Bayonne*, 85 N. J. L. 176, 89 Atl. 53; *People ex rel. v. Williams*, 154 N. Y. S. 295, 91 Misc. Rep. 135.

**Review.** Every one appointed to office and classified under the

**§ 558. Removal of appointive officers without terms.**

The power to appoint carries with it the power to discharge.<sup>12</sup> The general rule is where the power of appoint-

civil service laws and rules, who is removed or transferred without his consent, after public hearing, may file petition for review. *Gardner v. Lowell*, 221 Mass. 150, 108 N. E. 937.

<sup>12</sup> *San Antonio v. Newman* (Tex. Civ. App.), 201 S. W. 191.

City civil engineer appointed by the mayor during the mayor's pleasure is removable by the mayor. *Terre Haute v. Brynes* (Ind. App.), 116 N. E. 604.

If no fixed term exists officer may be discharged at the discretion of appointing power, just as an ordinary employee. *Chestnut v. Kansas City*, 171 Mo. App. 327, 157 S. W. 656, citing § 558, vol. 2, ante.

If not a constitutional officer in Pennsylvania, the officer may be removed at the pleasure of the power by which he was appointed. Borough solicitor, appointed by council. *Ulrich v. Coaldale Borough*, 53 Pa. Sup. Ct. 246.

An ordinance providing that a city attorney should hold office for one year is not in conflict with a statute authorizing the mayor, with the consent of the aldermen, to remove from office any appointive officer at will, and under such authority the mayor, with the consent of the aldermen, may exercise such power at will. *Edward v. Kirkwood*, 162 Mo. App. 576, 142 S. W. 1109.

The limitations in a particular law were that the mayor could not discharge for political reasons

nor without the concurrence of the majority of the council, and the mayor was required to file, at the time of the discharge, with the city clerk, his written reasons for the discharge. The mayor filed his written reasons, which were concurred in by the council. The mayor had power to discharge, for he believed the officer incompetent and unfit. If the mayor deemed the officer incompetent and unfit, even though he was in error, nevertheless, the power vested in him to discharge. The decision, it appears, is with the mayor. The court found the testimony sufficient to sustain (1) that the officer was, in fact, a competent and fit person to perform the duties of city marshal, and (2) that the mayor actually had political reasons that could have inclined him to desire the discharge of the officer. The court remarked that neither of these two facts, singly nor jointly, proves the issue in this suit that must be established by the officer, namely, that the mayor deemed the officer a competent and fit person for the office of city marshal. The charter says the mayor may discharge for any reason he may deem fit, provided that reason is not a political reason. The only reasonable construction is that the mayor cannot discharge an appointee when the mayor's sole reason is political. *San Antonio v. Newman* (Tex. Civ. App.), 201 S. W. 191.



ment is conferred in general terms, the power of removal at the discretion and at the will of the appointing power is implied, and always exists unless limited or restricted by some other provision of the law.<sup>13</sup>

### § 559. Removal of subordinates and employees.

Unless restricted by law, the officer or head of a department or board may dismiss subordinates and employees at pleasure, and notwithstanding limitations in this respect, in the interest of efficient and economical administration, positions and places may in good faith be abolished and the subordinates or employees removed without notice and hearing.<sup>14</sup>

### § 560. Removal by recall.

The provision is common that the holder of any elective office of the municipality may be removed or recalled by the electors at an election held for such purpose.<sup>15</sup> Laws

<sup>13</sup> State ex rel. v. Wilkerson, 88 Conn. 300, 90 Atl. 929; State ex rel. v. Chatfield, 71 Conn. 104, 112, 40 Atl. 922, 925.

<sup>14</sup> Colgarry v. Newark Board of Street and W. Commissioners, 85 N. J. L. 583, 89 Atl. 789.

Power of head of department to remove subordinates. State ex rel. v. Boyington (Wash. 1920), 188 Pac. 777.

Injunction will not lie to try title to office; but the question whether municipal officers have power to remove employees does not involve title to office. State ex rel. v. Lucas, 236 Mo. 18, 30, 139 S. W. 348.

Mayor has power to remove employees for insubordination, and disrespect, etc. Thomas v. Connell (Pa. 1919), 107 Atl. 691.

Held board of park commissioners and not the mayor had

power to discharge a gardener employed by the park department, as the mayor is not the head of a department in whom is vested the authority to remove employees. Gardner v. Board of Park Directors (Cal. App. 1917), 170 Pac. 672.

Although a superintendent of buildings has power to appoint and remove subordinates, held his chief inspector in the absence or inability of the superintendent to act, had not power to remove an inspector. People ex rel. v. Henderson, 133 N. Y. S. 304, 148 App. Div. 225.

Written statement of reasons, and chance to answer. Thomas v. Connell (Pa. 1919), 107 Atl. 691.

<sup>15</sup> Baines v. Zemansky (Cal.), 168 Pac. 565.

"The mere signing of a petition by the requisite number of voters

so providing are uniformly held valid and constitutional.<sup>16</sup> Removal by recall is unauthorized, however, under a constitutional provision restricting the mode of removal to a judicial proceeding which secures the right of trial by jury and appeal, and for causes enumerated in the constitution.<sup>17</sup>

The removal of officers by means of a recall is held a municipal affair under the constitution of California,

does not operate to remove the officer named therein, but a regular election is necessary. *Bonner v. Belsterling* (Tex. Civ. App.), 137 S. W. 1154, affirming in 104 Tex. 432, 138 S. W. 571.

<sup>16</sup> *Conn. v. Richmond*, 17 Cal. App. 705, 121 Pac. 714, 719.

**"The principle underlying the recall of public officers means that the people may have an effective and speedy remedy to remove an official who is not giving satisfaction—one whom they do not want to continue in office, regardless of whether or not he is discharging his full duty to the best of his ability and as his conscience dictates. If the policies pursued do not meet the approval of a majority of the people, it is the underlying principle of the recall doctrine to permit them to recall expeditiously the official without form or ceremony except as provided for in the charter."** *Durham v. Ardery*, 43 Okla. 619, 143 Pac. 331.

The recall does not seek to substitute within the municipality "a socialist or communistic system of government in lieu of a republican form of government." And, moreover, it does not operate to impair the obligation of a contract. The officer holds his office by election and not by contract. "It is neither

socialist, communistic or obnoxious to a republican form of government to require an elective officer of a municipal government to submit to the voters of the city the issue for their determination whether he shall longer continue in office." *Bonner v. Belsterling* (Tex. Civ. App.), 137 S. W. 1154.

<sup>17</sup> Under a constitution which permits officers of incorporated cities and towns to be removed from office for causes specified in the constitution by the courts under such regulations as may be prescribed by law, and guaranteeing trial by jury and appeal, a commission charter, fixing the term of office at three years, with the usual phrase "and until his successor is elected and qualified," renders the term definite and certain, and thus a provision for recall of city commissioners is unconstitutional. "As the statute has fixed the term of office at three years, the incumbent thereof cannot be removed during the term for which he is elected, by recall or otherwise, except by the mode and in the manner and for the causes fixed in the constitution." *Williams v. State*, 197 Ala. 40, 72 So. 330, approving *Nolen's case*, 118 Ala. 154, 24 So. 251.

and, hence, is not subject to general laws inconsistent with charter provisions on the subject. However, this does not mean that the general laws prescribing procedure and causes for removal do not apply to such municipal officers. The rule is that where a freeholders' charter has provided a mode of removal of officers, and that mode is resorted to, the general law cannot control the exercise of the power in that manner or change the procedure required by the charter.<sup>18</sup>

Constitutional provisions constitute the general law of the state on the subject of recall in Washington, and, hence, they supersede charter provisions of cities on this subject.<sup>19</sup>

The procedure in some jurisdictions is substantially that a petition demanding the election of a successor to the incumbent sought to be removed or recalled shall be filed with the election officers. The Kansas statute, however, does not authorize the naming, in a recall petition, of another person to be nominated or elected as a successor to the incumbent upon his removal. Some electors, it is urged, might desire the recall of the incumbent, provided the successor named in the petition was to be elected, but otherwise would be opposed to the recall. Such a question presents to the electors a dual question and is illegal. A petition in such case must present a single question, namely: shall the city officer (naming him) be recalled? <sup>20</sup>

The recall petition is required to be signed by qualified or registered voters of a certain percentage of the entire vote cast at a named election, usually at the last preceding general municipal election, for an officer named, as the mayor.<sup>21</sup>

<sup>18</sup> *Scheafer v. Herman*, 172 Cal. 338, 155 Pac. 1084; *Coffey v. Superior Court*, 147 Cal. 535, 82 Pac. 75.

<sup>19</sup> *State ex rel. v. Fairley*, 76 Wash. 332, 136 Pac. 374.

<sup>20</sup> *Hay v. Dorn*, 93 Kan. 392, 144 Pac. 235; *Leavenworth v. Wilson*,

69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367.

<sup>21</sup> Method of calculating the percentage of signatures to the petition as required by the law. *Mills v. Michens*, 81 Wash. 409, 142 Pac. 1145.

The "election" means the last

What such petition shall contain, and the method of the determination of its sufficiency is to be tested, of course, by the meaning of the applicable local law, and such local laws vary in many respects.<sup>22</sup>

regular municipal election at which the officers sought to be recalled were voted upon and not a subsequent election at which other municipal officers were elected. *Robinson v. Anderson*, 26 Cal. App. 644, 147 Pac. 1182.

The computation is made on the total number of ballots cast at the election, not on the basis of the total number of votes cast, for all candidates for aldermen; for example, where there were two or more to be elected and the electors could vote for three or more. *Robinson v. Anderson*, 26 Cal. App. 644, 147 Pac. 1182.

Where the test is the "highest vote cast," it means the highest vote cast for and against any candidate or any proposition voted on at the preceding municipal election. *State ex rel. v. Berg*, 97 Neb. 63, 149 N. W. 61.

<sup>22</sup> Petition for election to recall should be liberally construed. *Conn v. Richmond*, 17 Cal. App. 705, 121 Pac. 714.

Petition "shall contain a general statement of the grounds upon which the removal is sought." *State ex rel. v. Houston*, 94 Neb. 445, 143 N. W. 796.

A joint petition for the recall of several officers, some of whom are subject to recall and others not, is a nullity and affords no basis for a recall election. *State ex rel. v. Howell*, 184 Tenn. 98, 188 S. W. 517, L. R. A. 1916D, 1097.

Sometimes, each signer of the

petition is required to add to his signature his place of residence, giving the street and number. This provision is sometimes found: "unless and until it be proven otherwise, by official investigation, it shall be presumed that the petition filed conforms to all legal requirements and contains the signatures of the requisite number of registered voters, and after an election based thereon, the sufficiency of said petition shall not be questioned." Held, under such provision, that the voter is not required to add to his signature the date upon which he writes it. *Scheafer v. Herman*, 172 Cal. 338, 155 Pac. 1084.

To obtain a vote for the recall of any officer, under a law requiring a typewritten charge declaring that such officer has committed "an act or acts of malfeasance or an act or acts of misfeasance while in office," specifying the act or acts, a charge that the officer, a councilman, did unlawfully enter into an improper agreement and did trade votes with another member of the council relating to the selection of certain cities officers, and the passage of an ordinance providing for Sunday closing, matters pending before the council, etc., held sufficient. *Pybus v. Smith*, 80 Wash. 65, 141 Pac. 203, citing *Commonwealth v. Callaghan*, 2 Va. Cas. 460, stating it was the only decision found directly in point.

Under a law providing that no recall should be filed against any officer until he has actually held his office for one year, where it is sought to recall an officer and he resigns and is immediately reappointed, he is not thereby vested with a new term of office. The court expressed the opinion that the resignation and immediate re-election of the officer to the same office constituted him a person who had held office for at least one year, "otherwise, the act would be a nullity, because every such officer could resign whenever proceedings were taken against him, and be immediately re-elected, and if he could not be proceeded against until the year following his appointment or re-election, he could continue to hold office beyond the reach of any recall for his entire term by resigning just before the year had expired and be immediately re-elected." <sup>23</sup>

In ascertaining whether the petition is signed by the requisite number of qualified electors, held, where registration laws are in force, it is limited to the electors registered in the city. *State ex rel. v. Berg*, 97 Neb. 63, 149 N. W. 61.

The duty of the clerk is to ascertain whether the petition is signed "by the requisite number of qualified electors" and to so certify. However, he has no power to pass on the legal qualifications of the officer to be recalled. *Poole v. Lawrence*, 86 N. J. L. 90, 90 Atl. 668.

The clerk makes a determination as to the sufficiency or insufficiency of the petition. It is the duty of the clerk to do so. When he determines the petition sufficient, the election is then called. A failure on the part of the clerk to perform his duties is enforceable by mandamus. If the clerk de-

termines the petition to be insufficient, he reports to the court and the objections are either sustained or overruled by the court. If overruled, the election is called. These duties on the part of the clerk are ministerial and therefore may be enforced by mandamus. *Cronin v. Lee*, 91 N. J. L. 443, 103 Atl. 401.

Signers of a petition for recall have the right to revoke their action thereon at any time before the petition is finally acted upon. *Hay v. Dorn*, 93 Kan. 392, 144 Pac. 235.

Where a petition sufficient in form and substance is presented the duty of the proper tribunal to proceed, call an election, etc., is mandatory. *Sidler v. Bakersfield* (Cal. App. 1919), 185 Pac. 194.

<sup>23</sup> *Poole v. Lawrence*, 86 N. J. L. 90, 90 Atl. 668.

**§ 561. Suspension of officers and employees.<sup>24</sup>****§ 563. Proceedings for removal of officers—in general.**

The proceedings must conform to the requirements of the law,<sup>25</sup> and the accused must be given a fair and im-

<sup>24</sup> May suspend police officer, pending investigation of charges filed against him. Suspend for cause and report and then investigation, or there may be a trial, etc. "Suspension is an ad interim stoppage or arrest of official power and pay. Removal terminates wholly the incumbency of the office or employment." *State ex rel. v. La Crosse Board of Police and Fire Comrs.*, 159 Wis. 295.

Some laws authorize the mayor to remove appointed officers and submit reason therefor to the legislative body for approval or disapproval by specified vote. Officer so removed stands suspended. He may be restored, however, on omission of mayor to submit reason, or failure of legislative body to approve, by the named vote. *Michels v. McCarty*, 196 Ill. App. 493.

In ouster proceedings, laws authorize the court to suspend the accused officer from performing any of the duties of his office pending the final hearing and determination of the matter, upon notice of a specified time and hearing, and upon a finding of good cause therefor. The right so guaranteed to an accused officer cannot be taken away by an injunction restraining him from exercising any function relating to his office until suspension proceedings may be heard. *State ex rel. v.*

*Alexander*, 132 Tenn. 439, 178 S. W. 1107.

Under many civil service laws, employees may be temporarily suspended for a named period pending further proceedings, without formal proceedings for removal or suspension. *Butler v. McSweeney*, 222 Mass. 5, 109 N. E. 653.

A civil service rule that when through lack of work or funds it becomes necessary to reduce the force, the last certified for employment shall be the first laid off, and that transfers and reinstatements should be controlled by security of certification, was held not applicable to common labor service. Laying off an employee in good faith in the interest of economy and necessary retrenchment, and not to circumvent or evade the civil service law or regulations thereunder. Law said "nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period not exceeding 30 days." *Thomas v. Chicago*, 273 Ill. 479, 113 N. E. 140, affirming 194 Ill. App. 526.

<sup>25</sup> *Stiles v. Morse* (Mass. 1919), 123 N. E. 615.

Removal by resolution, without charges or complaint, void. *McGrath v. Bayonne*, 85 N. J. L. 188, 89 Atl. 48, reversing 83 N. J. L. 224, 83 Atl. 780. *State ex rel. v. Strever*, 93 Neb. 762, 141 N. W. 820.

partial hearing.<sup>26</sup> The method provided is sometimes exclusive.<sup>27</sup>

If a state statute and the municipal charter prescribe modes of hearing which are inconsistent the latter will prevail in some jurisdictions, in conformity with the proper construction in view of the policy of the particular state.<sup>28</sup>

Notice and opportunity to be heard are conditions precedent to removal. Hence, the adoption by the council of orders removing an officer or employee without notice to the accused and furnishing him a copy of the charges, and permitting him to answer them in person or by counsel and giving him a public hearing, if he so requested it, as the law provided, is a nullity.<sup>29</sup>

The proceedings of removal are generally regarded as judicial or quasi-judicial in character,<sup>30</sup> although frequently viewed as summary in nature and design to accomplish an administrative purpose,<sup>31</sup> and hence a full compliance with the rules governing trials in court is not required. They are considered judicial when they embrace, (1) specific written charges, (2) a hearing, (3) sworn testimony usually reduced to writing, and (4) a determination or judgment as to the sufficiency of the evidence to warrant removal.<sup>32</sup> "When by statute or by implication of law the power of removal can only be exercised for cause or after a hearing the proceeding although

<sup>26</sup> *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953.

A hearing shall be accorded the accused by an impartial and disinterested tribunal. "The rule is fundamental that a person who has not heard the testimony in a given case occupies no legal status as arbiter or judge to adjudicate upon the cause." *Eisberg v. Cliffside Park Borough* (N. J. L. 1919), 105 Atl. 716.

<sup>27</sup> *Hodges v. Tucker*, 25 Idaho 563, 138 Pac. 1139.

<sup>28</sup> *Betkowski v. Los Angeles Superior Ct.* (Cal. App.), 166 Pac. 1027.

<sup>29</sup> *Thomas v. O'Donnell*, 227 Mass. 116, 116 N. E. 497; *Tucker v. Boston*, 223 Mass. 478, 112 N. E. 90.

<sup>30</sup> § 555, ante.

<sup>31</sup> § 555, ante.

<sup>32</sup> *People ex rel. v. Griffing*, 152 N. Y. S. 113, 166 App. Div. 538; *People ex rel. v. McClave*, 123 N. Y. 512; *People ex rel. v. Nichols*, 79 N. Y. 582.

an exercise of an administrative power is judicial in its nature." <sup>33</sup>

A mere removal is not essentially judicial or quasi-judicial, but rather an executive or administrative function, especially when the power may be exercised with or without inquiry at the pleasure or caprice, or for any reason or cause as may seem to the removing authority proper. But in removal for cause only, embracing notice, right to defend, to subpoena, and compel the attendance of witnesses, administer oaths, hear evidence, and decide on the right of a citizen to hold office, it is clear that such proceedings assume a judicial character, because such is in substance a court procedure, the hearing is on the merits. It is a recognition that the accused cannot be deprived of the right to hold the office or position except for good cause established by satisfactory evidence at a hearing on the merits, which results in a decision of the right of the accused to hold or not to hold the office or position involved. It appears, therefore, that the proceeding, both in form and result, is at least quasi-judicial. <sup>34</sup>

<sup>33</sup> *People ex rel. v. Waldo*, 212 N. Y. 156, 170, 105 N. E. 961, 966.

"Such provisions for a hearing imports written charges specifically alleging substantial cause for removal, reasonable notice of the hearing, permission to cross-examine witnesses called to sustain the charges, an opportunity to be heard and to produce witnesses in defense, and a just judgment." *People ex rel. v. Griffing*, 152 N. Y. S. 113, 166 App. Div. 538, *Re Reddy*, 132 N. Y. S. 937, 148 App. Div. 725.

<sup>34</sup> *Walzen v. San Francisco Board of Supervisors*, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17, 45, note.

"Although such boards do not have the character of an ordinary

court of law or equity, they frequently are required to exercise judicial functions in the course of the duties enjoined upon them." *Imperial Water Co. v. Imperial County Supervisors*, 162 Cal. 14, 17, 120 Pac. 780.

Proceedings judicial or quasi-judicial. *Kammann v. Chicago*, 222 Ill. 63, 78 N. E. 16; *Powell v. Bullis*, 221 Ill. 379, 77 N. E. 575; *People v. Powell*, 127 Ill. App. 614.

Proceeding is quasi-judicial in character, and in the absence of controlling provisions to the contrary, the substantial principles of the common law affecting private rights must be observed. *State ex rel. v. Milwaukee*, 157 Wis. 505, 147 N. W. 50; *Ekern v. McGovern*, 154 Wis. 157, 142 N. W. 594, 46



Hearing by a civil service board with power to subpoena witnesses and compel their attendance, administer oaths, examine books, records, etc., to reinstate the accused officer or confirm his dismissal, is held to be acts of a quasi-judicial tribunal.<sup>35</sup> It is sometimes said that the power is administrative rather than judicial, but it is to be exercised in a judicial manner.<sup>36</sup> Removing officers and boards "are not bound by the hard and fast rules in exercising the power of removal that ordinarily surround and influence a court whose functions are purely judicial."<sup>37</sup>

Power to remove vested in a council cannot be delegated to a committee.<sup>38</sup>

Civil service laws as to removals should be liberally construed. Acts of commissioners "must not be construed with that technical exactness which the law exacts in procedure in courts of record."<sup>39</sup>

L. R. A. (N. S.) 796; *People v. Thompson*, 94 N. Y. 451, 465.

<sup>35</sup> *Crowe v. Albee*, 87 Or. 148, 169 Pac. 785.

<sup>36</sup> *State v. Superior*, 90 Wis. 612, 64 N. W. 304; *Fuller v. Ellis*, 90 Mich. 96, 57 N. W. 33.

In hearing complaints, boards are said to act not in a judicial, but in an administrative capacity. *State ex rel. v. Bwiney*, 269 Mo. 602, 610, 191 S. W. 981.

<sup>37</sup> *Farish v. Young*, 18 Ariz. 298, 158 Pac. 845.

"The proceedings being of a summary character and designated to accomplish an administrative purpose, a full compliance with the rules governing trials in court is not required." *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842, 849.

"There are at least three substantial elements of a common law hearing: first, the right to know reasonably the charges or claims preferred; second, the right to

meet such charges or claims by competent evidence; and, third, the right to be heard by counsel upon the probative force of the evidence adduced by both sides and upon the law applicable thereto. If either of these rights are denied a party, he does not have the substantial of a common law hearing." *State ex rel. v. Milwaukee*, 157 Wis. 505, 511, 147 N. W. 50.

<sup>38</sup> *State ex rel. v. Milwaukee*, 157 Wis. 505, 509, 147 N. W. 50, 52, citing § 563, vol. 2, ante; *Darmstatter v. Passaic*, 81 N. J. L. 162, 165, 79 Atl. 545.

<sup>39</sup> *Mohr v. Des Moines Civ. Ser. Com.* (Ia. 1919), 172 N. W. 278.

Civil service commission or under civil service laws. *State ex rel. v. Lesser*, 94 Ohio St. 387, 115 N. E. 33; *Ellis v. Shepard* (Mass.), 118 N. E. 231, formal charges and hearing.

Investigation and determination

**§ 564. Same—presentation and sufficiency of charges.**<sup>40</sup>

**§ 565. Same—who may act—composition of tribunal.**<sup>41</sup>

of two commissioners of a board of three, held sufficient. *Schau v. Chicago*, 170 Ill. App. 19.

<sup>40</sup> Information in court. *Collman v. Wanamaker*, 27 Idaho 342, 149 Pac. 292.

Accusations by private citizens allowed by some laws. *Dorris v. McKamy* (Cal. App. 1919), 180 Pac. 645.

By district attorney, on request of specified number of citizens; sufficiency of petition. *State ex rel. v. Egan*, 138 La. 201, 70 So. 97.

Written charges required. *State v. La Crosse Comrs.*, 159 Wis. 295, 150 N. W. 493, 496.

Complaints or charges against police officers to be tried by the board may be presented by the commissioners. *State ex rel. v. Burney*, 269 Mo. 602, 609, 191 S. W. 981, following doctrine of *State ex rel. v. Heimburger*, 210 Mo. 601, 109 S. W. 758.

Written charges filed by chief of the department or by an elector of the city. Action in the absence of such charges is without jurisdiction, and void, by administrative tribunal. *State ex rel. v. La Crosse Board of Police & Fire Comrs.*, 159 Wis. 295, 150 N. W. 493.

Must prefer specific charges, etc. *State ex rel. v. Strever*, 93 Neb. 762, 141 N. W. 820.

Specifications, full and complete are required. *Kennedy v. Foley*, 177 N. Y. S. 849; *Gorman v. Foley*, 177 N. Y. S. 865.

Must fairly inform officer of the charges, but need not be as full,

complete and formal as a legal paper presented to a court. *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842.

“The accuracy of a legal pleading is not required in such proceedings. It is sufficient if it appears that the officer sought to be removed is fairly informed of the general nature of the charge so that he can meet it upon the hearing. This the first charge did. True, it was not as definite as it could have been made, but the evidence made it definite, and he had ample opportunity to meet the charge made by the proof by counter evidence.” *State ex rel. v. Milwaukee*, 157 Wis. 505, 513, 147 N. W. 50.

Mayor of Boston may remove any head of a department or member of a board (with certain exceptions) by filing a written statement with the city clerk setting forth in detail his specific reasons for such removal, a copy of which shall be delivered or mailed to the person, thus removed, who may make a reply in writing which, if he desires, may be filed with the city clerk; but such reply shall not affect the action taken unless the mayor so determines. *Murphy v. Curley*, 220 Mass. 73, 107 N. E. 378.

**Notice.** When removal can take place only for cause, based on charges set forth in writing, a reasonable notice to the accused is implied, and twenty-four hours; held insufficient. *Re Reddy*, 132 N. Y. S. 937.

<sup>41</sup> Superintendent of schools who is a member of the board of edu-

**§ 566. Same—the hearing or trial.**

On the presentation of charges under many civil service laws, an opportunity to the accused to explain is provided and if the explanation is insufficient the accused may be discharged forthwith and an entry thereof made on the records.<sup>42</sup> If the law limits the investigation of a civil service board to a consideration of whether the removal was for political or religious reasons, or whether it was made in good faith for the purpose of improving the public service, in such examination, it is held the burden of proof is on the discharged employee.<sup>43</sup>

The officer or tribunal hearing the charges is bound to

cation may sit as member on charges preferred by him against a teacher for removal, but in particular case he did not act on final decision. *Grosjean v. San Francisco Board of Education* (Cal. App. 1919), 181 Pac. 113, 116, citing § 565, vol. 2, ante.

Although mayor is accuser, prosecutor and witness he is not disqualified from participating in the final vote. *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842.

Fact a council committee formulated the charges, will not disqualify members of committee from voting on them as members of the council. *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953.

Fact that a member of the commission hearing a removal proceeding has a similar charge pending against him does not disqualify him from acting. *Barrett v. Atlantic City*, 85 N. J. L. 134, 88 Atl. 856.

Trial of policemen on charges under particular laws. *People ex rel. v. Waldo*, 212 N. Y. 156, 105 N. E. 961, affirming 143 N. Y. S. 1138, 159 App. Div. 901, rehearing denied, 106 N. E. 1040.

A police commissioner is not disqualified from sitting as a member of the board at the hearing of charges preferred by him against a police officer. *State ex rel. v. Burney*, 269 Mo. 602, 610, 191 S. W. 981, following *State ex rel. v. Heimbürger*, 210 Mo. 601, 109 S. W. 758.

It is "essential that those participating be qualified to act fairly and impartially, without prejudice, personal interest, or ill feeling towards the accused, in a frame of mind ready and willing to hear, weigh and judicially pass upon the evidence produced and in the end determine the case upon its merits as disclosed upon the hearing." *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953, 957.

Hearing is to be before the officer, board or tribunal vested with jurisdiction to remove. *Burke v. Connolly*, 135 N. Y. S. 179, 76 Misc. Rep. 337.

<sup>42</sup> *Hawthorne v. Waldo*, 144 N. Y. S. 898, 83 Misc. Rep. 374.

<sup>43</sup> *Crowe v. Albee*, 87 Or. 148, 169 Pac. 785.

a reasonably strict observance of all legal requirements and the fundamentals of a fair and impartial trial.<sup>44</sup> If the applicable law is silent as to the mode of procedure the substantial principles of the common law as to proceedings affecting private rights must be observed. While strict conformity to legal rules as to evidence is not required, there should be no disregard of fundamentals. The evidence should be given under the sanction of an oath. As aptly said: "Although not a court in the strict sense its duty is so far judicial that it cannot dispense with this prerequisite of a judicial inquiry."<sup>45</sup>

The right to a hearing indubitably includes oral argument, either by the accused or his representative before the officer or tribunal with power of decision, and such right is not satisfied by permitting it before a committee.<sup>46</sup>

<sup>44</sup> *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953, holding trial unfair under circumstances given.

Trial must be fair. *People ex rel. v. Waldo*, 136 N. Y. S. 191, 151 App. Div. 709.

When the accused is sick and unable to attend the hearing, and the hearing board is so notified, it is unfair to the accused to proceed. *Re Reddy* 132 N. Y. S. 937.

The fact that a commission trying a police officer allowed the assistant general superintendent of police to sit with them, held did not nullify an order of dismissal. *Schlau v. Chicago*, 170 Ill. App. 19.

<sup>45</sup> *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842, 849.

<sup>46</sup> "That the word 'hearing' includes 'oral argument' is expressly ruled by the following cases: *Miller v. Tobin* (C. C.), 18 Fed. 609, 616; *Joseph D. G. Co. v. Hecht*, 120 Fed. 760, 763, 57 C. C. A. 64; *Merritt v. Portchester*, 8 Hun. (N. Y.) 40, 45; *Babcock v.*

*Wolf*, 70 Ia. 676, 679, 28 N. W. 490. See also *Akerly v. Vilas*, 24 Wis. 165, 171, 1 Am. Rep. 166. Indeed the idea of the right of a person to be heard by himself or counsel, when his property or his personal rights are questioned, was so early and firmly imbedded into the groundwork of our jurisprudence, that it is difficult to find instances where it has been challenged even in quasi-judicial proceedings. The importance and value of such right is considerable in nearly every case. It is the office of counsel to marshal the facts proven, to point out their relative importance, and to interpret them in the light of the law applicable thereto. When this is properly done the judicial mind is enlightened and is in condition to decide the questions presented with full knowledge of the facts and the law involved. Its importance in the present proceeding is apparent, when it is borne in mind that the evidence taken by the

The accused may waive a hearing and acquiesce in everything done by the tribunal.<sup>47</sup>

§ 567. Same—the evidence.<sup>48</sup>

The removing officer has much discretion, but it is not unlimited; it is to be directed by the law and evidence. Members of a tribunal cannot act capriciously or arbi-

committee was very voluminous, was read to the common council at a number of different sessions, separated by considerable intervals of time, and was wholly circumstantial in character. The right of the relator either personally or by counsel to argue the evidence and the law to the common council, which body alone had the right to remove, is unquestioned. That the denial of such a right was prejudicial follows from what has been said. Nothing herein contained must be construed to question the right of the body before whom a hearing is had to limit reasonably and control the length of time for oral argument. Limitation exercised in that respect would be judicially interfered with only in case of an obvious abuse of discretion.

"The fact that counsel for relator were allowed oral argument before the committee is beside the question. The committee was not the body vested with the power of removal. It could only report the evidence taken, with its conclusions thereon, to the common council for action. The hearing granted the relator was a hearing before the common council, which alone had the right to remove. The arguments made before the committee were not heard by nor read to the common council. They could,

therefore, in no wise aid or influence it in its judgment upon the matter. The committee consisted of five members; the common council of thirty-seven.

"The trial court seemed to be of the opinion that, inasmuch as the common council could, by ordinance, prescribe the manner of hearing, it could therefore refuse to hear oral argument. In the first place the ordinance is silent upon the question of oral argument before the common council, so it had not by ordinance prescribed a hearing without oral argument. In the second place, authority to prescribe the manner of a hearing does not include the power to suppress or destroy a substantial constituent element of the hearing itself." *State ex rel. v. Milwaukee*, 157 Wis. 505, 511, 512, 147 N. W. 50, 51.

<sup>47</sup> *Ladd v. Newburyport* (Mass. 1919), 122 N. E. 874.

<sup>48</sup> Council may appoint committee to take the evidence. *State ex rel. v. Milwaukee*, 157 Wis. 505, 147 N. W. 50.

City council held to be judge of sufficiency of evidence. *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842.

Removal of mayor for neglect to enforce law concerning bawdy houses. *Cutchin v. Roanoke*, 113 Va. 452, 74 S. E. 403.

A mayor being threatened with

trarily. Their judgment must be based on sufficient evidence of probative force of the existence of some actual and substantial cause, within the contemplation of the law for removal.

**§ 568. Same—judgment and record.**

The conviction must be on the specific charge made. The appointing officer cannot remove an officer upon one ground and have the removal sustained upon a ground separate and distinct from that relied upon by the removing officer. There may be a finding that the officer is not guilty of the offense stated in its aggrieved form but that he is guilty of a lower grade of the offense charged.<sup>49</sup>

It is sometimes required that a conviction by a statutory tribunal proceeding in a summary way shall contain a recital of the substance of the evidence upon which the conviction rests. The common law requires the substance of the evidence upon which a summary conviction is rested to be contained in the record of such conviction. Hence, a resolution of a city council convicting an officer of misconduct and incompetency in office which failed to contain any evidence upon which that conviction was based is a nullity. It should give the substance of the evidence upon which the conviction is based.<sup>50</sup>

removal for being intoxicated, resigned and was thereupon appointed by the council to fill the vacancy, held the resignation and reappointment did not constitute a defense to removal proceedings subsequently instituted against him. *State ex rel. v. Baughn*, 162 Iowa 308, 143 N. W. 1100.

Law placed burden of proving incompetency or misconduct on the party alleging the same. Where a position is abolished and an employee discharged, the burden is not on the city to show that it

abolished the position in good faith, without any ulterior motive. The discharge was not for incompetency or misconduct, but due to the fact the position was abolished. *Babcock v. Des Moines*, 180 Iowa 1120, 162 N. W. 763.

<sup>49</sup> *State ex rel. v. Seattle*, 65 Wash. 645, 118 Pac. 821.

<sup>50</sup> *Mullane v. South Amboy*, 86 N. J. L. 173, 90 Atl. 1030, following *Marter v. Repp*, 80 N. J. L. 530, 77 Atl. 1030, and distinguishing *Devault v. Camden*, 48 N. J. L. 433, 5 Atl. 451.

In removal proceedings the vote necessary to a decision required must be given by the board or tribunal. A requirement of a two-thirds vote to remove to be given by a council was held to mean two-thirds of the members of the council who attended the trial and heard the evidence, and that those who were absent could not vote. The legal requirement was not satisfied, it was ruled, by having all of the testimony taken by an unofficial stenographer read before the council.<sup>51</sup>

Commuting the sentence of dismissal to suspension for a definite time, without findings in writing, was held to create the presumption that the charges were sustained. This was the action of a civil service commission on the dismissal of a police officer by the chief. *Nunc pro tunc* entries of findings are not always sustained. A re-hearing can be granted only where the law so authorizes.<sup>52</sup>

### § 569. Judicial review of removal proceedings.<sup>53</sup>

<sup>51</sup> "We think the charter contemplates and requires that when exercising its limited power to remove for cause a public officer by such quasi-judicial proceedings, there must be an affirmative vote amounting to two-thirds of the members elect, cast by members who participated in all the proceedings and heard all the evidence given by the witness who appeared and testified." *Hawkins v. Grand Rapids*, 192 Mich. 276, 158 N. W. 953, 958.

<sup>52</sup> *Crowe v. Albee*, 87 Or. 148, 169 Pac. 785, following *Renaud v. State Court of Mediation & Arbitration*, 124 Mich. 648, 654, 83 N. W. 620, 51 L. R. A. 458, 460, 83 Am. St. Rep. 346, 351.

<sup>53</sup> *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842; *Hackett v. Morse* (Cal. App. 1920), 188 Pac. 308; *State ex rel. v. Butte* (Mont. 1920), 188 Pac. 367.

Allowed. *State ex rel. v. Seattle*, 65 Wash. 645, 118 Pac. 821.

Removal of unnecessary officers and abolition of useless positions in good faith will not be interfered with by courts. *Gardner v. Lowell*, 221 Mass. 150, 108 N. E. 937.

In certain cases, courts cannot review the removal of officers. *Glenn v. Park*, 48 Utah 160, 158 Pac. 425; *Skeen v. Browning*, 32 Utah 164, 89 Pac. 642.

Reinstatement in an equity suit denied on the ground of fraud, bringing about the resignation of a police officer, where power to remove existed without cause, in the absence of resignation. *Glenn v. Park*, 48 Utah 160, 158 Pac. 425.

Under Soldiers' Preference Law of Iowa right to judicial review is given. *Babcock v. Des Moines*, 180 Iowa 1120, 162 N. W. 763.

Review of action of removing

§ 570. Consideration by courts in reviewing removal proceedings—practice.<sup>54</sup>

§ 571. Certiorari to review proceedings are sanctioned in most jurisdictions.<sup>55</sup>

On *certiorari* the probative force and sufficiency of the evidence to sustain the charge of removal will not be

officer or commission in court, but no appeal allowed to supreme court. *Clancy v. Milwaukee Board of Fire & Police Comrs.*, 150 Wis. 630, 138 N. W. 109.

If sufficiency of the charges was not questioned at the hearing, they cannot be questioned on mandamus. *Schlau v. Chicago*, 170 Ill. App. 19.

Whether charges were sufficiently proved is not open on review where the proceedings were regular. *Schlau v. Chicago*, 170 Ill. App. 19.

Law authorizing petition for review of removal or transfer, without consent of employee, in certain courts, and making such decision "final and conclusive on the parties," applicable to all persons holding positions classified under the civil service as officers. *Gardner v. Lowell*, 221 Mass. 150, 108 N. E. 937.

<sup>54</sup> Whether cause for removal exists court may review. *People ex rel. v. Foley*, 172 N. Y. S. 279.

Errors in removals, etc., disregarded unless substantial rights are affected. *State ex rel. v. Getchell*, 51 Mont. 323, 152 Pac. 480.

<sup>55</sup> *Arizona. Farish v. Young*, 18 Ariz. 298, 158 Pac. 845.

*California. Donovan v. San Francisco*, 32 Cal. App. 392, 163 Pac. 69.

*Georgia. Savannah v. Monroe* (Ga. App.), 96 S. E. 500.

*Montana. State ex rel. v. District Court* (Mont. 1920), 190 Pac. 295.

*New York. People ex rel. v. Woods*, 157 N. Y. S. 606, 171 App. Div. 684; *People ex rel. v. Connolly*, 172 N. Y. S. 48; *People ex rel. v. Waldo*, 212 N. Y. 156, 105 N. E. 961; *People ex rel. v. Cropsey*, 162 N. Y. S. 927, 176 App. Div. 415; *People ex rel. Burke v. Hoffman*, 152 N. Y. S. 1135; *People ex rel. Loevin v. Griffing*, 152 N. Y. S. 113, 166 App. Div. 538; *People ex rel. v. Waldo*, 147 N. Y. S. 848, 62 App. Div. 345.

*Rhode Island. McCarthy v. Central Falls*, 38 R. I. 385, 95 Atl. 921.

*Vermont. Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842.

*Washington. State ex rel. v. Boyington* (Wash. 1920), 188 Pac. 777.

*Wisconsin. State v. Canavan*, 155 Wis. 398, 145 N. W. 44.

If act of removal is executive it is not reviewable on certiorari, but if it is on a hearing and formal findings, it is so reviewable. *People ex rel. v. Davis*, 178 N. Y. S. 436.

Certiorari lies to correct material errors of law. *Swan v. Justices of the Superior Court*, 222 Mass. 542, 544, 111 N. E. 386.

Statute forbidding appeals in



reviewed. The province of the court is to enforce sub-

removal proceedings does not preclude remedy by certiorari. *Swan v. Justices of Superior Court*, 222 Mass. 542, 111 N. E. 386.

The fact that the decision of the judge is final and conclusive does not deprive the parties of the right to have errors of law corrected by writ of certiorari. *Murphy v. Justices of Municipal Court*, 228 Mass. 12, 116 N. E. 969.

The issuance of a writ of certiorari is in the judicial discretion of the court, to be granted only when necessary to prevent substantial wrong, especially where the matters in controversy are of a public nature. Where it appears that substantial justice has been done, the writ will be denied. *Ashcroft v. Goodman*, 139 Tenn. 625, 202 S. W. 939.

If law makes no provision for hearing, but give power to remove and only requires that reasons therefor be stated in writing and filed, and if officers, desires, an opportunity to explain, held act "executive," as to right to review by certiorari. *People ex rel. v. Brady*, 166 N. Y. 44, 47, 59 N. E. 701; *People ex rel. v. Griffing*, 152 N. Y. S. 113, 166 App. Div. 538.

Certiorari denied to review act of council in discharging a municipal officer on ground that act was not judicial or quasi-judicial. *State ex rel. v. Minneapolis*, 138 Minn. 182, 164 N. W. 806.

In Oregon the ancient remedy of certiorari is known as the writ of review and lies only for the re-examination of judicial or quasi-judicial acts, and not for minis-

terial orders. *Crowe v. Albee*, 87 Or. 148, 169 Pac. 785, 787; *Hodgdon v. Goodspeed*, 60 Or. 1, 118 Pac. 167; *Cookinham v. Lewis*, 58 Or. 484, 488, 114 Pac. 88, 89, 115 Pac. 342.

Assistant building inspector created by resolution, held a "position" as distinguished from office, and hence certiorari is the proper remedy to test the legality of removal, and not quo warranto. *McGrath v. Bayonne*, 85 N. J. L. 188, 89 Atl. 48, reversing 83 N. J. L. 224, 83 Atl. 780; *Peterson v. Salem*, 63 N. J. L. 57, 42 Atl. 844.

Certiorari denied to de facto officer to be reinstated after the appointment upon his removal of his successor de jure. *Barter v. Rockland*, 114 Me. 466, 96 Atl. 773.

Certiorari denied to review opinion of civil service commission that a resolution of a board reducing certain officers in rank and salary was without legal power. *Newark v. Fordyce*, 88 N. J. L. 440, 97 Atl. 67.

Fire commissioners demoted certain officers which action was reversed by the civil service commission. Certiorari was denied on application of the mayor and council to review the opinion of the civil service commission. *Newark v. Fordyce*, 88 N. J. L. 440, 97 Atl. 67.

Certiorari denied to review removal on the ground of being drunk and disorderly. *State ex rel. v. Bodden*, 165 Wis. 243, 161 N. W. 707.

Failure to retain a probational police officer, held not reviewable

stantial observance of the law; it is not to pass upon the merits, for the law has expressly delegated that function to the hearing tribunal. "To hold otherwise is to make the use of the right of *certiorari* as a remedy for the correction of errors, an office it is not intended to perform." <sup>56</sup>

The rule is otherwise where a special statutory provision applicable thereto grants the court the right to make such review; but aside from statute, *certiorari* is not available for the correction of errors on the part of tribunals with power to hear and determine questions of removal. <sup>57</sup>

"The rule which prevents the court, upon *certiorari*, or by any other proceedings from undue and meddlesome interference in the details of municipal government, is one so manifestly wise as to deserve and command general approval. If the law were such that every order of discharge or suspension or other measure of discipline intended to insure prompt and faithful discharge of duty by employees and ministerial officers generally, could be dragged through the courts and set aside or nullified because the courts may disagree with municipal authorities upon the merits of the disputed questions of

by *certiorari*, in view of facts of a particular law. *People ex rel. v. Woods*, 157 N. Y. S. 786, 171 App. Div. 516.

*Certiorari* denied where it was alleged that a removed police officer did not have a fair trial and was not given the opportunity to testify in his own behalf, under the facts of the particular case. *People v. Woods*, 158 N. Y. S. 18, 172 App. Div. 120.

<sup>56</sup> *Riley v. Crawford*, 181 Ia. 1219, 165 N. W. 345.

<sup>57</sup> *Buntin v. Commissioners*, 179 Iowa 1048, 162 N. W. 565.

On *certiorari* to review the action in a removal case, the court cannot go outside the facts em-

bodied in the return. *People ex rel. v. Adamson*, 157 N. Y. S. 462, 171 App. Div. 655; *People ex rel. v. Eno*, 176 N. Y. S. 513, 68 N. E. 868; *People ex rel. v. Wurster*, 149 N. Y. S. 549, 44 N. E. 298.

If trial was unfair, removal will be set aside on *certiorari*. *People ex rel. v. Waldo*, 136 N. Y. S. 191, 151 App. Div. 709.

On *certiorari* the dismissal was set aside, of an employee who had served twenty years and who had been dismissed for acts of insubordination while in an extreme nervous condition or in a condition of mental derangement. In such case the proper judgment would be temporary suspension or

fact, discipline would be destroyed and efficiency in public position become a lost art. Whenever the statute has guarded the right of the officer to his position by prescribing the manner in which and means by which he may be removed, the courts will protect him in that right, i. e., the court will support his claim that the methods provided by the law shall be substantially followed, but the court will not assume or take to itself authority to try the merits of a charge which the statute has expressly delegated to another tribunal." <sup>58</sup>

### § 572. Mandamus to review removal proceedings—reinstatement.

It is axiomatic that mandamus will lie in all proper cases to compel reinstatement of an officer or employee illegally removed or discharged. The rule is otherwise if the action was in all respects legal.<sup>59</sup> For example,

retirement for disability. *People v. Connolly*, 172 N. Y. S. 48.

<sup>58</sup> *Riley v. Crawford*, 181 Ia. 1219, 165 N. W. 345.

<sup>59</sup> *California. Barry v. Jackson*, 30 Cal. App. 165, 157 Pac. 828; *Kydd v. San Francisco (Cal. App.)*, 174 Pac. 88, (holding applicant must show compliance with civil service rules when they apply to his position).

*Illinois. McKenna v. South Side Park Comrs.*, 198 Ill. App. 369.

*Kansas. McLaughlin v. Green*, 96 Kan. 641, 152 Pac. 661.

*Massachusetts. Butler v. McSweeney*, 222 Mass. 5, 109 N. E. 653; *Stiles v. O'Connell (Mass.)*, 118 N. E. 347; *Thomas v. O'Donnell*, 227 Mass. 116, 116 N. E. 497.

*Missouri. State ex rel. v. Martin*, 195 Mo. App. 366, 191 S. W. 1064; *State ex rel. v. Brodie*, 177 Mo. App. 382, 164 S. W. 233.

*Montana. Bailey v. Edwards*, 47 Mont. 363, 133 Pac. 1095.

*Michigan. Philbrick v. Dust*, 178 Mich. 605, 146 N. W. 175.

*New York. People ex rel. v. Ward*, 162 N. Y. S. 744; *People ex rel. v. Griffing*, 152 N. Y. S. 113, 166 App. Div. 538; *People ex rel. v. Purdy*, 221 N. Y. 396, 117 N. E. 609; *Thompson v. New York Board of Education*, 201 N. Y. 457, 94 N. E. 1082, affirming 121 N. Y. S. 491, 136 App. Div. 721; *Randolph v. Smith*, 155 N. Y. S. 99, 92 Misc. Rep. 291; *People ex rel. v. Board of Education*, 156 N. Y. S. 65, 149 N. Y. S. 558, 164 App. Div. 930; *People ex rel. v. Higgins*, 144 N. Y. S. 157, 159 App. Div. 226.

*Nebraska. State ex rel. v. Strever*, 93 Neb. 762, 141 N. W. 820.

*Pennsylvania. Wood v. Griffith*, 66 Pa. Super. Ct. 290.

where the dismissal, or temporary suspension, was made in good faith to reduce the force on the ground of lack of employment.<sup>60</sup> However, if the dismissal was wrongful and the reduction made in bad faith the rule is otherwise.<sup>61</sup>

Mandamus will lie to test the legality of a refusal of a civil service commission to certify the name of the

Washington. *State ex rel. v. Seattle*, 83 Wash. 91, 145 Pac. 61; *State ex rel. v. Seattle*, 88 Wash. 589, 153 Pac. 336.

Mandamus to reinstate a discharged veteran. *Re Delahunt*, 160 N. Y. S. 900, 96 Misc. Rep. 548.

Mandamus to reinstate a veteran who had preference over other employees, where there had been a reduction of the force, sustained. *Re Dooley*, 142 N. Y. S. 366, 81 Misc. Rep. 340.

The remedy of an officer demoted is not certiorari to review the judgment but mandamus to compel reinstatement. *Newark v. Fordyce*, 88 N. J. L. 440, 97 Atl. 67.

Mandamus denied to reinstate a medical inspector convicted of falsifying his report. Under the rules of the civil service, held reinstatement without examination only applied where there was no fault or delinquency on the part of the officer removed. *People ex rel. v. Creelman*, 135 N. Y. S. 781, 77 Misc. Rep. 23.

Mandamus cannot assign a man to work retroactively. *Ovens v. Marks*, 159 N. Y. S. 424, 173 App. Div. 138.

Neither errors in decisions of facts or rulings of law, nor the justice of the finding is open to

review. Only the questions of jurisdiction and observance of applicable procedure are open. *Quinn v. Chicago*, 178 Ill. App. 115.

Mandamus to secure reinstatement—effect of delay. *State ex rel. v. Duncan*, 47 Mont. 447, 133 Pac. 109.

Remedy of reinstatement by mandamus will not bar suit for damages for illegal removal. *McGraw v. Gresser*, 226 N. Y. 57, 123 N. E. 84.

<sup>60</sup> Mandamus for reinstatement denied where dismissal was due to reduction of force. *Re Griffin*, 138 N. Y. S. 128, 77 Misc. Rep. 553.

Mandamus denied for reinstatement by Spanish American war veteran, where he had been laid off on the ground of lack of work, and to reduce the force. *Reilly v. Smith*, 156 N. Y. S. 686, 92 Misc. Rep. 309.

<sup>61</sup> To require reinstatement of policeman for wrongful dismissal without trial, held council resolution providing for reduction of police force to the lowest possible working basis is inapplicable as a defense, where the evidence shows as many appointments to the police force after, as prior to the passage of the resolution. *State ex rel. v. Getchell*, 51 Mont. 323, 152 Pac. 480.

relator on the pay roll;<sup>62</sup> to test the validity of an attempted removal under the civil service law;<sup>63</sup> to compel a mayor to refrain from proceeding to remove a head of a department;<sup>64</sup> to compel a transfer.<sup>65</sup>

When subordinates or employees are removed or suspended some laws authorize an appeal to the civil service commission. Under such law, which has reference only to removal for cause, where one is illegally deprived of his place by an unlawful continuance of the office or place he filled he need not appeal, because in such case the removing officer, here the mayor, usurped authority and discontinued the office or place without action of the council.<sup>66</sup>

In New York City, under the civil service law, it has been held that by resignation an employee renders himself ineligible for reinstatement and reappointment, and that dismissal for cause produces the same result. Hence, if an officer removes an employee for cause, he cannot rescind the order, accept the resignation of the employee and thus make him eligible to reappointment. Nor in such case has the civil service commission power subsequently to reinstate such employee, and give him an appointment in another city department.<sup>67</sup>

<sup>62</sup> *Brokaw v. Burke*, 89 N. J. L. 132, 98 Atl. 11.

<sup>63</sup> Law in force at time of removal, of course, controls, not amendment made subsequently. *Hornberger v. State (Ohio)*, 116 N. E. 28.

<sup>64</sup> *Cunningham v. Rockwood*, 222 Mass. 574, 111 N. E. 409.

<sup>65</sup> *People ex rel. v. Whitehead*, 164 N. Y. S. 663, 99 Misc. Rep. 578.

<sup>66</sup> *Foster v. Hindley*, 72 Wash. 567, 131 Pac. 197.

<sup>67</sup> *People ex rel. v. Gallagher*, 144 N. Y. S. 107, 82 Misc. Rep. 679.

## CHAPTER 13.

### MEETINGS AND PROCEEDINGS OF COUNCIL OR GOVERNING LEGISLATIVE BODY.

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| § 574. Corporate meetings required.                               | § 590. Casting vote by presiding officer.                               |
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#### PROCEEDINGS.

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### § 573. Municipal organization—where corporate authority vested.<sup>1</sup>

The composition of,<sup>2</sup> and powers that may be exercised

<sup>1</sup> Re Opinion of the Justices (Mass. 1918), 119 N. E. 778.

<sup>2</sup> Two councilmen from each ward in cities of the first class in

by the governing or legislative body, generally called the council, depend upon the charter. Its powers are limited by that instrument,<sup>3</sup> and all acts by it in excess of its powers are simply nugatory.<sup>4</sup>

It has not been the policy from the beginning to separate legislative from executive functions in the government of municipalities. The municipal councils from time immemorial have had charge of the fiscal matters of the municipality and the general control of its affairs, and they have at the same time exercised certain limited legislative functions.<sup>5</sup> Both legislative and executive functions have been exercised by these bodies from the foundation of the government. A municipal council is primarily a legislative and administrative body, but is often vested with judicial or *quasi* judicial functions. When sitting upon charges involving removal for causes it acts in the latter capacity.<sup>6</sup>

Oklahoma. *State v. Perkins*, 35 Okl. 317, 125 Pac. 731.

Freeholders charter adopted by virtue of constitutional provisions providing for a house of legislation, its municipal assembly, is a legislative assembly. *St. Louis v. Atlantic Quarry & Construction Co.*, 244 Mo. 479, 148 S. W. 948.

<sup>3</sup> The law under which it is constituted will not be so construed as to empower it to destroy the city government by the abolition of city offices. *Fennett v. McCuiston*, 105 Tex. 299, 147 S. W. 867, reversing 144 S. W. 1155.

Power of council to settle a dispute between a contractor and a city department as to the value of work done, where made in good faith, is binding on the city, but of course, such settlement is not binding on the contractor's surety unless he consents. *Chicago v. Agnew*, 182 Ill. App. 499.

<sup>4</sup> *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388.

Council had power to investigate all city officers and departments, but held to have no power to investigate a board of education, to ascertain whether the mayor should proceed with the removal of a member of the board where the investigation was not at the mayor's request and where it appeared that it was not necessary. *Miller v. Tayntor*, 155 N. Y. S. 746, 170 App. Div. 126.

**Committee** created by council is without authority to admit citizens as members thereof who may be designated by a business or a civic organization. *Sroka v. Halliday*, 39 R. I. 119, 97 Atl. 965.

<sup>5</sup> *Bryan v. Voss*, 143 Ky. 422, 427, 136 S. W. 884.

<sup>6</sup> *Rutter v. Burke*, 87 Vt. 14, 93 Atl. 842, 849.

**§ 574. Corporate meetings required.**

The general rule is that to bind the municipality the council or legislative body must be duly assembled and act in the mode prescribed by the law of its creation, evidenced by an order entered of record.<sup>7</sup>

**§ 575. Kinds of corporate meetings stated—notice.<sup>8</sup>****§ 579. What the notice or warning must specify.<sup>9</sup>**

<sup>7</sup>Cade v. Bellington (W. Va. 1918), 96 S. E. 1053.

The legislative authority of the municipality is vested in its council as an organized body, and its will can be expressed only in the manner prescribed by the law of its creation. The members of the council acting separately and severally can do nothing. *Mobile v. Kiernan*, 170 Ala. 449, 54 So. 102, 104, citing § 574, vol. 2, ante (*McQuillin*, Mun. Ord. § 91); *Scott v. Lincoln* (Neb. 1920), 178 N. W. 203.

"A municipality acts only through its assembled council whose will can be expressed only by a vote embodied in some distinct and definite form." *Ray v. Huntington* (W. Va. 1918), 95 S. E. 231; *Moundsville v. Yost*, 75 W. Va. 224, 83 S. E. 910; *Rutherford v. Williamson*, 70 W. Va. 402, 74 S. E. 682.

Informal consideration of a matter pending before the council by the members of the council at the home of one of them, where no minutes are made of the matter and no formal action taken, notwithstanding there was a general consensus of opinion as to what should be done, was held not a council action. *Atlantic Bitulithic*

*Co. v. Edgewood*, 76 W. Va. 630, 87 S. E. 183.

Where nothing appears to the contrary the presumption is always in favor of the regularity of the proceedings of public bodies. *Delmar Inv. Co. v. Lewis*, 180 Mo. App. 22, 162 S. W. 675.

<sup>8</sup>Place. For want of a borough hall the council meetings were habitually held in the mayor's private offices. A councilman was ordered to leave by the mayor, held councilman was entitled to remain until the close of the meeting. *State v. Seifert*, 85 N. J. L. 104, 88 Atl. 947.

Notice to appear at a hearing before the regular meeting of the city council should specify the time and place. An ordinance fixing the time and place is for the guidance of the city officers only and not for the government of the inhabitants. *Hendricks v. Carter* (Ga. App.), 94 S. E. 807.

<sup>9</sup>Warrants signed by proper officers, directed to the legal voters, posted in two public and conspicuous places within the corporate limits seven days prior to the meeting, and with duly signed returns, held in conformity with legal requirements applicable.



§ 581. Legal governing body—de facto councils and officers.<sup>10</sup>

§ 584. Presiding officer in this country—mayor as member.<sup>11</sup>

§ 587. Signing of bills by presiding officer.<sup>12</sup>

Paul v. Huse, 112 Me. 449, 92 Atl. 520.

Where the warning explicitly referred to the grand jury list of a named year, and action was taken thereunder at an adjourned meeting voting a tax payable on a date named in the autumn of the year mentioned, held the tax must be understood to have been voted on the list of the specified year pursuant to the warning. *Montpelier v. Central Vermont Ry. Co.*, 89 Vt. 36, 93 Atl. 1047, 1051.

<sup>10</sup> One elected as councilman who qualified, acted and was recognized as such is at least a de facto officer, although a non-resident of the ward he claims to represent whose office under the terms of the charter had become vacant. Hence, an ordinance passed where his vote was essential will not be declared void because the ordinance was "one of interest to all the people." *McAvoy v. Trenton*, 82 N. J. L. 101, 80 Atl. 950, 952, following *Oliver v. Jersey City*, 63 N. J. L. 634, 44 Atl. 709, 48 L. R. A. 412, 76 Am. St. Rep. 228.

<sup>11</sup> Mayor presiding officer. *People v. Welsh*, 260 Ill. 532, 103 N. E. 578.

Method prescribed for selecting presiding officer must be observed to the exclusion of every other method. *People ex rel. v. Zeeh*,

148 N. Y. S. 111, 85 Misc. Rep. 151.

Recorder, in absence of mayor. *Blake v. Trout*, 127 Ark. 299, 192 S. W. 179.

Mayor not member of council. *Taylor v. Carr*, 125 Tenn. 235, 141 S. W. 745, 747.

Whether the president of the council shall be regarded as a member of the council, with power to vote, depends upon the intent of the law applicable. To vote the presiding officer need not be a councilman eo nomine, but he may be entitled "president of the council," and authorized by law to vote with the councilmen in an election to fill a vacancy in the council. *Reese v. State*, 184 Ala. 36, 62 So. 847.

"The ordinary duties appertaining to the office of mayor are rather executive or administrative in character, and he is usually not allowed to vote either as a member or presiding officer of a municipal board unless the privilege is conferred by correct interpretation of the charter or the general statutes applicable," holding under a particular charter the mayor could give the casting vote in case of tie. *Markham v. Simpson* (N. C.), 95 S. E. 106, 108, citing § 584, vol. 2, ante.

<sup>12</sup> *Whitley v. Stephens* (Ky. 1919), 211 S. W. 770.

§ 588. When mayor's approval of proceedings necessary.<sup>13</sup>

§ 590. Casting vote by presiding officer.<sup>14</sup>

§ 594. Quorum of definite body.

In the absence of a legal provision applicable to the contrary a majority of a definite body constitutes a quorum,<sup>15</sup> and the vote of a majority of those present

Pro tem speaker or presiding officer may sign. *Parker-Washington Co. v. Field* (Mo. App. 1919), 214 S. W. 402.

Signing of ordinance by the presidents of both branches of legislative body composed of two branches, held not required under particular law. *Re Black St., Pittsburgh*, 236 Pa. 395, 84 Atl. 918.

<sup>13</sup> Failure of mayor to approve in writing the minutes of the city council showing the passage of a penal ordinance in effect for several years, in the absence of charter or ordinance provision so requiring, was held not to invalidate the ordinance. Such legal requirements are usually regarded as directory only. *Moore v. Thomasville*, 17 Ga. App. 285, 86 S. E. 641; *Jones v. Carrollton*, 17 Ga. App. 476, 87 S. E. 605.

<sup>14</sup> Presiding officer may vote as a member of the body and also a second time in case of tie. *Markham v. Simpson* (N. C.), 95 S. E. 106, citing § 590, vol. 2, ante.

If the mayor had no right to vote unless there should be a tie "his vote for an order or ordinance was brutum vulmen if there was a unanimous vote by the aldermen." *State ex rel. v. Creswell*, 117 Miss. 795, 78 So. 770.

<sup>15</sup> Laws provide that two-thirds of the members of the body shall constitute a quorum. *State ex rel. v. Tyrell*, 158 Wis. 425, 49 N. W. 820.

Under a charter providing that the board of police and fire shall consist of two city commissioners and the mayor, a meeting of two commissioners is valid. *People ex rel. v. Newark*, 163 N. Y. S. 374, 99 Misc. Rep. 111.

The charter provision was that a majority of the whole number of the members should constitute a quorum for the transaction of business, but a smaller number could adjoin from time to time. Filling vacancies in office was held transacting business, and that less than a majority did not constitute a quorum for such purpose, and that three in a council of seven, of course, could not. *Westcott v. Scull*, 87 N. J. L. 410, 96 Atl. 407.

Nor under such provision may less than a majority remove an officer or employee. *Doughty v. Scull* (N. J. L.), 96 Atl. 564; *Schermerhorn v. Jersey City*, 53 N. J. L. 112, 20 Atl. 829.

Where the membership of the board consisted of four aldermen and only two and the mayor were present at the meeting, a resolution passed thereat is illegal.

when duly convened will suffice to make effective any act within the scope of its power.<sup>16</sup>

**§ 595. Quorum and majorities of boards, commissioners, committees, etc.<sup>17</sup>**

Reynolds County Telephone Co. v. Piedmont, 152 Mo. App. 361, 367, 133 S. W. 141, following O'Dwyer v. Monett, 123 Mo. App. 184, 100 S. W. 670.

City which had been transferred to a higher class with a greater number of councilmen where a legal provision was in force that councilmen in office should remain until their successors were duly elected, it was held that a council meeting of the old councilmen with the requisite number to constitute a quorum under the law applicable to the class of cities from which it emerged, was valid. Tandy & Fairleigh Tobacco Co. v. Hopkinsville, 174 Ky. 189, 193-196, 192 S. W. 46.

<sup>16</sup> Hartzler v. Goodland, 97 Kan. 129, 154 Pac. 265, citing § 594, vol. 2, ante; Barry v. New Haven, 162 Ky. 60, 171 S. W. 1012; Public Service Railway Co. v. General Omnibus Co. (N. J. L. 1920), 108 Atl. 229.

Resolution consenting to annexation of territory may be passed by a majority of a quorum, although an ordinance required two-thirds vote of all the council members, as the law prescribed. Batesville v. Ball, 100 Ark. 496, 140 S. W. 712.

It is imperative that the functions of local municipal government should not be suspended in case of a vacancy in the council.

If there should be sufficient members of the council remaining in office who voted for and sanctioned the act to be done or the project to be undertaken, to constitute a majority of the entire constituent membership, and not merely a majority of a quorum, it seems that their official action is valid. Hartzler v. Goodland, 97 Kan. 129, 154 Pac. 265, citing §§ 593, 594, vol. 2, ante.

It is not necessary to the validity of an ordinance that the mayor should vote on it. Feagin v. Andalusia, 12 Ala. App. 611, 67 So. 630; Clark v. Union Town, 4 Ala. App. 264, 58 So. 725.

<sup>17</sup> Resolution is valid if adopted by a majority of a board. Moriarty v. Orange, 89 N. J. 385, 98 Atl. 465, terminating a garbage contract.

Minority less than a quorum may adjourn meeting to another day for lack of a quorum. Mena v. Tomlinson Bros., 118 Ark. 166, 174, 175 S. W. 1187, citing § 595, vol. 2, ante.

Where board of health is constituted of three members, if only two are appointed they cannot legally do an act authorized to be done by a majority of the board, because no official board exists of which such two would be a majority. Saco v. Jordan, 115 Me. 278, 281, 98 Atl. 808.

### § 596. When definite vote required.

The vote specified in the law applicable must be obtained to constitute the action valid and binding.<sup>18</sup> Certain acts require a concurrence of a majority, or an affirmative vote of a majority of all of the members of the body,<sup>19</sup> or a two-thirds vote,<sup>20</sup> or a three-fourths vote.<sup>21</sup>

<sup>18</sup> *Hansen v. Anthon* (Iowa 1919), 173 N. W. 939.

In council of five, an affirmative vote of three was essential to grant a franchise; held vote of four was sufficient although when the ordinance passed the electors had voted to advance the municipality to a higher class, when its council would consist of seven and an affirmative vote of five would be required to pass such franchise ordinance—the status of the municipality at the time of action held the test. *State ex rel. v. Superior Court*, 64 Wash. 594, 117 Pac. 487, approving *Ritchie v. South Topeka*, 38 Kan. 368, 16 Pac. 332.

An ordinance introduced as an emergency ordinance failing to receive the prescribed vote to pass such ordinance, does not after the expiration of the prescribed time for the taking of effect of ordinance become a valid general ordinance, but it is without force. *Newark v. Richter*, 7 Ohio App. 390.

Where the law relating to the particular subject does not specify the vote required to do the particular act, as authorizing the vacation of a street, a majority vote is sufficient, although the charter required a two-thirds vote in such matters, the court holding the charter method was not exclusive.

*State ex rel. v. Kelley*, 167 Wis. 91, 166 N. W. 782.

If charter precludes any other method of vacating streets and alleys and specifies a two-thirds vote, of course, such vote is essential. *Baines v. Janesville*, 100 Wis. 369, 75 N. W. 404.

<sup>19</sup> "A majority of the whole number of members elected" means a majority of the entire number necessary to constitute the full membership of the body. *State ex rel. v. Willis*, 47 Mont. 548, 133 Pac. 962; *Wood v. Gordon*, 58 W. Va. 321, 52 S. E. 261.

Where town had five aldermen and the mayor constituting the council, an ordinance getting three votes only, of course, not receiving a majority vote, is not passed. *Wiggs v. State*, 5 Ala. App. 189, 59 So. 516.

Present four aldermen and the mayor, on vote to grant a license two voted "yes" two "no" and the mayor "yes." Law: the mayor and aldermen shall constitute the council. License requires a majority vote of all the members of the council; and in such case the mayor shall not be counted in determining such majority and he shall have no vote except in case of tie, held mayor could not vote and hence, a majority vote was lacking. *State ex rel. v. McIntosh*, 165 Wis. 596, 162 N. W. 670.

Whatever the act may be, whether to pass a resolution, ordinance or by-law, remove an officer, expel a member, grant a franchise, provide for a particular improvement, create or abolish an office or place in the municipal serv-

Act of a majority of a board of commissioners at a meeting duly held is the act of the body. *Moriarty v. Orange Board of Comrs.*, 89 N. J. L. 385, 98 Atl. 465, 100 Atl. 1070.

Law requiring change of grade of a highway to be authorized by a unanimous vote, held inapplicable to a contract for separation of grade under particular law which "inferentially is to be exercised on the principle of a majority rule." *Wittingham v. Milburn Tp.* (N. J. L.), 100 Atl. 854.

Law fixed a quorum at seven. More than three must attend to transact business, fill vacancy in office. *Wescott v. Scull*, 87 N. J. L. 410, 96 Atl. 407.

Law fixed majority of the whole number of members as a quorum held less than a majority cannot remove a city officer. *Doughty v. Scull* (N. J.), 96 Atl. 564.

Council had six members who were present, three voted for a resolution, two against and one excused due to interest; held not carried, as this was not favorable vote of a majority of those present. *Livesey v. Secaucus Borough* (N. J. L.), 97 Atl. 950.

<sup>20</sup> Ordinance creating office, two-thirds vote required. *People v. Coffin*, 282 Ill. 599, 119 N. E. 54.

A charter requirement of a two-thirds vote to remove an officer, held to mean two-thirds of the members who attend the hearing and heard all of the evidence.

*Hawkins v. Grand Rapids*, 192 Mich. 296, 158 N. W. 953.

Two-thirds vote required in passage of an ordinance, giving extra compensation to any public officer, servant, employee, or contractor after service shall have been rendered or contract made. *Vare v. Walton*, 236 Pa. 467, 84 Atl. 962.

The two-thirds vote in each house of congress which is required in proposing an amendment to the constitution is a vote of two-thirds of the members present—assuming the presence of a quorum—and not a vote of the entire membership present and absent. *Missouri Pac. Ry. Co. v. Kansas*, 248 U. S. 276, approved in late decision sustaining the 18th amendment.

<sup>21</sup> To expel a member. *Powell v. Hambrick*, 164 Ky. 340, 175 S. W. 633.

Law: To vacate street or alley three-fourths majority of all the aldermen. In a council consisting of six aldermen a vote of four to vacate, held ineffectual. *Rollo v. Pool*, 280 Ill. 607, 117 N. E. 756; *People v. Atchison, Topeka & Santa Fe Ry. Co.*, 217 Ill. 394, 75 N. E. 573.

Three-fourths vote required to pass improvement ordinance of a general and permanent nature, held ordinance for construction of temporary sidewalk was not of that nature. *Gibson v. Troupe*, 96 Neb. 770, 148 N. W. 944.

ice, fix salaries, etc., to make it the act of the municipality, it must receive the vote prescribed.<sup>22</sup>

**§ 597. Vote necessary in suspending rules.<sup>23</sup>**

**§ 598. Quorum and majority in elections by the council.**

If the law applicable is silent in not requiring a majority vote the common law rule applies. Thus under a charter requiring two-thirds of the aldermen to constitute a quorum for the transaction of business where four are present, being two-thirds, a majority of such quorum in the absence of a law to the contrary is sufficient to elect, a majority of the entire membership in such case is not required.<sup>24</sup>

In a council consisting of the mayor and eight councilmen in a meeting to fill a vacancy in the council due to the death of a member, the mayor and seven councilmen were present, and four voted for N. and three for H. The mayor ruled that there was no election, as neither had re-

<sup>22</sup> *Celaya v. Brownsville* (Tex. Civ. App.), 203 S. W. 153; *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725; *State ex rel. v. Tyrrell*, 158 Wis. 425, 149 N. W. 280; *Reynolds County Tel. Co. v. Piedmont*, 152 Mo. App. 361, 367, 133 S. W. 141, where only two aldermen of a board of four, took action, e. g., passed a resolution.

**Presumption.** Two-thirds vote was required. In absence of record of vote in minutes, held it will be presumed to have received the required vote. Presumption arises that council complied with law. This rule is doubtful. *Harrold v. Huntington*, 74 W. Va. 538, 82 S. E. 476.

<sup>23</sup> Two-thirds of the members elected. *Miller v. Lincoln*, 94 Neb. 577, 143 N. W. 921; *Nelson v. South Omaha*, 84 Neb. 434, 121 N. W. 453.

Three-fourths vote. *Gibson v. Troupe*, 96 Neb. 770, 143 N. W. 944.

The law required a vote of "two-thirds of the members composing the council," to dispense with the rule, held means two-thirds of the members composing the council, whether present or absent. The corporate authorities were: one mayor, one recorder, and five aldermen who constituted the council—seven in all—present six, four voted to suspend the rule. Held, four are not two-thirds of seven, all the members, but two-thirds of six, those present. *Redmond v. Sulphur*, 32 Okl. 201, 120 Pac. 262.

<sup>24</sup> *State ex rel. v. Tyrrell*, 158 Wis. 425, 149 N. W. 280.

ceived a majority vote. An appeal was taken from this decision and three voted to sustain and four to the contrary, and the mayor ruled that a majority of the council had not voted to reverse his ruling, thereupon N. qualified. The question presented was whether the mayor should be included in ascertaining the majority of the members of the council. The law prescribed that in filling vacancies "a majority vote of the remaining members of the city council shall be necessary to fill the same," and the council should consist of a mayor and a specified number of aldermen. The mayor was held to be a member. The council consisted of the mayor and eight aldermen,—nine members, and after the death of one the mayor and seven members, in such case, of course, five members constitute a majority. In such case the court said that: "Whether the mayor shall vote or not is entirely immaterial in determining the number requisite to election."<sup>25</sup>

"A majority of the whole number of members elected" to the council was required to elect a municipal officer. In a council composed of sixteen members, of course, nine votes are necessary to elect, hence, where a member resigns prior to the meeting and only fifteen are present, and one candidate receives eight votes and another six, there is no election, applying the above requirement; however, in filling a vacancy, of an elective office under a law reciting that the council by "a majority vote of the members" may fill it for the unexpired term, it was held that the phrase meant a majority of those constituting the membership of the council at the time of action, and therefore a council of sixteen members, having been reduced to fifteen could elect by eight votes.<sup>26</sup>

Under a law requiring that in elections "a concurrence of a majority of the whole number of elected members of

<sup>25</sup> State ex rel. v. Noth, 173 Ia. 1, 151 N. W. 822, approving Griffin v. Messenger, 114 Ia. 99, 86 N. W. 219; Horner v. Rowley, 51 Ia. 620, 2 N. W. 436.

<sup>26</sup> State ex rel. v. Willis, 47 Mont. 548, 133 Pac. 962, 964.

the council shall be required," in a council of eight and a president, there were present seven members and the president, and a ballot taken, resulted (the president not voting) in A receiving four votes and B, three. On a second ballot B received five votes, including that of the president, and was thereupon declared elected. A's claim that he was elected on the first ballot was denied. The presence of the president without voting was held not a concurrence with a majority voting, that a blank ballot was a mere nullity.<sup>27</sup>

A councilman, who had resigned, voted as a member of the council for a resolution accepting his resignation and appointing his successor, which resolution was adopted by a majority of one. Here it was held that until the retiring councilman had ceased to be a member by the acceptance of his resignation, obviously a successor could not be elected or appointed; that if the resolution be taken as an acceptance of his resignation, his vote thereon must be excluded in ascertaining whether the person named as his successor was elected; and that by the exclusion of the retiring councilman's vote, a tie would result and, consequently, the election was invalid.<sup>28</sup>

### § 599. How quorum affected by interest of members.<sup>29</sup>

It is improper and illegal for a member of a municipal legislative body to vote upon a question in which he is personally interested.<sup>30</sup> However, an ordinance designating a bank as a city depository is not necessarily void, it has been held, because the mayor and one of the council-

<sup>27</sup> *Reese v. State*, 184 Ala. 36, 62 So. 847.

<sup>28</sup> *Commonwealth v. Krapf*, 249 Pa. 81, 94 Atl. 553.

<sup>29</sup> Member of board of education, elected clerk by his own vote, held no election. *State ex rel. v. Goodrich*, 86 Conn. 68, 84 Atl. 99; *State ex rel. v. Fowler*, 66 Conn. 294, 298, 32 Atl. 162, 33 Atl. 1005.

See § 457, ante.

Member cannot vote on own resignation. *Commonwealth v. Randenbush*, 249 Pa. 86, 94 Atl. 555; *Commonwealth v. Krapf*, 249 Pa. 81, 94 Atl. 553.

<sup>30</sup> Vote of member interested necessary to pass an ordinance vacating a highway renders the ordinance invalid. *Krueger v. Ramsey* (Iowa 1919), 175 N. W. 1, 3.



men who voted for it were officers and directors of such bank.<sup>31</sup>

Three members of the council who voted for an ordinance granting privileges in a street to a railroad company and whose votes were necessary to its passage were employees of the company; and it was held "as such they were not interested in the question on which they voted, nor in any sense disqualified to act upon it. Their interest did not extend beyond their salary or wages. They had no interest in the railroad company, nor in the privileges granted to it."<sup>32</sup>

The fact that a member owned property in a proposed assessment district was held, in the absence of a law to the contrary, not a disqualification to vote for a resolution of intention to improve the street although such member's vote was necessary to constitute a majority in favor of the passage thereof.<sup>33</sup>

#### PROCEEDINGS.

### § 601. Special meetings—notice.

Requirements as to the calling of special meetings are generally held mandatory and jurisdictional, and in case of failure to observe them, especially in the absence of notice as prescribed, the legislative body has no power to transact business. On notice to each member, the mayor is frequently empowered to call special meetings.<sup>34</sup>

The general rule is that when the law requires or authorizes notice, written notice is meant, and the absence of notice to one member will render the special meeting illegal, notwithstanding all the other members attend and concur in the action taken. The fact that a majority

<sup>31</sup> Smith v. Winder (Ga. App.), 96 S. E. 14.

<sup>32</sup> Taylor County Court v. Graf-ton (W. Va.), 86 S. E. 924.

<sup>33</sup> Beale v. Santa Barbara (Cal. App.), 162 Pac. 657, 661, following United States Real Estate, etc., Co. v. Barnes, 159 Cal. 244, 43 Pac.

167, distinguishing Capron v. Hitchcock, 98 Cal. 428, 33 Pac. 431, construing and applying statutory provision.

<sup>34</sup> State ex rel. v. Oconto Electric Co., 165 Wis. 467, 161 N. W. 789.

may take such action is not important since the law demands that all confer and deliberate together prior to final decision. The joint and collective judgment of all the members, it appears, it was the purpose of the law to obtain in the public interest.<sup>35</sup>

Sometimes notice of special meetings is required to be served personally or left at the usual place of residence of the members, and that a record of such service shall be made. In such case failure to serve notice by leaving it at the residence of a member known to be in a far distant state does not render the action void, and moreover, failure to make record of the notice was held not vital, since such requirement was viewed as directory merely.<sup>36</sup>

Notice of special meeting of a municipal legislative body may be dispensed with or its necessity waived, by the presence and consent of everyone of those entitled to notice, and who participate in the meeting.<sup>37</sup> A special meeting duly called on notice to all members, whether all attended or not, is legal. And when all members are present voluntarily and participate the meeting is legal for all purposes unless the law provides otherwise.<sup>38</sup>

The requirement that the notice shall designate the object or purpose of the meeting should be substantially observed. Omitting details the notice should state the purpose with certainty and precision. A notice merely stating the object to be to "consider ordinances" is too indefinite. The intent of the law is that the notice shall be sufficiently definite and certain to give information of the character of the business that will be transacted so that the members of the body, and through them the public generally may have some intelligence of the proposed

<sup>35</sup> *Rafferty v. Clermont*, 180 Iowa 1391, 164 N. W. 199.

Omission to give notice as required, invalidates the meeting, if one member is absent. *Orange v. Clement* (Cal. App. 1919), 183 Pac. 189.

<sup>36</sup> *Rafferty v. Clermont*, 180 Iowa 1391, 164 N. W. 199, 202,

203, distinguishing *Barclay v. School Township*, 157 Iowa 183, 138 N. W. 395.

<sup>37</sup> *Schwartz v. Gallup*, 22 N. Mex. 521, 165 Pac. 345; *Tandy & Fairleigh Tobacco Co. v. Hopkinsville*, 174 Ky. 189, 192 S. W. 46.

<sup>38</sup> *Mena v. Tomlinson Bros.*, 118 Ark. 166, 175, 175 S. W. 1187.

action, legislative or otherwise, and some opportunity to consider it.<sup>39</sup>

Failure to file a statement with the clerk of the body setting forth the object of the special meeting as required, is cured where written notice is sent to all of the members and they all attend the meeting.<sup>40</sup>

The business that may be transacted at a special meeting is to be determined by the applicable local law.<sup>41</sup>

## § 602. Power to adjourn meetings.<sup>42</sup>

## § 603. Business that may be transacted at adjourned meetings.<sup>43</sup>

<sup>39</sup> Meacham Contracting Co. v. Kleiderer, 146 Ky. 441, 142 S. W. 720, 722, approving Reuter v. Meacham Contracting Co., 143 Ky. 557, 136 S. W. 1028.

<sup>40</sup> Ward v. Du Quoin, 173 Ill. App. 515.

<sup>41</sup> No vote shall be reconsidered or rescinded at a special meeting unless at such special meeting there be present as large a number of members as were present when such vote was taken. People ex rel v. Davis (Ill. 1918), 120 N. E. 326, 328.

Law forbids the passing of any ordinance, the letting or entering into any contract or allowing any bill for the payment of money at any special meeting or at any adjourned special meeting. Intermela v. Perkins, 205 Fed. 603, 123 C. C. A. 619.

Tax levy at special meeting held void, where law required such action at a regular meeting. Louisiana Western R. Co. v. Duson (La. 1919), 83 So. 455.

<sup>42</sup> "In this country the rule is generally recognized in all bodies exercising legislative functions

that the minority 'less than a quorum has the right to adjourn the meeting to another day for lack of a quorum.'" Mena v. Tomlinson Bros., 118 Ark. 166, 174, 175 S. W. 1187, 1189, citing § 602, vol. 2, ante.

A minority of aldermen convening at the time and place appointed for a regular meeting have power to adjourn to a later date. Rolla v. Schuman, 189 Mo. App. 252, 175 S. W. 241.

<sup>43</sup> Minutes of regular meeting "adjourned to meet January 25, 1912," without naming hour. Meeting held January 25, "at or about the hour for holding regular meetings." Two members were absent. Held, meeting invalid. "It seems to be settled that such a meeting is invalid unless the hour of assembling be specified in the motion to adjourn." Reed v. Wing, 168 Cal. 706, 144 Pac. 964, 966.

Adjourned meeting is a continuation of the same meeting. Mena v. Tomlinson Bros., 118 Ark. 166, 175 S. W. 1187.

This question is to be determined by the local law under parliamentary usage.<sup>43a</sup>

**43a** Meeting pursuant to adjournment of regular meeting, is regular, not special meeting, and continuation of regular meeting, and any business permissible to be transacted at regular, of course, may take place at adjourned. *Dockett v. Old Forge Borough*, 240 Pa. 98, 87 Atl. 421; *Commonwealth v. Fleming*, 23 Pa. Super. Ct. 404.

"A deliberative assembly may lawfully reconsider and annul a vote previously taken at the same meeting. The session of the deliberative assembly which is held in pursuance of a special motion, adopted at a regular meeting, to adjourn the meeting to a fixed time, is a continuation of the regular meeting, and at such session the assembly can do anything that it could have done at the earlier session." *Stiles v. Lambertville*, 73 N. J. L. 90, 62 Atl. 288.

Where a minority of the legislative body convening at the time and place fixed for a regular meeting, adjourned to a subsequent date, such action will be effective to give validity to proceedings carried out at such adjourned meeting at which a majority of the members were present. *Rolla v. Schuman*, 189 Mo. App. 252, 259, 175 S. W. 241.

May enact ordinance, provided there is a quorum present and voting, although the meeting of which this is an adjourned meeting had no quorum. *Parker & Washington v. Field* (Mo. App. 1919), 214 S. W. 402.

Resolution passed at regular meeting which adjourned to defi-

nite date at which adjourned meeting the resolution was reconsidered, held valid, as adjourned meeting was continuation of prior meeting. *Delaware & Atlantic Tel. & Tel. Co. v. Beverly*, 86 N. J. L. 677, 94 Atl. 310.

Ordinance may be finally passed at an adjourned meeting. *Tandy & Fairleigh Tobacco Co. v. Hopkinsville*, 174 Ky. 189, 192 S. W. 46, 50.

Where an adjourned meeting is a continuation of a regular meeting the council may appoint an officer. *Collins v. Sauer*, 89 N. J. L. 139, 97 Atl. 897.

A recess law forbade the passing any ordinance, the letting or entering into any contract or allowing any bill for the payment of money at any adjourned regular or special meeting. Regular session met and "took a recess until 3 o'clock P. M." next day, when council met "after expiration of recess in continuation of yesterday's meeting," and declared another recess "until 4 o'clock P. M." next day, when the act questioned was taken, held valid because it was not an adjourned meeting. Purpose of law was to require business specified to be transacted at a regular meeting. "In the present case the council met at a regular meeting, and finding itself unable to complete or transact the business in hand, took a recess, so termed, until the next day, and in like manner took another recess to another day, at which time the business in hand was completed, and the

**§ 605. Action of legislative body consisting of two branches.**

The passage of an ordinance authorizing a contract for the lighting of the streets is the exercise of legislative power,<sup>44</sup> and hence cannot be passed at a joint session of a body composed of two branches, but must be enacted by each branch sitting separately and apart from the other.<sup>45</sup>

A common council, consisting of a board of aldermen and a board of councilmen, is a legislative body. The body is not required to act in joint session of the two branches composing it. The plan is that matters originate in one board and must be approved by the other. The latter board may amend any measure submitted to it and return it to the former board. "If the board of aldermen agree to such amendment its action as amended shall be the action of the common council." The separate action of the two bodies alone is essential, and when made, constitute the enactment of the common council. Although in procedure the law may not be followed literally, if it constitutes a substantial compliance, the action will be valid.<sup>46</sup>

In a Kentucky case the council was composed of two branches, namely, aldermen and councilmen. An ordinance was passed by the aldermen and afterwards by the councilmen at a special meeting called by the mayor. The law authorized the mayor for special reasons to convene the general council at any time, but he only convened one branch thereof, namely, the councilmen. It was held the ordinance was not legally passed.<sup>47</sup>

In a Pennsylvania case corporate powers were vested in the mayor and council composed of two branches. Under express provision the branches were authorized to hold joint sessions when convenient "for the transaction

council adjourned." Regular session was not brought to close. *Intermela v. Perkins*, 205 Fed. 603, 611, 612, 123 C. C. A. 619.

<sup>44</sup> *Jones v. Schuykill Light, H. & P. Co.*, 202 Pa. 164, 51 Atl. 762; *Kalb v. Tamaqua Borough*, 218 Pa. 126, 67 Atl. 44.

<sup>45</sup> *Elliott v. Monongahela*, 229 Pa. 618, 79 Atl. 144.

<sup>46</sup> *Re Buffalo*, 132 N. Y. S. 926, 148 App. Div. 384.

<sup>47</sup> *Bridges' Son v. Kelly*, 156 Ky. 96, 160 S. W. 771, following *Glazier v. Newport*, 132 Ky. 181, 116 S. W. 262, cited in § 605, vol. 2, ante.

of business as if it were but one council;" a majority of each branch constituted a quorum, and no appropriation of money and no ordinance, it was provided, should be of any force or validity unless concurred in or approved by both branches. An ordinance authorizing the proper officers to enter into a contract to light the streets, fixing the period and price, and involving the expenditure of money, passed at a joint session of both branches, composed of six members each, by a vote of three members of one branch and four members of the other, with three votes of one branch and two votes of the other against; that is, with twelve members of both branches present, and voting seven votes were cast in favor of the ordinance and five against it, but a majority of the members of one branch did not vote for the ordinance. The ordinance was void, because it did not receive the concurrence of the two branches, either in joint or separate sessions. Moreover, the court expressed the opinion that a joint session was not authorized for the purpose of passing an ordinance, but only to transact ministerial or administrative business.<sup>48</sup>

### § 606. Rules for conducting business—parliamentary law.

In the absence of legal provisions or restrictions a municipal legislative body may adopt its own rules or parliamentary usage as to procedure.<sup>49</sup> Often after prescrib-

<sup>48</sup> "When the councils attempt by ordinance or resolution to enact permanent regulations for the government of the city or do any other act of a legislative character the charter contemplates that such action shall be taken with full consideration and deliberation by each branch of the municipal legislature sitting separately and apart from the other. This gives to such legislation as may be enacted the approval of both instead of one of the municipal bodies.

The purpose of the division is that, in legislating for the city, one branch shall be a check on the acts of the other," and hence an ordinance authorizing a contract to light the city streets being legislative in character cannot be enacted at a joint session, but must be passed by each branch sitting separately and apart from the other. *Elliott v. Monongahela City*, 229 Pa. 618, 79 Atl. 144.

<sup>49</sup> E. g. of right and method of reconsideration of votes and ac-

ing rules the body specifies some standard work on parliamentary law to govern the procedure when not inconsistent with its own rules. Actions of municipal legislative bodies, e. g., a motion to lay on the table, are often construed in accordance with general parliamentary law and not in accordance with the exceptional usage of the national house of representatives.<sup>50</sup>

Action taken by a body without rules of procedure, although power was vested in it to adopt them, as the passage of an ordinance, failure to observe parliamentary usage will not invalidate such action.<sup>51</sup>

Actions of municipal legislative bodies are generally liberally construed,<sup>52</sup> unless, of course, the applicable law

tion. *Nevins v. Springfield*, 227 Mass. 538, 116 N. E. 881, 884.

E. g., for the passage of ordinances. *Taylor County Court v. Grafton* (W. Va.), 86 S. E. 924.

Courts are not required to recognize all parliamentary rules that may be adopted by a body of legislative functions. *Reuter v. Meacham Contracting Co.*, 143 Ky. 557, 136 S. W. 1028, approved in *Tuell v. Meacham Contracting Co.*, 145 Ky. 181, 140 S. W. 159.

Municipal legislative body may determine its own rules of procedure in passing ordinances within the legal restrictions prescribed. *People ex rel. v. Strohm*, 285 Ill. 580, 121 N. E. 223.

<sup>50</sup> Particular rule as to motion to take from the table by two-thirds vote, construed as not limiting the right to make the motion at the same meeting at which the matter was laid on the table, but holding that such motion could be made at a subsequent meeting. *People ex rel. v. Davis* (Ill. 1918), 120 N. E. 326, 328.

<sup>51</sup> Where the facts of action can be obtained from the record of the

council, non-compliance with strict technical rules will not overthrow the action. *Corinth v. Sharp*, 107 Miss. 696, 706, 65 So. 888, 64 So. 379, quoting with approval § 606, vol. 2, ante (*McQuillin Mun. Ord.* § 115).

Concerning the corporate acts and proceedings of public and quasi-public corporations, as road districts, courts constantly enforce the rule that every intendment of law is made in favor of the regularity of their action. *State ex inf. v. Hefferman*, 243 Mo. 442, 453, 148 S. W. 90.

<sup>52</sup> Action of municipal council in enacting ordinances should receive a liberal construction. *Corinth v. Sharp*, 107 Miss. 696, 706, 65 So. 888, 64 So. 379, quoting from with approval § 606, vol. 2, ante (*McQuillin Mun. Ord.* § 115).

Placing an ordinance upon its second reading and final passage by one and the same vote, while an irregularity, if no harm results, courts will not interfere. *Robertson Lumber Co. v. Grand Forks*, 27 N. D. 556, 147 N. W. 249, 255.

renders failure to observe mandatory requirements vital.<sup>53</sup>

**§ 607. Form of corporate action—mandatory and directory provisions.<sup>54</sup>**

**§ 608. Taking yeas and nays.<sup>55</sup>**

<sup>53</sup> Mere departure from form not vital unless law so declares. *Rogers v. Mendota*, 200 Ill. App. 254, 257, approving § 606, vol. 2, ante, (*McQuillin*, Mun. Ord. § 115).

<sup>54</sup> Method of enactment to be followed. *Lindsley v. Dallas Consolidated St. Ry.* (Tex. Civ. App. 1918), 200 S. W. 207.

Departure from form prescribed will not affect validity unless the governing law makes such form vital, as by declaring the ordinance void unless the form prescribed is followed. *Rogers v. Mendota*, 200 Ill. App. 254, 257, citing §§ 606, 607, vol. 2, ante, (*McQuillin*, Mun. Ord. §§ 115, 116).

<sup>55</sup> *Louisiana Western R. Co. v. Duson* (La. 1919), 83 So. 455; *Jones v. Sheldon*, 172 Iowa 406, 154 N. W. 592; *Spalding v. Lebanon*, 156 Ky. 37, 160 S. W. 751.

Yeas and nays must be called and recorded, held mandatory. No presumption can be indulged in this respect. *Farmer's Telephone Co. v. Washta* (Ia.), 133 N. W. 361, 363.

Ayes and noes, required to be taken and entered at length upon the journal, held mandatory. *State ex rel. v. Milwaukee Electric Ry. & Light Co.*, 144 Wis. 386, 129 N. W. 623, 629.

All votes by commissioners in commission form, to be by "aye" or "no" and so to appear in min-

utes. *Rome v. Reese*, 19 Ga. App. 559, 91 S. E. 880.

That yeas and nays should be entered of record, held directory only. *Wabash R. Co. v. Gretzinger*, 182 Ind. 155, 104 N. E. 69, 73; *Crosslin v. Warnes-Quilan Asphalt Co.* (Okla.), 177 Pac. 376.

Requirement held not to apply to matters which may be initiated and determined finally by the voters of the city. *State v. Axness*, 31 S. D. 125, 139 N. W. 791, 794.

"On the passage of every by-law or ordinance, resolution or order, to enter into a contract, the yeas and nays shall be called and recorded." *Ogelsby v. Fort Smith*, 105 Ark. 506, 152 S. W. 145.

Constitutional requirement as to taking yeas and nays, held not applicable to municipal councils in the passage of ordinances. *Corinth v. Sharp*, 107 Miss. 696, 705, 65 So. 888, 64 So. 379.

"Yeas and nays shall be taken upon the passage of all ordinances and on all propositions to create any liability against the city or for the expenditure or appropriation of money," held vote on an amendment to an ordinance may be adopted by a viva voce vote. *Robertson Lumber Co. v. Grand Forks*, 27 N. D. 556, 147 N. W. 249, 255.

Ordinance not adopted by yea and nay vote, and vote entered



**§ 609. Reasons for requiring yeas and nays.<sup>56</sup>****§ 610. Reading bills on three different days.**

Although charters usually require bills which result in ordinances or legislative acts especially those of a permanent nature to be read on different days, generally three, prior to their final passage,<sup>57</sup> if the applicable law does

upon the minutes, as required by mandatory charter provision is void. *Elton v. Buttrell*, 142 La. 1025, 78 So. 104; *Marthaville v. Chambers*, 135 La. 767, 66 So. 193; *De Ridder v. Head*, 139 La. 840, 72 So. 374.

Formalities in the passage of an ordinance which are not expressly required to be entered on the minutes, will, in the absence of evidence to the contrary, be presumed to have been observed. *Ruston v. Lewis*, 140 La. 777, 73 So. 862; *State v. Joseph*, 139 La. 734, 72 So. 188.

Failure to take when law so requires invalidates the ordinance. *Arkansas Light & Power Co. v. Cooley* (Ark. 1919), 211 S. W. 664, 666.

<sup>56</sup> That the people generally, and particularly the constituency of the aldermen are entitled to know how their representatives vote on important questions. *State ex rel. v. Milwaukee Electric Ry. & Light Co.*, 144 Wis. 386, 129 N. W. 623, 629.

<sup>57</sup> Ordinance regulating jitney busses need not be read on three different days under Dallas, Texas, Charter. This required in ordinances granting franchises. *Dallas v. Gill* (Tex. Civ. App. 1918), 199 S. W. 1114.

Ordinance of a general or permanent nature to be fully and dis-

tinctly read on three different days unless three-fourths vote shall dispense with rule, held ordinance for construction of temporary sidewalk was not of that nature, and the law did not apply. *Gibson v. Troupe*, 96 Neb. 770, 148 N. W. 944.

Bill to be read at length in each branch, and no bill can become a law on the same day on which it was introduced. Here, ordinance was passed by both branches on same day, but introduced the day before. Held valid. *Re Black Street, Pittsburgh*, 236 Pa. 395, 84 Atl. 918.

Ordinance may be finally passed at an adjourned meeting. The law provided that ordinances shall be passed "at two sessions held on different days." It does not require that the sessions shall be regular or special sessions or meetings. "The argument therefore that the adjourned meeting was only a continuation of the original meeting and not a separate and distinct session cannot prevail." *Tandy & Fairleigh Tobacco Co. v. Hopkinsville*, 174 Ky. 189, 192 S. W. 46, 50.

Law required bills twice publicly to be read and passed at two different sessions held on different days. Object was to secure notice to public of council proceedings. Where an ordinance is read as

not so restrict ordinances may be introduced and passed at a single session.<sup>58</sup>

**§ 611. Ratification of void acts.<sup>59</sup>**

**§ 612. Reconsideration—general powers respecting.**

If the law does not forbid the legislative body may adopt its own rules or parliamentary practice as to the right and method of reconsideration.<sup>60</sup>

"A municipal council, like other legislative bodies, has a right to reconsider under parliamentary law, its votes and action upon questions rightfully pending before it and rescind its previous action."<sup>61</sup> Sometimes the

specified by law, and fails to pass at the second reading it may, in the absence of rule, emanating from the law or council action, be reconsidered and passed within a reasonable time thereafter. *Tuell v. Meacham Contracting Co.*, 145 Ky. 181, 140 S. W. 159.

Charter required reading on three different days, unless two-thirds vote dispense with rule, held two-thirds vote of members composing council, not of two-thirds vote of present members. *Redmond v. Sulphur (Okl.)*, 120 Pac. 262.

Ordinance to be "fully and distinctly read on three different days," but rule or such requirement may be dispensed with by a "two-thirds vote of the members elected." Ordinance read on three different days, and was then amended in substance and passed immediately, without suspending rule. It appeared that more than two-thirds of the members elected were present and voted for the amendment, and for the enactment of the ordinance as amended, held substantial compliance with law.

To hold that there must be a formal vote dispensing with the rule "is altogether too technical for this court to overthrow the will of the council plainly expressed." *Miller v. Lincoln*, 94 Neb. 577, 143 N. W. 921, relying on *Nelson v. South Omaha*, 84 Neb. 434, 121 N. W. 453, where it is said that "the passage of a formal motion to suspend the rules by two-thirds of the members of the council would have been an idle formality. Two-thirds of the council could have carried such a motion, and then a majority vote could have ordered the second reading by title." *Taylor County Court v. Grafton (W. Va.)*, 86 S. E. 924.

<sup>58</sup> *Taylor County Court v. Grafton (W. Va.)*, 86 S. E. 924.

<sup>59</sup> *Irregular act. Hansen v. Anthon (Iowa 1919)*, 173 N. W. 939.

Ratification can take place only at a valid meeting. *Orange v. Clement (Cal. App. 1919)*, 183 Pac. 189.

<sup>60</sup> *Nevins v. Springfield*, 227 Mass. 538, 116 N. E. 881, 884.

<sup>61</sup> *People ex rel. v. Davis (Ill. 1918)*, 120 N. E. 326, 328.

power is limited, as that no vote shall be reconsidered or rescinded at a special meeting unless at such special meeting there be present as large a number of members as were present when such vote was taken. A deliberative body may lawfully reconsider a vote previously taken at the same meeting, and when a meeting is regularly adjourned to a fixed day a reconsideration may occur at the adjourned meeting as such meeting is a continuation of the regular meeting.<sup>62</sup>

Where an ordinance is read the number of times prescribed by law and fails of passage, in the absence of rule emanating from the law or council action, it may be reconsidered thereafter within a reasonable time. A reasonable time depends upon the circumstances of each particular case.<sup>63</sup>

Concerning the right to reconsider a vote to pass an order or ordinance over a mayor's veto there is much diversity of opinion in legislative precedents. "An unbroken legislative practice upon a question partaking so much of the nature of pure parliamentary law would be entitled to weight. But there is no harmony among legislative bodies. On principle in our opinion a vote upon the question, whether a measure shall be passed by either branch of a city council notwithstanding the objection of the mayor, may be reconsidered provided this is in accordance with the rule governing its procedure."<sup>64</sup>

<sup>62</sup> Delaware & Atlantic Telegraph & Tel. Co. v. Beverly, 86 N. J. L. 677, 94 Atl. 310; Stiles v. Lambertville, 73 N. J. L. 90, 62 Atl. 288.

<sup>63</sup> Two months, held reasonable. Tuell v. Meacham Contracting Co., 145 Ky. 181, 140 S. W. 159, reviewing and approving Jersey, etc. Ry. Co. v. Passaic, 68 N. J. L. 110, 52 Atl. 242; People v. Rochester, 5 Lans. (N. Y.) 11, and McGraw v. Whitson, 69 Iowa 348, 28 N. W. 632.

<sup>64</sup> The legislative body consisted

of two branches. Ordinance passed and mayor vetoed it and returned to branch in which it originated, which passed it over veto and sent it to the other branch where it failed to pass over the veto. Notice to reconsider at next meeting was duly given. At the next meeting the motion to reconsider prevailed. The ordinance was then read and passed in concurrence by roll call vote by requisite vote, two-thirds. Held, ordinance passed, as procedure conformed to rules. Nevins v. Spring-

### § 613. Power to rescind prior acts.<sup>65</sup>

If the act has been carried out, the power to rescind does not exist.<sup>66</sup> Thus when a city accepts the provisions of a state act and establishes a free library and reading room thereunder, the act cannot be rescinded thereafter.<sup>67</sup>

There being no question of the enforcement of any contract with outside parties, it is clear that a council can rescind a resolution passed by a former council for the installation of certain public improvements, e. g., electric lights, waterworks and sewerage and providing for a bond issue therefor, and the courts cannot supervise or control such action.<sup>68</sup>

### § 614. Rescinding votes in electing and appointing officers.<sup>69</sup>

After an election, acceptance and qualification by the officer the council cannot reconsider and elect another.<sup>70</sup> However, in event of mistake or fraud in the taking of a ballot another ballot may be taken and the irregular or

field, 227 Mass. 538, 116 N. E. 881, 884, 885.

When mayor returns the ordinance with his objections, held proper motion is to reconsider the vote by which the measure was adopted. Reconsideration of a vetoed ordinance in a particular case. *Rogers v. Mendota*, 200 Ill. App. 254.

Council rule provided that reconsideration may be "at any time during the same meeting or at the first regular meeting held thereafter." "A motion for reconsideration having been once made and decided in the negative shall not be renewed, nor shall a vote to reconsider be reconsidered." *People ex rel. v. Davis* (Ill. 1918), 120 N. E. 326.

<sup>65</sup> *People ex rel. v. Davis* (Ill. 1918), 120 N. E. 326.

<sup>66</sup> *Schieffelin v. Hylan*, 174 N. Y. S. 506.

<sup>67</sup> *State ex rel. v. Bentley*, 96 Kan. 344, 150 Pac. 218.

<sup>68</sup> *Lucas v. Belhaven* (N. C. 1918), 95 S. E. 41, approving *Ward v. Beanfort*, 146 N. C. 534, 60 S. E. 418, 125 Am. St. Rep. 489; *Glenn v. Moore County Comrs.*, 139 N. C. 412, 52 S. E. 58.

<sup>69</sup> *People v. Lower*, 251 Ill. 527, 96 N. E. 346.

<sup>70</sup> *State ex rel. v. Tyrell*, 158 Wis. 425, 149 N. W. 280, 283; *State ex rel. v. Miller*, 62 Ohio St. 436, 57 N. E. 227, 78 Am. St. Rep. 732; *Regina v. Donoghue*, 15 Up. Can. Q. B. 454.

fraudulent one rejected.<sup>71</sup> But the application of the rule to the confirmation of an executive appointment has been denied. Thus an appointment of a member of a board by the mayor and confirmation by the legislative body, it has been held, may be reconsidered.<sup>72</sup>

A resolution appointing extra patrolmen to the police force may thereafter be rescinded and the positions created thereby abolished.<sup>73</sup>

### § 615. Committees.<sup>74</sup>

It is common for committees of municipal legislative

<sup>71</sup> *State ex rel. v. Starr*, 78 Conn. 366, 63 Atl. 512.

<sup>72</sup> A member of a board of education was appointed by the mayor and confirmed by the council. While the motion to reconsider was pending the officer assumed the duties of the office but this was held not to have the effect to give him title to the office. A motion to reconsider was made at the same meeting which was laid on the table to be taken up in accordance with the rules of the council. It was afterwards taken up and prevailed. The question presented was can the council reconsider? Should the same rule apply to confirmation as to election? The court regarded that the weight of authority denied to deliberated assemblies the power to reconsider the election of an officer which it was authorized to make. The court said: "This is not, however, the case of an election—a choice between two or more candidates. The council does not in any sense choose the appointee. The question before us is the approval of the executive act of the mayor. Its action is discretionary and deliberative. No

good reason is apparent why the council may not establish rules in such case for the government of its own procedure in arriving at its final judgment as well as in other cases. Orderly procedure requires some rules for the proper dispatch of its business and deliberation in its conduct. The confirmation of executive appointment should be deliberately considered and the rules applicable to ordinary questions to secure such deliberation may well be applied." *People ex rel. v. Davis* (Ill. 1918), 120 N. E. 326, 329, following *Attorney General v. Oakman*, 126 Mich. 717, 721, 86 N. W. 152, 86 Am. St. Rep. 574, overruling 209 Ill. App. 117, 130-133, holding that when appointments of members of a board are made by the mayor and approved by the council they are completed and the council power is exhausted in the premises. There can be no reconsideration, quoting with approval from § 614, vol. 2, ante.

<sup>73</sup> *Runge v. West Hoboken*, 88 N. J. L. 301, 95 Atl. 972.

<sup>74</sup> *Johnson v. Milwaukee*, 147 Wis. 476, 133 N. W. 627.

bodies to investigate, take evidence and report to the body concerning pending and contemplated legislation in the public interest, and also for other purposes relating to the functions of the body.<sup>75</sup> Such committees are mere agencies or instrumentalities of the governing body.<sup>76</sup>

### § 616. Power to commit for contempt.

Power of municipal legislative bodies to punish for contempt must be granted expressly by constitution or statute. Such power is not to be implied or inferred. Administrative boards or officers including municipal legislative bodies may be invested with power to punish a contumacious witness who refuses to respond to proper inquiries concerning a subject which such bodies are required to act upon.<sup>77</sup>

A municipal legislative body may issue attachment for a witness who refuses to appear before it to testify concerning matters under investigation relating to proposed legislation within its jurisdiction.<sup>78</sup>

<sup>75</sup> Committees may be appointed to take evidence in proceeding to remove municipal officer. *State ex rel. v. Milwaukee*, 157 Wis. 505, 147 N. W. 50.

<sup>76</sup> *Re Holman*, 270 Mo. 696, 195 S. W. 711, 191 S. W. 1105, 197 Mo. App. 70.

<sup>77</sup> *State ex rel. v. Fitzgerald*, 131 Minn. 116, 154 N. W. 750.

<sup>78</sup> *Re Holman*, 197 Mo. App. 70, 270 Mo. 696, 196 S. W. 711, 191 S. W. 1109.

See *Re Sanford*, 236 Mo. 665, 139 S. W. 376.

## CHAPTER 14.

### MUNICIPAL RECORDS.

- § 617. The keeping of records necessary.
- § 618. Who to keep municipal records.
- § 619. Sufficiency of record—presumptions.
- § 620. Same—taking yeas and nays.
- § 621. Municipal records as evidence.
- § 623. Parol evidence to prove record.
- § 624. Parol evidence to show omissions.
- § 625. Same subject—imperfect records—rights of creditors.
- § 626. Amendment of records.
- § 630. Inspection of municipal records.
- § 631. Enforcing delivery of municipal records.

**§ 617. The keeping of records necessary.<sup>1</sup>**

**§ 618. Who to keep municipal records.<sup>2</sup>**

**§ 619. Sufficiency of record—presumptions.<sup>3</sup>**

A record is sufficient if it shows that the ordinance was

<sup>1</sup>Alabama City G. & A. Ry. Co. v. Gladsden, 185 Ala. 263, 64 So. 91, 93, quoting with approval from § 617, vol. 2, ante; Jones v. Sheldon, 172 Ia. 406, 152 N. W. 592; Spalding v. Lebanon, 156 Ky. 37, 160 S. W. 751; Dunn v. Cadiz, 140 Ky. 217, 130 S. W. 1089.

Identification of ordinance by municipal records. Avis v. Allen (W. Va. 1919), 99 S. E. 188.

<sup>2</sup>The mayor of a city in Montana is not required to keep a record of his official acts. The duty to keep such records devolves upon the clerk. Butte v. Nevin, 46 Mont. 380, 128 Pac. 600.

<sup>3</sup>Bell v. Jonesboro, 3 Ala. App.

652, 57 So. 138; Meacham Constr. Co. v. Kleiderer, 146 Ky. 441, 142 S. W. 720; Corinth v. Sharp, 107 Miss. 696, 165 So. 888. For passage of resolution for improvements. Jones v. Sheldon, 172 Iowa 406, 154 N. W. 592.

As to objections and hearing thereof relating to apportionment of benefit assessments in improvement proceedings. Irelan v. Portland (Or. 1919), 179 Pac. 286, 290.

Failure of mayor or any other officer to sign the minutes of the legislative body containing the ordinance involved, held not to invalidate it. Moore v. Thomasville, 17 Ga. App. 285, 86 S. E.

adopted in the manner and by the vote prescribed and duly entered in the minutes as required.<sup>4</sup>

Presumptions may arise as to the sufficiency of municipal records. Thus where the ordinance was duly signed by the mayor it will be presumed that it was legally enacted and presented to him for approval.<sup>5</sup> So the recital in the record or minutes that the ordinance was passed raises a presumption in favor of the regularity of the enactment.<sup>6</sup> So a record duly signed by the mayor and city clerk showing that an ordinance "was passed," but omitting to specify by what vote, it has been held, will be aided by the presumption that the ordinance received the necessary vote.<sup>7</sup> And courts have frequently declared that notwithstanding the omission of certain formalities, the presumption will be indulged that the ordinance was duly passed.<sup>8</sup>

On the other hand, a record merely stating a resolution was adopted, it has been held, does not raise the pre-

641; *Jones v. Carrollton*, 17 Ga. App. 476, 86 S. E. 605.

Sufficiency of record of enactment of penal ordinance because of certain omissions, sustained after the ordinance had been in force for several years. *Moore v. Thomasville*, 17 Ga. App. 476, 86 S. E. 605.

A record recited: "The roll was then called on the passage of the ordinance, and resulted in all members of the council voting 'yea,' except H, who was absent." Held, sufficient to show a two-thirds vote as required. *Buck v. Monroe*, 85 Wash. 1, 47 Pac. 432.

<sup>4</sup> *Cartersville v. McGinnis*, 142 Ga. 71, 81 S. E. 487; *Martin v. Greenville*, 145 Ky. 649, 140 S. W. 1043; *Harrison v. Greenville*, 146 Ky. 96, 142 S. W. 219, holding that pasting a printed copy of the ordinance in the minutes instead

of writing it in did not destroy the record.

Erroneous recital in the record of the date of the passage of an ordinance will not invalidate the ordinance. *Malvern v. Cooper*, 108 Ark. 261, 156 S. W. 845, 847.

Record was duly signed and authenticated but erasure and correction in estimated costs appeared therein; held, record presumptively correct. *Burrus v. Board of Sewer Improvement*, 134 Ark. 10, 203 S. W. 20.

<sup>5</sup> *Monett Elec. L. etc. Co. v. Monett*, 186 Fed. 360.

<sup>6</sup> *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487.

<sup>7</sup> *Harrison v. Greenville*, 146 Ky. 96, 142 S. W. 219.

<sup>8</sup> *Ruston v. Lewis*, 140 La. 777, 73 So. 862; *State v. Joseph*, 139 La. 734, 72 So. 188.



sumption that it received the required vote, e. g., three-fourths.<sup>9</sup>

### § 620. Same—taking yeas and nays.<sup>10</sup>

Under a law requiring the yeas and nays to be taken and recorded, a record is defective if it fails to show that the vote on the final passage of the ordinance was so taken.<sup>11</sup> But a record which contained the names of all voting "yea" and "nays—none," was held sufficient, although it omitted other formalities.<sup>12</sup> And a record reciting that the ordinance was "unanimously adopted and passed the ayes and nays being called resulted in each member present voting in the affirmative," was held sufficient.<sup>13</sup>

On the other hand, a record was held insufficient which recited that all members of the council were present, but their names were not recorded, nor the names of those who voted for or against the ordinance involved, nor was it stated whether the vote was unanimous.<sup>14</sup>

<sup>9</sup> Re Boulevard, Queens Borough, New York, 173 N. Y. S. 28.

<sup>10</sup> Jones v. Sheldon, 172 Ia. 406, 154 N. W. 592; Buck v. Monroe, 85 Wash. 1, 147 Pac. 432.

Directory. Crosslin v. Warner-Quinlan Asphalt Co. (Okl. 1918), 177 Pac. 376.

Requirement, held mandatory. "No presumption can be indulged in this respect." Farmer's Telephone Co. v. Washta (Ia.), 133 N. W. 361, 363.

In absence of record of action or taking of "aye" and "no" vote, parol evidence, held inadmissible. Rome v. Reese, 19 Ga. App. 559, 91 S. E. 880.

<sup>11</sup> The law required all ordinances to be read and considered by sections and the vote on their final passage to be taken by yeas and nays to be entered on the

minutes. The minutes only recited that a certain ordinance "was read and adopted by sections;" held, the record was insufficient to show that the mandatory directions were regarded in the final passage of the ordinance. De Ridder v. Head, 139 La. 840, 72 So. 374.

<sup>12</sup> Ruston v. Lewis, 140 La. 777, 73 So. 862.

<sup>13</sup> Klein v. Reinhardt, 163 Ill. App. 257, 264.

<sup>14</sup> "Plainly enough this was not a compliance with the statute exacting that 'the yeas and nays shall be called and recorded' construed to be mandatory." Sutton v. Mentzer, 154 Ia. 1, 134 N. W. 108, holding also that such law was observed where the record disclosed that the mayor and six councilmen were present; that a motion prevailed that the rules be

In a Michigan case the law required the yeas and nays to be entered on the journal. In a council of six aldermen, the record showed the presence of four whose names were set out; that a bill was presented, etc., "passed to its second and third reading and adopted. Yeas five and nays none." The record was adjudged insufficient.<sup>15</sup>

### § 621. Municipal records as evidence.

"No proposition is better settled or more uniformly recognized than every intendment of law is made in favor of the regularity of corporate acts and proceedings. Where records are kept of municipal acts and proceedings the law is clearly defined that the same are receivable in evidence of the truth of the facts recited; and it would seem to be a rule that when so produced they establish themselves; because they are made by accredited agents, or of a public nature and notoriety and are usually made under the sanction of an oath of office."<sup>16</sup> The general well established rule, therefore, is that where a public corporation is required to keep a record of its proceedings the record is the only competent proof of its actions, or at least is such until it is shown that a record was made, but has been lost or destroyed.<sup>17</sup>

suspended and the ordinance be put on final passage and the names of five councilmen voted yea and were so recorded and nays none. On motion, the ordinance was adopted and the names of the same five were recorded as voting yea and none nay. "The objection that the record does not disclose that the yeas and nays were called is not well taken. That this was done is clearly to be implied from the recital of how each councilman voted. Not otherwise could this have been ascertained and recorded."

<sup>15</sup> *Monett Electric Light, etc. Co. v. Monett*, 186 Fed. 360, 366-

370, following *Steckert v. East Saginaw*, 22 Mich. 104 (set out in § 620, vol. 2, ante).

<sup>16</sup> *State ex inf. v. Heffernan*, 243 Mo. 442, 453, 148 S. W. 90.

<sup>17</sup> *Dayton v. Dayton Board of Education*, 181 Ky. 574, 579, 205 S. W. 678; *Crouch v. Commonwealth*, 172 Ky. 463, 189 S. W. 698, 701.

The only record of the passage of a certain improvement resolution was the record or minutes of the meeting and the original papers themselves; held, failure to spread the resolutions on the pages of a book was not necessarily fatal to their validity. "If this had

A municipality can speak only by its records. Thus where it legally terminated a lighting contract by ordinance, in a suit relating to the performance of the contract, its allegation that the contract is still in force must be treated as ineffectual, since its rights and obligations in this respect are to be determined by the official action of its council.<sup>18</sup>

### § 623. Parol evidence to prove record.

Late decisions adhere to the well established general rule that where the law requires public records of proceedings to be kept such records cannot be contradicted, added to, or supplemented by parol evidence.<sup>19</sup> Official acts of a municipal legislative body can be shown only by its records whenever evidence of those acts is required and they cannot be enlarged or restricted by oral evidence. To permit this would render such records uncertain and unreliable and they would fail to afford any evidence that could be depended upon to show the true proceedings of the municipal body at any of its meetings.<sup>20</sup>

been done such record would doubtless be the best evidence of the action of the council." *Jones v. Sheldon*, 172 Ia. 406, 154 N. W. 592; *Hintrager v. Kiene*, 62 Ia. 605, 15 N. W. 568, 17 N. W. 910.

<sup>18</sup> *Winchester v. Kentucky Utilities Co.* (Ky. 1918), 206 S. W. 296.

<sup>19</sup> Rule applied to board of local improvements. *Belleville v. Miller*, 257 Ill. 244, 100 N. E. 946; *Dunn v. Youmans*, 224 Ill. 34, 79 N. E. 321; *Tandy & Fairleigh Tobacco Co. v. Hopkinsville*, 174 Ky. 189, 197, 192 S. W. 46, 50, approving § 623, vol. 2, ante.

A board can speak only through its records and parol evidence is

inadmissible to supply omissions. *Hardingsburg v. Mercer*, 172 Ky. 661, 664, 183 S. W. 1117, citing § 623, vol. 2, ante. (*McQuillin*, Mun. Ord. § 129).

<sup>20</sup> *Spalding v. Lebanon*, 156 Ky. 37, 160 S. W. 751, 753, citing § 623, vol. 2, ante. (*McQuillin* Mun. Ord. § 129).

A clerk to keep the record having been provided, the municipal corporation can speak only by its record. "Any other rule would be to substitute for the record the uncertain memory of the witnesses." *Dunn v. Cadiz*, 140 Ky. 217, 130 S. W. 1089, quoting with approval part of § 623, vol. 2, ante. (*McQuillin* Mun. Ord. § 129).

Among the numerous applications of the rule, it has been applied to the enactment of ordinances,<sup>21</sup> and failure to call and record the yeas and nays when required.<sup>22</sup>

A clerical error in the record will sometimes be permitted to be shown, as in the revision of the general ordinances the employment of "chapter" instead of "title."<sup>23</sup>

#### § 624. Parol evidence to show omissions.<sup>24</sup>

<sup>21</sup> *Highland Park v. Reker*, 173 Ky. 206, 208, 209, 190 S. W. 706; *Spalding v. Lebanon*, 156 Ky. 37, 160 S. W. 751, 753.

<sup>22</sup> *Rome v. Reese*, 19 Ga. App. 559, 91 S. E. 880.

"It is the recorded yea and nay vote which the statute requires and not the mere fact of such vote. To hold that a fact which the statute provides shall be made a matter of official record may be established by parol would amount to a judicial repeal of a legislative enactment. This is not an action to correct a record, nor is it a case of a lost record of the contents of which secondary evidence is offered; but it is an attempt to establish a legislative act of a town council as it happens to be registered in the uncertain recollections of some of the members of that council ten years after the date of the alleged fact, and to give to this oral testimony the force and effect of a record which the statute specifically requires. This we are quite certain cannot and ought not to be done." *Farmer's Telephone Co. v. Washta* (Ia.), 143 N. W. 361, 363.

<sup>23</sup> "We think that whether the city council had adopted the ordinance was a question of fact,

and if the ordinance was in fact passed that fact would be shown, even if it was necessary in order to do so to show that a mistake in the minutes had been made by reciting that the ordinance was adopted as Chapter 15 instead of Title 15." At the time the council was revising the general ordinances. *Houston E. & W. T. Ry. Co. v. Cavanaugh* (Tex. Civ. App.), 173 S. W. 619, 623.

<sup>24</sup> Denied as to the taking of the yeas and nays. *Rome v. Reese*, 19 Ga. App. 559, 91 S. E. 880; *Farmer's Telephone Co. v. Washta*, 157 Ia. 447, 133 N. W. 361, 363.

"It has been determined in many cases that parol evidence of corporate acts is admissible, as in case of natural persons, and while the records are generally conclusive of what actually took place this rule does not apply when the record on its face shows its incompleteness. Nor are they conclusive when fraud or the like appears." *Watts v. Levee District*, 164 Mo. App. 263, 283, 145 S. W. 129, holding parol evidence of statements of one of the directors as to the object of the meeting admissible, where the record entry was that such director explained the object, but did not contain his statement.

§ 625. Same subject—imperfect records—rights of creditors.<sup>25</sup>

§ 626. Amendment of records.<sup>26</sup>

§ 630. Inspection of municipal records.<sup>27</sup>

§ 631. Enforcing delivery of municipal records.<sup>28</sup>

<sup>25</sup> *Winfield v. Collins*, 143 La. 493, 78 So. 747, 748, citing § 625, vol. 2, ante.

<sup>26</sup> All of § 626, vol. 2, ante, is quoted with approval in *State ex rel. v. Hackmann*, 270 Mo. 56, 63, 64, 195 S. W. 706, holding that a school board had power to amend its record as to calling an election relating to the place, to make the record speak the truth, namely, by having the record read that the election was ordered to be held at the school house.

Amendment of record to show passage of ordinance allowed. *Robbins v. Herrin* (Ill. 1920), 127 N. E. 353.

Omission to record the yea and nay vote in the record may be supplied by correction of the record, and such correction has the same effect as if the yeas and nays had been recorded at the time the vote was taken. *Winfield v. Collins*, 143 La. 493, 78 So. 747, citing §§ 625, 628, vol. 2, ante.

Erroneous entries inadvertently made by the clerk of the minutes or record, e. g., omission, may be corrected by the same legislative body thereafter—eight months—by resolution commanding the

clerk to amend the minutes or records so they will speak the truth where the rights of third persons had intervened or action had been taken on the faith that the erroneous records spoke the truth. *Owens v. Dalton*, 144 Ga. 656, 87 S. E. 913.

<sup>27</sup> As a rule, official records are open to inspection of taxpayers and other interested persons. *Uvalde Asphalt Paving Co. v. New York*, 134 N. Y. S. 50, 149 App. Div. 391.

Discretionary power of board of health to refuse copy of records, certified transcripts, etc., of deaths in certain fatal cases during a designated period and to promulgate and enforce regulations concerning inspection of papers, files, reports, etc. *People ex rel. v. Emerson*, 169 N. Y. S. 297; *Re Allen*, 205 N. Y. 158, 98 N. E. 470.

<sup>28</sup> As the mayor is not required to keep record of his official acts, a carbon copy of a report of accountants of audit of the city books delivered by them to the mayor is his private property, and in an action in claim and delivery the city cannot recover such copy from him. *Butte v. Nevins*, 46 Mont. 380, 128 Pac. 600.

## CHAPTER 15.

### GENERAL NATURE AND REQUISITES OF VALID MUNICIPAL ORDINANCES.

- § 632. Ordinance defined.
- § 633. Difference between ordinance and resolution.
- § 634. Illustrations as to when ordinance is necessary.
- § 635. Same—creating offices and situations.
- § 636. When action may be taken by resolution—illustrations.
- § 637. How ordinances differ from regulations, orders, resolutions, etc.
- § 639. Classification of ordinances.
- § 641. Same—general or special.
- § 643. Force and effect of ordinances.
- § 646. Ordinances must conform to charter.
- § 647. Ordinance must conform to the statutes and general laws of the state.
- § 648. Same—exceptions.
- § 649. Ordinances must harmonize with the public policy and the common law of the state.
- § 650. Ordinances must be enacted in good faith.
- § 651. Ordinances must be definite and certain.
- § 652. Ordinances of cities of same class may vary.
- § 653. Notice to be taken of ordinances.
- § 654. Who are bound by ordinances?
- § 655. Ordinances are operative upon property within the corporate limits.
- § 657. Territorial operation of ordinances.
- § 658. Places within municipal jurisdiction.
- § 662. Judicial limitation of operation of ordinances.
- § 665. Ordinances applying to part of city—improvement ordinances.
- § 666. When do ordinances take effect?
- § 669. Expiration and suspension of ordinances.

#### § 632. Ordinance defined.<sup>1</sup>

A municipal ordinance is a local law or rule prescribed by a municipal government for application within its jurisdiction.<sup>2</sup> It generally imports a command or prohibi-

<sup>1</sup> Local "by-law" or "ordinance" is often used interchangeably. *Commonwealth v. Slocum* (Mass.), 119 N. E. 687.

<sup>2</sup> *Monk v. Moultrie*, 145 Ga. 843, 90 S. E. 71.

tion applicable to all the inhabitants or certain classes in the given community. It is usually designed to compel or prevent action of some sort on the part of some one.<sup>3</sup>

Although an ordinance is not a law in every sense in which the term law is used in constitutions and statutes,<sup>4</sup>

<sup>3</sup> *Mills v. Sweeney*, 219 N. Y. 213; 216, 114 N. E. 65.

<sup>4</sup> § 754, post; § 754, vol. 2, ante; §§ 759, 781, post, §§ 759, 781, vol. 2, ante.

Ordinances are not laws within the meaning of the Pennsylvania Constitutional provision forbidding local or special laws. *Taylor v. Philadelphia* (Pa. 1918), 104 Atl. 766.

Ordinance assailed as unconstitutional, held not a statute of a state within the Judicial Code, forbidding an interlocutory injunction to restrain its enforcement, unless heard by three judges, etc. *Birmingham Waterworks Co. v. Birmingham*, 211 Fed. 497; *Cumberland Telephone Co. v. Memphis*, 198 Fed. 955; *Sperry-Hutchinson Co. v. Tacoma*, 190 Fed. 682.

Under a statute defining "crime," "offense" and "criminal offense" to mean any offense for which any punishment may by law be inflicted, it was held that a violation of a municipal ordinance was not a criminal offense within the contemplation of a statute permitting proof of the conviction of a criminal offense of a witness to affect his credibility, for the reason that an ordinance is not a law. *Meredith v. Whillock*, 173 Mo. App. 542, 553, 158 S. W. 1061.

Under the provision of the Constitution of Pennsylvania declaring that "no law shall extend the

term of any public officer, or increase or diminish his salary or emolument after his election or appointment," a borough ordinance passed pursuant to authority of a legislative act, fixing the salary of the burgess is not such law, but merely a municipal regulation, and moreover a burgess is not a public officer. *Davis v. Homestead Borough*, 47 Pa. Super. Ct. 444, 448, relying on *Baldwin v. Philadelphia*, 99 Pa. St. 164, holding that an ordinance increasing the salary of the mayor "is not a law, and therefore does not come within the constitutional prohibition. It is a mere local regulation for the city of Philadelphia. It has perhaps the force of a law in the community to be affected by it, but it is not prescribed by the supreme power, and it concerns only a subdivision of the state, and does not rise to the dignity of a law." This last case followed in *McCormick v. Fayette County*, 150 Pa. 190, 24 Atl. 667.

A motor vehicle law of the state provided for the payment to the state of fines, etc., collected for its violation, "or of any act in relation to the use of the public highway by motor vehicles now in force or hereafter enacted," etc. It was held that such law did not include fines and penalties prescribed by ordinance, rules or regulations of park commissioners, that it was restricted to such as

(as has often been declared by judicial decisions)

were or should be prescribed by legislative acts, and therefore fines collected by virtue of ordinances, rules and regulations of the park board belonged to the city and not to the state. In New York state it appears that "act" and "bill" are used synonymously with "law."

"No one ever refers to an ordinance, by-law, rule or regulation of a municipal corporation as an act; certainly no one ever used the expression in a statute to convey the idea of an ordinance or other local law; and in section 288 of this very statute we find references to ordinances, rules and regulations of municipal corporations wherever it has these in view; it does not call them 'any act' but refers to them in the usual terminology of the law in reference to such local enactments. The rule is well settled that words having a precise and well settled meaning in the jurisprudence of a country, have the same sense when used in statutes, unless a different meaning is plainly intended (*Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 215), and certainly the expression 'an act' as used in the Constitution and laws of this state and as recognized throughout the jurisprudence of the country, cannot be held to mean ordinances, rules and regulations of a municipal corporation when appearing in a general statute, without anything in the context to indicate that they are used in any different sense than that which usually prevails." *People v. Buffalo*, 161 N. Y. S. 706, affirming 157 N. Y. S. 938, 93 Misc. Rep. 275.

Power to hear and determine a certain class of causes conferred upon courts of general jurisdiction by a valid city ordinance was held to be a jurisdiction conferred upon such courts by law. *Grand Ave. Ry. Co. v. Citizens Ry. Co.*, 148 Mo. 665, 671.

An ordinance authorizing an election to adopt or reject a street railway franchise was held to be a law within the meaning of a statute which renders illegal voting a crime. *Re Siegel*, 263 Mo. 375, 382, 173 S. W. 1, where it is said: "We think the statute under consideration ought to be construed to include an election held pursuant to the ordinance. \* \* \* If one speaks generally of the laws of a certain city or place he is presumed to refer to all laws having a binding force in that locality, and not merely to a certain class of laws by which that vicinity is governed."

After quoting from § 643, vol. 2, ante, that "Valid ordinances of municipal corporations are as binding on the corporators and the inhabitants of the place as the general laws of the state upon the citizens at large," the question is put: Can it be a misnomer to classify as a law that which was enacted by a legislative body and possesses all the force of law? *Re Siegel*, 263 Mo. 375, 381, 173 S. W. 1.

In considering whether the word "law," as found in the constitution of California, was intended to cover only statutes passing by the legislature it was said: "It is useless to attempt to apply ironclad rules of interpretation to be used



it is nevertheless a local law of the municipality,<sup>5</sup> emanating from its legislative authority, and operative within its restricted sphere as effectively as a general law of the sovereignty.<sup>6</sup>

Ordinance as a term of municipal law is the equivalent of legislative action, and hence, its employment in a constitution, statute or charter carries with it by natural, if not necessary implication, the usual incidents of such action.<sup>7</sup> It means something more than a verbal motion subsequently reduced to writing.<sup>8</sup> To create an ordinance, therefore, legislative formality is indispensable.<sup>9</sup>

### § 633. Difference between ordinance and resolution.

A resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of government,<sup>10</sup> and is distinctively a legislative act.<sup>11</sup>

in a constitution. Especially is this true of a word which has a technical as well as a popular meaning. There is no word in the language which in its popular and technical application takes a wider or more diversified signification than the word 'law'—its use in both regards is illimitable." *Miller v. Dunn*, 72 Cal. 462, 465.

<sup>5</sup> *Chesapeake & O. Ry. Co. v. Mellon*, 162 Ky. 738, 172 S. W. 1067.

An ordinance is not a public law but only a local law. *Kansas City v. Clark*, 68 Mo. 588.

<sup>6</sup> See § 643, post; § 643, vol. 2, ante; *Choice v. Dallas* (Tex. Civ. App. 1919), 210 S. W. 753, 756.

"An ordinance passed by legislative authority is a law within the meaning of that term, as used in Constitutions." *Gomeringer v. McAbee*, 129 Md. 557, 99 Atl. 787.

<sup>7</sup> "If this were not so the power to pass an ordinance would not carry with it the power to intro-

duce it, or to refer it, or to amend it, or to move for its reconsideration, or to apply to it any of the legislative or parliamentary usages that universally obtain in deliberative bodies as incidents of legislative action." *Stemmel v. Madison Borough*, 82 N. J. L. 596, 83 Atl. 85.

<sup>8</sup> § 677, post; § 677, vol. 2, ante; § 1875, vol. 4, ante.

<sup>9</sup> Entries upon the minutes of the council is not an ordinance. Nor is permission granted by the council to do a particular thing on verbal motion which was carried unanimously and reduced to writing and incorporated in the minutes by the clerk. An ordinance must be reduced to writing prior to action thereon by the council. *American Construction Co. v. Seelig*, 104 Tex. 16, 133 S. W. 429, affirming 131 S. W. 655.

<sup>10</sup> *Rome v. Reese*, 19 Ga. App. 559, 91 S. E. 880.

<sup>11</sup> § 632, ante.

Charters contemplate that all legislation creating liability or affecting in any important or material manner the people of the municipality, should be enacted by ordinances, and this is true whether the city is acting in its governmental or private capacity. Whenever the controlling law directs the legislative body to do a particular thing in a certain manner the thing must be done in that manner.<sup>12</sup>

"While there are in some instances and for some purposes, fundamental distinctions between an ordinance and a resolution there is no such broad distinction between a resolution and other acts of an administrative or *quasi* legislative board. Almost any one of these acts not required to be by ordinance may be in the form of a resolution."<sup>13</sup>

Where a resolution is in substance and effect an ordinance or regulation, the name given to it is immaterial.<sup>14</sup>

### § 634. Illustrations as to when ordinance is necessary.<sup>15</sup>

If the law requires the deliberative form of an ordinance to accomplish a named act such act can be performed only in this manner,<sup>16</sup> as that the power shall be

<sup>12</sup> Louisville v. Parsons, 150 Ky. 420, 150 S. W. 598; Keenan & Wade v. Trenton, 130 Tenn. 71, 168 S. W. 1056.

The corporation cannot accomplish by an order or resolution that which under its charter can be done only by an ordinance. Bigelow v. Springfield, 178 Mo. App. 463, 162 S. W. 750, 753, citing § 633, vol. 2, ante.

Naming a city street not theretofore named, held a legislative act. Darling v. Jersey City, 80 N. J. L. 514, 78 Atl. 10.

<sup>13</sup> Meade v. Dane County, 155 Wis. 632, 145 N. W. 239, 243.

<sup>14</sup> State ex rel. v. Kelsey, 66 Or. 70, 133 Pac. 806, 809, citing § 633, vol. 2, ante.

Where the requisites for passing an ordinance are not observed a resolution is not an ordinance. American Constr. Co. v. Davis (Tex. Civ. App.), 141 S. W. 1019.

Unless it is shown that the resolution was passed with the same formality observed as is required for the passage of an ordinance to accomplish the thing in question, the presumption arises it was not so passed. Ketchum v. Monett, 193 Mo. App. 529, 533, 181 S. W. 1064.

<sup>15</sup> See § 1875, post; § 1875, vol. 4, ante.

<sup>16</sup> Keenan & Wade v. Trenton, 130 Tenn. 71, 168 S. W. 1053; New Seattle Chamber of Commerce v. Seattle, 88 Wash. 620, 153 Pac. 351.

exercised "by ordinance and not otherwise,"<sup>17</sup> or "only by ordinance unless herein otherwise provided."<sup>18</sup> And when the governing law directs that the appropriate public authorities "shall give notice of each election as may be prescribed by ordinance," an ordinance is necessary, either a general ordinance or an ordinance passed for the particular election.<sup>19</sup>

Ordinances, rules, regulations and by-laws are sometimes construed as intended to be synonymous and are to be promulgated by ordinance and cannot be made effective by resolution.<sup>20</sup>

In construing particular charter and statutory provisions ordinances have been adjudged essential to accomplish the following legislative purposes: to levy a tax;<sup>21</sup> to abate a nuisance;<sup>22</sup> to levy a license tax;<sup>23</sup> to authorize the issuance of a license;<sup>24</sup> to call an election;<sup>25</sup> to provide for and authorize public improvements,<sup>26</sup> as to construct a sidewalk,<sup>27</sup> a sewer,<sup>28</sup> open a street,<sup>29</sup> change an

<sup>17</sup> Charter power "by ordinance and not otherwise," for the erection of asphalt plants, and for the preparation, manufacture and sale of asphalt, and to fix the price, requires the price to be fixed by ordinance. *Shanstrom v. Case* (Or. 1918), 175 Pac. 323.

<sup>18</sup> The council can exercise its powers under this charter "only by ordinance unless herein otherwise provided." *Thornton v. Portland Ry. & Light Power Co.*, 63 Or. 478, 128 Pac. 850.

<sup>19</sup> *Reed v. Wing*, 168 Cal. 706, 144 Pac. 964.

<sup>20</sup> *Eckerson v. Englewood*, 82 N. J. L. 298, 81 Atl. 1070; *Levy v. Elizabeth*, 81 N. J. L. 643, 80 Atl. 498.

<sup>21</sup> *New Seattle Chamber of Commerce v. Seattle*, 88 Wash. 620, 153 Pac. 351.

<sup>22</sup> *Wilson v. Ottumwa*, 181 Ia. 303, 164 N. W. 613, 615.

<sup>23</sup> Resolution adopted by a viva voce vote, held ineffective. *Martha-ville v. Chambers*, 135 La. 767, 66 So. 193.

<sup>24</sup> In Nebraska an ordinance is necessary to authorize the issuance of a license for the sale of intoxicating liquors. *Re Doerr*, 97 Neb. 562, 150 N. W. 625.

<sup>25</sup> *Reed v. Wing*, 168 Cal. 706, 144 Pac. 964.

<sup>26</sup> Improvement, extending and constructing lateral sewers. Resolution is not sufficient. *Jones v. Whitaker*, 33 Okl. 13, 124 Pac. 312.

<sup>27</sup> *Kaynor v. District Court*, 178 Iowa 1055, 158 N. W. 557; *Ketchum v. Monett*, 193 Mo. App. 529, 181 S. W. 1064.

<sup>28</sup> *Schueler v. Kirkwood*, 191 Mo. App. 575, 177 S. W. 760.

<sup>29</sup> *Bigelow v. Springfield*, 178 Mo. App. 463, 471, 162 S. W. 750, citing § 634, vol. 2, ante.

established street grade,<sup>30</sup> provide for street lighting,<sup>31</sup> or for a surface drainage improvement,<sup>32</sup> or to perform an act involving an expenditure of a large sum of money, defining street lines and the condemnation or purchase of lands;<sup>33</sup> to enter into specified contracts and make appropriations in excess of a named amount;<sup>34</sup> appropriations to pay salaries of officers and employees;<sup>35</sup> granting franchises or rights to occupy or use the streets and public ways;<sup>36</sup> granting to another town the right to construct and maintain a sewer in the streets;<sup>37</sup> to transfer the control of waterworks to officers created by statute;<sup>38</sup> and to repeal an ordinance.<sup>39</sup>

### § 635. Same—creating offices and situations.

The creation and abolition of officers and situations in the municipal service and appointments to office are generally required to be by ordinance.<sup>40</sup>

<sup>30</sup> *Landis v. Marion*, 176 Iowa 240, 157 N. W. 841; *Ketchum v. Monett*, 193 Mo. App. 529, 533, 181 S. W. 1064.

<sup>31</sup> *Keenan & Wade v. Trenton*, 130 Tenn. 71, 168 S. W. 1053.

<sup>32</sup> *Jones v. Caruthersville*, 186 Mo. App. 404, 171 S. W. 639.

<sup>33</sup> *Miller v. West View Borough*, 57 Pa. Super. Ct. 14.

<sup>34</sup> Contracts and appropriation in excess of specified amount, e. g., \$500. Motion of council to allow extra pay held insufficient. *Clatskanie State Bank v. Rainer*, 72 Or. 243, 143 Pac. 909.

<sup>35</sup> *Thiel v. Philadelphia*, 245 Pa. 406, 91 Atl. 490.

<sup>36</sup> "No franchise or right to occupy or use the streets, highways, bridges or public places in the city shall be granted, renewed or extended except by ordinance." *American Construction Co. v. See-lig*, 104 Tex. 16, 133 S. W. 429.

Permission to erect telegraph and telephone poles in street and public way, by ordinance as usually viewed as legislative act or resolution, passed as ordinance. *East Tennessee Tel. Co. v. Frankfort*, 143 Ky. 86, 136 S. W. 138, 141 Ky. 588, 133 S. W. 564.

License to use street, not common to all. *Kurtz v. Southern Ry. Co.*, 80 Or. 213, 155 Pac. 367, 156 Pac. 794.

Permitting use of street for all purposes. Separation of grades where a public service railroad crosses streets and prescribing manner in which bridges and viaducts crossing street should be constructed. *Detamore v. Hindley*, 83 Wash. 322, 145 Pac. 462.

<sup>37</sup> *Berwyn v. Berglund*, 255 Ill. 498, 99 N. E. 705.

<sup>38</sup> *Commonwealth v. Elbert*, 244 Pa. 535, 91 Atl. 227.

<sup>39</sup> *Ludwigs v. Walla Walla*, 83

### § 636. When action may be taken by resolution—illustrations.

Where the governing law is silent as to the mode usually a resolution will be sufficient.<sup>41</sup> *A fortiori* where the resolution though denominated such was in fact an ordinance enacted in the same form and manner as such legislation.<sup>42</sup>

If an ordinance or resolution is required, for example, to submit charter amendments to the electors, a mere motion made and carried by the legislative body is insufficient.<sup>43</sup> But it has been held that a motion taking the form of a resolution is equivalent to a resolution.<sup>44</sup>

Wash. 205, 145 Pac. 193, citing § 839, vol. 2, ante (McQuillin, Mun. Ord., § 210).

<sup>40</sup> May create office by ordinance only. *People v. Coffin* (Ill. 1918), 119 N. E. 54.

"Office" or "position" of police patrolman by ordinance, resolution insufficient. *Gillen v. Chicago*, 177 Ill. App. 318, 322.

Creation of office of policeman—resolution held bad. *San Antonio v. Coultriss* (Tex. Civ. App.), 169 S. W. 917.

Cannot create an office nor appoint any subordinate except by ordinance. *Eckerson v. Englewood*, 82 N. J. L. 298, 81 Atl. 1070; *Levy v. Elizabeth*, 81 N. J. L. 643, 80 Atl. 498; *Connors v. Hillman*, 86 N. J. L. 490, 92 Atl. 59.

By charter. appointment of officers, e. g., street commissioner. "Motion" insufficient. *Connors v. Hillman*, 86 N. J. L. 490, 92 Atl. 59.

To abolish municipal office. *Rome v. Reese*, 19 Ga. App. 559, 91 S. E. 880.

When office created either by statute or ordinance it must be abolished in a like solemn manner.

*Cahill v. West Hoboken*, 90 N. J. L. 398, 101 Atl. 417.

<sup>41</sup> *Batesville v. Ball*, 100 Ark. 496, 140 S. W. 712; *Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 498, 502; *Van Valkenburg v. Rutherford*, 92 Neb. 803, 139 N. W. 652; *Keenan & Wade v. Trenton*, 130 Tenn. 71, 168 S. W. 1053.

To construct or repair a levee and to obtain material for such work by contract or condemnation. *Mound City v. Mason*, 262 Ill. 392, 104 N. E. 685.

"The charter being silent with respect to the matter of municipal legislation, the manner of exercising the initiative and referendum powers, when not violative of the state constitution could as well have been prescribed by a resolution as by an ordinance." *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806, 809.

<sup>42</sup> *State ex rel. v. Zorth*, 84 Or. 372, 164 Pac. 958; *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806, 809, citing § 633, vol. 2, ante (McQuillin, Mun. Ord., § 2).

<sup>43</sup> *California-Oregon Power Co. v. Medford*, 226 Fed. 957, 960.

<sup>44</sup> Laying of temporary sidewalk,

Charters do not always require an ordinance to be passed in a different manner from a resolution, nor are forms usually prescribed for the doing of particular acts; for example, grants of permissions to erect and maintain telegraph and telephone poles in the streets and public ways. When the municipal legislative body is given control of the subject without limitation as to form of action, ordinarily a resolution evidencing consent is as effective as an ordinance.<sup>45</sup>

Under particular laws resolutions have been held sufficient in the following instances: creating an office or place;<sup>46</sup> fixing salaries;<sup>47</sup> the determination of the necessity for incurring indebtedness;<sup>48</sup> exercising the power of initiative and referendum;<sup>49</sup> consent to the annexation of territory;<sup>50</sup> employment of an attorney;<sup>51</sup> permission to construct an entrance to a basement;<sup>52</sup> declaring the necessity of a particular improvement;<sup>53</sup> initiation of street improvements;<sup>54</sup> the construction of a sidewalk pursuant to general ordinance which prescribed the method;<sup>55</sup> acts incidental to an improvement authorized and which are required to complete it;<sup>56</sup> acceptance of public work duly authorized.<sup>57</sup>

in form of a motion duly entered of record and carried, held equivalent to a resolution. *Monroe v. Pearson*, 176 Iowa 283, 157 N. W. 849.

<sup>45</sup> *East Tennessee Tel. Co. v. Frankfort*, 141 Ky. 588, 133 S. W. 564.

<sup>46</sup> *San Antonio v. Coultress* (Tex. Civ. App.), 169 S. W. 917, 919.

<sup>47</sup> *State ex rel. v. Kelly*, 154 Wis. 482, 143 N. W. 183; *Brown v. Amarillo* (Tex. Civ. App.), 180 S. W. 654.

<sup>48</sup> *Bernheim v. Anchorage*, 159 Ky. 315, 167 S. W. 139.

<sup>49</sup> *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806, 809.

<sup>50</sup> *Batesville v. Ball*, 100 Ark. 496, 140 S. W. 712.

<sup>51</sup> *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.

<sup>52</sup> *State ex rel. v. Armstrong*, 97 Neb. 343, 149 N. W. 786.

<sup>53</sup> *Miller v. Oelwein*, 155 Iowa 706, 136 N. W. 1045.

<sup>54</sup> *Miller v. Portland*, 62 Or. 26, 123 Pac. 64.

<sup>55</sup> *Dargatz v. Pauley*, 91 Kan. 698, 139 Pac. 419.

<sup>56</sup> Something incidental to a street improvement, as a retaining wall, incident to the grading provided for in the ordinance authorizing all further acts and proceedings necessary to be taken to carry out the improvement to completion to be taken by resolution and not by ordinance. *Hackett v. Hussels* (N. J. L.), 102 Atl. 527.

§ 637. How ordinances differ from regulations, orders, resolutions, etc.

**Regulation.** Under certain constitutions and statutes an ordinance is held not to be a "law" but merely a municipal regulation.<sup>58</sup>

**Motion—order.** Proceedings in the form of a motion duly carried and entered of record are frequently held to be equivalent to a resolution,<sup>59</sup> or order.<sup>60</sup> However, a

Where the improvement of a street has been inaugurated by ordinance a change in grade can be made by resolution. "A reasonable interpretation would be that when the municipal council had by ordinance acquired jurisdiction to improve a highway, any matter germane thereto and necessary to effectuate the object, for which the ordinance was passed might be authorized by resolution." *Meday v. Rutherford*, 52 N. J. L. 499, 19 Atl. 972.

<sup>57</sup> Acceptance of work may be by resolution instead of by ordinance, e. g., construction of aseptic tank. *Schueler v. Kirkwood*, 191 Mo. App. 575, 177 S. W. 760.

<sup>58</sup> *Davis v. Homestead Borough*, 47 Pa. Super. Ct. 444, 448; *McCormick v. Fayette County*, 150 Pa. 190, 24 Atl. 667; *Baldwin v. Philadelphia*, 99 Pa. St. 164.

<sup>59</sup> *Monroe v. Pearson*, 176 Iowa 283, 157 N. W. 849, following *Sawyer v. Lorenzen*, 149 Iowa 87, 127 N. W. 1091, Ann. Cas. 1912C, 940; *Wagner v. Summers*, 33 S. D. 40, 144 N. W. 730.

"Motion made and seconded that L. & W. be granted liquor licenses on lots 1 and 2, carried." Held, resolution. *Sawyer v. Lorenzen*, 149 Iowa 87, 127 N. W. 1091, Ann. Cas. 1912C, 940.

Action of the council appearing in the record in the form of an informal motion made and carried, was held a resolution. "It seems, however, that in substance there is no difference between a resolution and a motion. Indeed, the terms are practically synonymous." *Spokane v. Ridpath*, 74 Wash. 4, 132 Pac. 638.

In a commission form a commissioner moved that an application for a permit to sell intoxicants at retail be granted, that the proper city officer be directed to issue it, and the motion prevailed; held, action was by resolution requiring it to be referred to the electors. Question was whether act was a law, order or resolution? If either it is subject to the referendum. It is clearly not an ordinance; it is a resolution. "Moved by commissioner D that the application of W. P. for a permit to sell intoxicating liquor at retail in the city of Y. be granted and the city auditor be instructed to issue permit." Court: "While couched in the language of a motion it was in effect a determination of that body. \* \* \* The motion as recorded embodied both the motion and the resolution. In adopting that so-called motion the board of commissioners thereby determined

mere motion is not necessarily a resolution.<sup>61</sup>

Authority to do a specified act may sometimes be conferred by the legislative body in the form of a motion.<sup>62</sup> So action may be taken legally by the legislative body by motion or order, as the removal of an officer.<sup>63</sup> A resolution or order is not a local law, but merely the form in which the legislative body expresses an opinion.<sup>64</sup>

### § 639. Classification of ordinances.

Ordinances may or may not involve the expenditure of money,<sup>65</sup> or they may or may not be for the purpose of raising revenue.<sup>66</sup>

As to the exercise of the power of the initiative or referendum ordinances may be legislative or administrative.

### § 641. Same—general or special.<sup>67</sup>

to grant the permit. The effect was the same as if a formal written resolution had been presented and adopted." *State ex rel. v. Summers*, 33 S. D. 40, 144 N. W. 730.

<sup>60</sup> When an oral motion is adopted by a city council it becomes a resolution or order of that body. *Green Bay v. Brauns*, 50 Wis. 204, 6 N. W. 503, approved in *Meade v. Dane County*, 155 Wis. 632, 145 N. W. 239.

<sup>61</sup> *California-Oregon Power Co. v. Medford*, 226 Fed. 957, 960.

<sup>62</sup> For example, to enter into a contract in behalf of the city, to be executed by the fire committee of the city council, to purchase fire apparatus. *American-La France Fire Engine Co. v. Astoria*, 218 Fed. 480.

<sup>63</sup> "The commission shall act only by resolution or ordinance," has no application to the removal by the commission of an officer. It may be by motion or order. *Farish v. Young*, 18 Ariz. 298, 158 Pac. 845, 848.

<sup>64</sup> *Chicago & Northern Pacific R. Co. v. Chicago*, 174 Ill. 439, 444, 51 N. E. 596, approved in *McDowell v. People*, 204 Ill. 499, 502, 68 N. E. 379, 381.

<sup>65</sup> Ordinance fixing term of office does not involve the expenditure of money, as relates to publication, between second and third readings. *Schneider v. Atkinson*, 86 N. J. L. 392, 92 Atl. 81.

<sup>66</sup> Law: Ordinance and resolutions for raising revenue shall originate in the board of councilmen. An ordinance to submit to the voters the question of incurring indebtedness for a sewage disposal plant and a storm water system and to complete a sewer, and an ordinance empowering the mayor to sell bonds voted by electors to raise funds to construct a sewage disposal plant, etc., are not ordinances to raise revenue. *Central Construction Co. v. Lexington*, 162 Ky. 286, 172 S. W. 648.

<sup>67</sup> Law required ordinances of a general or permanent nature to be



**§ 643. Force and effect of ordinances.**

Valid ordinance have within the proper territory the character and effect of a statute and may correctly be said to be in force by the authority of the state.<sup>68</sup>

read on three different days before passage unless rule by three-fourths vote is dispensed with, held ordinance for the construction of temporary sidewalk was not of that nature. *Gibson v. Troupe*, 96 Neb. 770, 148 N. W. 944.

<sup>68</sup>Florida. *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, 775, citing § 643, vol. 2, ante.

Indiana. *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593, 106 N. E. 365, 368.

Maryland. *Baltimore v. Hampton Court*, 126 Md. 341, 346, 347, 94 Atl. 1018; *Rossberg v. State*, 111 Md. 394, 74 Atl. 581; *Hammond v. Haines*, 25 Md. 541; *Baltimore v. Plunet*, 23 Md. 449.

New York. *Crayton v. Larabee*, 220 N. Y. 493, 116 N. E. 355, 358, reversing 147 N. Y. S. 1105, 162 App. Div. 934; *Keenahan v. New York*, 147 N. Y. S. 835, 162 App. Div. 364; *Stubbe v. Adamson*, 159 N. Y. S. 751, 759, 760, 173 App. Div. 305; *Buffalo v. New York*, etc., R. Co., 152 N. Y. 276, 46 N. E. 496; *Rochester v. Simpson*, 134 N. Y. 414, 31 N. E. 871.

Oklahoma. *Strahan v. Ft. Gibson*, 44 Okl. 79, 143 Pac. 674, quoting with approval part of § 643, vol. 2, ante.

Virginia. *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139.

United States. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1; *New Orleans Water Works v. New Orleans*, 164 U. S. 471.

Ordinance enacted pursuant to

statute has the same force as a statute. *Inglewood v. Kew*, 21 Cal. App. 611, 132 Pac. 780, 782.

When the legislature confers power to pass, an ordinance when passed in accordance with such grant is as obligatory as though ordained by the legislature itself. *McCabe v. New York*, 213 N. Y. 468, 107 N. E. 1049, affirming 140 N. Y. S. 127, 155 App. Div. 262; *Buffalo v. New York, Lake Erie & Western R. Co.*, 152 N. Y. 276, 46 N. E. 496.

"An ordinance passed in pursuance of express legislative authority is a law and has the same effect as a local law, and it may prevail over a general law on the same subject." *Gould v. Baltimore*, 120 Md. 534, 538, citing § 643, vol. 2, ante.

Ordinance creating subordinate police officers enacted by command of a statute has force and effect of a state law. *State ex rel. v. Duncan*, 49 Mont. 54, 59, 140 Pac. 95, citing § 643, vol. 2, ante. (*McQuillin, Mun. Ord.*, § 12.)

Where the statutes invest a municipal corporation with power to regulate and fix the compensation of municipal officers the ordinances enacted for that purpose must be treated as though passed by the legislature itself. *Holman v. Macon*, 155 Mo. App. 398, 402, 137 S. W. 16.

The Building Code adopted by the municipal assembly of the City of New York and ratified by the

### § 646. Ordinances must conform to charter.<sup>69</sup>

An ordinance violative of the city charter would be void although adopted by the electors of the city. "The initiative and referendum provisions of the city charter provide an additional method for the adoption of ordinances, but the fact that such method is pursued adds no additional validity to the ordinance. If the ordinance would be void if adopted by the city council, the infirmity would not be cured by its adoption by the vote of the electors of the city."<sup>70</sup>

state legislature, held should be given the same force and effect within the corporate limits as the statute passed by the legislature itself. *Gordon v. Automobile Club of America*, 167 N. Y. S. 585; *People ex rel. v. Miller*, 146 N. Y. S. 403, 161 App. Div. 138, following *New York v. Sailors Snug Harbor Trustees*, 85 App. Div. 355, 83 N. Y. S. 442, affirmed in 180 N. Y. 527, 72 N. E. 1140; *New York v. Foster*, 133 N. Y. S. 152, 148 App. Div. 258, affirming 129 N. Y. S. 620, 72 Misc. Rep. 67.

Ordinance duly enacted fixing rate of speed of railroad trains has the force and effect of law, within the bounds of the municipality which enacted it. *Pittsburgh C. C. & St. L. Ry. Co. v. Macy*, 59 Ind. App. 125, 107 N. E. 486, 491.

Ordinance requiring a railroad to provide a flagman at street crossing made to take effect immediately on publication has the force of law, and like a statute, imposes an obligation regardless of any question of actual notice, or of constructive notice based upon opportunity for information, notwithstanding the hardship that may sometimes result. *Denton v. Mis-*

*souri, K. & T. Ry. Co.*, 90 Kan. 51, 133 Pac. 558, 47 L. R. A. (N. S.) 829.

Correction department rules in New York City, and regulation have the force and effect of statutes. *New York v. Fox*, 178 N. Y. 805.

Resolution as to a building zone adopted by a local board pursuant to a statute, held to have a like force. *West Side Mortgage Co. v. Leo*, 174 N. Y. S. 451.

<sup>69</sup> *Hall v. Macon* (Ga. 1918), 95 S. E. 248, quoting with approval from § 646, vol. 2, ante. (*McQuillin*, Mun. Ord., § 15.)

Ordinance, evading law as to awarding contracts to lowest bidder, held ultra vires. *Riddle v. Atlantic City*, 89 N. J. L. 122, 97 Atl. 790, 792.

An ordinance cannot enlarge a limitation set by charter, e. g., authorizing a cumulative sentence where the charter authorizes the imposition of alternative sentences only. *Reddick v. Milledgeville*, 14 Ga. App. 461, 81 S. E. 384.

<sup>70</sup> *State ex rel. v. White*, 36 Nev. 334, 136 Pac. 110, 50 L. R. A. (N. S.) 195, 199, 200.

**§ 647. Ordinance must conform to the statutes and general laws of the state.<sup>71</sup>**

Unless authorized by express legislative grant,<sup>72</sup> except in matters of purely local and municipal concern, the regulation of which has been committed to the municipality,<sup>73</sup> ordinances repugnant to the general statutes of the state must yield. Where the subject matter of the ordinance in question is obviously one with reference to which the state has the power to enact a general law, the ordinance must harmonize and be consistent with the law of the state subsequently enacted, that is, a statute designed to apply uniformly throughout the state. The enactment of such law will have the effect of superseding or repealing all conflicting or inconsistent charter and ordinance provisions.<sup>74</sup>

<sup>71</sup> Alabama. *Ex parte Rhodes* (Ala.), 79 So. 462, 469, 1 A. L. R. 568, 580, citing § 647, vol. 2, ante. (McQuillin, Mun. Ord., § 16.)

Illinois. *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872.

Maryland. *Levering v. Williams* (Md. 1919), 106 Atl. 176.

New Mexico. *State v. Aztec Ditch Co.* (N. Mex. 1919), 185 Pac. 549.

Tennessee. *Farmer v. Nashville*, 127 Tenn. 509, 156 S. W. 189.

Washington. *State ex rel. v. Woody*, 90 Wash. 501, 156 Pac. 534.

Wisconsin. *Hickman v. Wellaver* (Wis. 1919), 171 N. W. 635.

In case of conflict the statute prevails. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 4 A. L. R. 1480.

<sup>72</sup> § 648, post; § 648, vol. 2, ante.

Ordinance inconsistent with general laws and statutes must be held of no effect unless they are authorized by an express legislative

grant. *Marengo v. Rowland*, 263 Ill. 531, 534, 105 N. E. 235, citing § 647, vol. 2, ante (McQuillin, Mun. Ord., § 16).

<sup>73</sup> *St. Louis v. Meyer*, 185 Mo. 583, 597, 84 S. W. 914; *St. Louis v. Dorr*, 145 Mo. 466, 476, 46 S. W. 976; *Murnane v. St. Louis*, 123 Mo. 479, 27 S. W. 711.

Sections 173, 175, ante.

<sup>74</sup> *St. Louis v. Williams*, 235 Mo. 503, 508, 139 S. W. 340; *St. Louis v. King*, 226 Mo. 334, 348, 126 S. W. 485, 136 Am. St. Rep. 643; *Buffalo v. Lewis*, 192 N. Y. 193, 199, 84 N. E. 809.

Ordinance restricting the signing of initiative petitions to registered voters is invalid, where the constitution gives the legal voters of every city and town power of initiative. *State ex rel. v. Dalles City*, 72 Or. 337, 143 Pac. 1127.

Where state has power and has established the pay of city fireman, an ordinance fixing different compensation is unauthorized and

Illustrations appear in provisions as to penalties,<sup>75</sup> standards for milk sold or offered for sale,<sup>76</sup> regulations

void. *Adams v. Omaha*, 101 Neb. 690, 164 N. W. 714.

Ordinance providing a different mode of collecting fines and costs than prescribed by state law is void. *Peay v. Pulaski County*, 104 Ark. 130, 148 S. W. 491.

An ordinance for street paving specifying property liable for assessment, was held inconsistent with statute. *State ex rel. v. Chillicothe*, 237 Mo. 486, 141 S. W. 602.

Attempt at pocket picking as defined by ordinance, and declared a misdemeanor, held not to conflict with state law. *Greenburg v. Cleveland* (Ohio 1918), 829.

Where the constitution forbids legislature from authorizing any municipal corporation from passing any law inconsistent with the general laws of the state, a poll tax ordinance requiring street tax payable in cash or work on street, and in case of default imposing fine, authorized by state limiting amount of tax was held constitutional. *Ex parte Birmingham* (Ala.), 79 So. 113.

Ordinance relating to fixing gas rates, and forbidding rebate, drawback or other device, pursuant to power conferred by constitution and statute. *Economic Gas Co. v. Los Angeles*, 168 Cal. 448, 143 Pac. 717.

State law treated of accuracy of weighing, the ordinance required the weighing of coal on municipal scales, held no conflict. *State v. Eck*, 121 Minn. 202, 141 N. W. 106.

Fire limit ordinance sustained as not conflicting with state law. *Commercial Club v. Chicago*, St.

*P. M. & O. Ry. Co.* (Minn. 1919), 171 N. W. 312.

Ordinance licensing plumbers, held inconsistent with state statute on the subject. *Houston v. Richter* (Tex. Civ. App.), 157 S. W. 189.

License tax on public vehicles by ordinance held not to conflict with statute on the subject. *Ex parte Holt* (Okla. 1918), 178 Pac. 260.

Ordinance authorizing expenditures beyond appropriation previously made contrary to statute is void, e. g., establishing minimum wage for laborers employed by city, after appropriation for laborers, had been made in budget for the fiscal year. *Shannon v. Rockwood* (Mass. 1918), 121 N. E. 31.

Ordinance forbidding the discharge of firearms within the corporate limits not inconsistent with a statute permitting the killing of any dog caught worrying, etc., sheep or domestic animals. *State v. Wolff*, 173 Iowa 187, 155 N. W. 165.

<sup>75</sup> Ordinance providing a lighter penalty than the statute, held not repugnant. *Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842.

Contra. *Ex parte Brewer* (Tex. Cr. App.), 152 S. W. 1068.

Penalty must be same as in state law where state law and ordinance cover the same offense. *Ex parte Farley* (Tex. Cr. App. 1912), 144 S. W. 530.

Contra. *Tooele City v. Hoffman*, 42 Utah 596, 134 Pac. 558.

<sup>76</sup> An ordinance fixing a lower municipal standard for milk sold or offered for sale, it was held did

as to hours of business, and Sunday restrictions and prohibitions,<sup>77</sup> conditions as to riding and driving in the

not conflict with a state statute on the same subject fixing a higher standard.

A lower municipal standard was not in the nature of an authorization to sell milk in violation of the state law. 'It was merely prohibitory in character. It did not invite or permit a violation of the discretion not to bring the machinery of city courts and city laws into operation to prosecute for violations in excess of the municipal standard. By so doing, the state is left to enforce its own law at all points and to the full limit—the city electing to remain passive when the violation falls between the municipal standard on one side and the state on the other.' St. Louis v. Scheer, 235 Mo. 721, 729, 139 S. W. 434.

'If a person sells dairy products in the city of St. Louis which come up to the standard of strength and purity fixed by the state, then he would be guilty of no offense either under the state law or the ordinances of the city; but if he should sell such products which do not come up to that standard, then he would be liable to punishment under the state law and not under the ordinance, unless the standard of strength and purity thereof should also fall below the standard prescribed by the city ordinance; in which event he would be liable to prosecution and punishment under both.' St. Louis v. Klausmeier, 213 Mo. 119, 129, 111 S. W. 507.

'Whatever the rule elsewhere, in Missouri the doctrine is firmly

established that so long as an ordinance, within the grant of municipal legislative power, falls within (that is, does not exceed, or is not inconsistent with) the state statute there is no conflict or inconsistency in the sense making the ordinance void. Contra, if it goes beyond the limits of the municipal grant of power, if it is in excess of the standard and limitations of the statute, if it add provisions prohibited by the statute, it is in conflict therewith in the sense making the ordinance void. For the voice of the state law-maker, evidenced by his laws passed within constitutional bounds in the exercise of the police power, is the voice of the overlord and as such is paramount to that of the municipal law-maker's. Therefore, there must be such substantial conformity in the latter to the public policy evidenced by the former as makes the one not inconsistent with the other.' St. Louis v. Scheer, 235 Mo. 721, 728, 139 S. W. 434.

Regulating sale and keeping of milk. State v. Stokes, 91 Conn. 67, 98 Atl. 294.

<sup>77</sup> Where state law taxes pool halls and empowers the town to levy a tax on them, without any limitation concerning the number of hours they may be operated each day, an ordinance requiring pool halls to be closed at nine o'clock p. m. under penalty conflicts with the state law and is therefore invalid. Ex parte Farley (Tex. Cr. App. 1912), 144 S. W. 530.

So an ordinance punishing the sale of meat after nine o'clock in

streets and public ways,<sup>78</sup> traffic regulations,<sup>79</sup> and motor vehicle laws prescribing general and particular requirements for the operation of motor vehicles, automobiles, jitney busses, and the registration and licensing thereof,<sup>80</sup> and restrictions as to hours of labor.<sup>81</sup>

the forenoon of Sunday was held not inconsistent or in conflict with the state statute prohibiting the sale of goods, wares and merchandise on Sunday; that is, the ordinance does not become void from the mere fact that it is not as broad as the statute. In such case the ordinance can provide its own limits of punishment, even greater than that of the statute. *St. Louis v. De Lassus*, 205 Mo. 578, 104 S. W. 12.

"All of which means that the city may carve out a lesser offense and remain passive as to the rest and residue of its legislative power on the subject matter." *St. Louis v. Scheer*, 235 Mo. 721, 139 S. W. 434.

<sup>78</sup> Ordinance regulating driving in streets, etc., held not in conflict with statute on the subject. *Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.

<sup>79</sup> State law required motor vehicles, etc., in approaching or passing a street car which has been stopped to take on and discharge passengers to slow down, and if necessary, to stop, and an ordinance required the operator to bring his car to a full stop not less than one foot from the rear end of the street car, held no conflict. *Pullen v. Selma* (Ala. App.), 79 So. 147.

<sup>80</sup> Ordinances and state laws regulating vehicles, automobiles, etc. *Chapman v. Selover*, 159 N. Y. S.

632, 172 App. Div. 858; *Windsor v. Bast* (Mo. App.), 199 S. W. 722; *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82.

Regulating automobiles, ordinance not in conflict with state law on subject. *Craddock v. San Antonio* (Tex. Civ. App.), 198 S. W. 634.

Ordinance regulating vehicle traffic and motor vehicle law of state, held not to conflict. *Freeman v. Green* (Mo. App.), 186 S. W. 1166.

Ordinance regulating jitney busses held to harmonize with state law regulating motor vehicles generally. *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840.

State law may regulate motor vehicles generally, and an ordinance may regulate jitney busses on city streets. *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840.

To obtain a license and pay a license fee for operation of vehicles for hire does not conflict with state law. *Ex parte Parr* (Tex. Cr. App. 1918), 200 S. W. 404.

Ordinance imposing license tax on vehicle held to conflict with state Motor Vehicle Law. *Lincoln v. Dehner*, 168 Ill. 175, 108 N. E. 991.

An ordinance requirement that the number of the city license shall be displayed on the automobile,

The fact that an ordinance makes additional regulations which are reasonable and consistent with the legislative regulatory act does not render it void as conflicting with the state law.<sup>82</sup>

Clearly an ordinance cannot authorize what a statute forbids.<sup>83</sup>

#### § 648. Same—exceptions.<sup>84</sup>

held to be in conflict with a state statute providing that the owner "shall not be required to place any other mark of identity upon his motor vehicle" than the registration number registered by the secretary of state. The court reasoned that the purpose of the statute requiring the display of a number is to facilitate the identification of the motor car whose driver has been guilty of negligence or of an offense against speed regulations, and hence, more than one number displayed on the rear of the machine might tend to confuse and destroy accurate observation or identification. *St. Louis v. Williams*, 235 Mo. 503, 509-513, 139 S. W. 340.

<sup>81</sup> Ordinance fixing day's work for workmen on municipal work at eight hours, held not to conflict with general laws. The Ohio Constitution limits day's work to eight hours except in cases of extraordinary emergencies. *Stange v. Cleveland (Ohio)*, 114 N. E. 261.

Power given city "to regulate," e. g., hospitals, is not authority to regulate in violation of state law, as a woman's ten hour law. *People v. Chicago*, 256 Ill. 558, 100 N. E. 194, 197.

<sup>82</sup> *Mann v. Scott (Cal. 1919)*, 182 Pac. 281.

If the statute on the subject

contains no restrictions, an ordinance enlarging upon its provisions does not conflict therewith. *Dowdell v. Beasley (Ala. App. 1919)*, 82 So. 40.

"It is no objection to municipal ordinances in which no contravention of a state enactment is undertaken or is effected that they afford additional regulations complementary to the end state legislation would effect." *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389, Ann. Cas. 1916C, 1061; *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603, 605; *Standard Chemical & Oil Co. v. Troy (Ala.)*, 77 So. 383, 386.

<sup>83</sup> *St. Louis v. Bernard*, 249 Mo. 51, 155 S. W. 394; *Lucarro (Tex. Cr. App.)*, 197 S. W. 982.

Ordinance cannot contravene a state penal law, nor in effect nullify it; e. g., a law forbidding bawdy houses. *Levy v. State (Tex. Cr. App. 1919)*, 208 S. W. 667.

Allowing moving picture shows to remain open on Sunday where forbidden by statute. *Lucarro v. State (Tex. Cr. App.)*, 197 S. W. 982.

<sup>84</sup> *Ex parte Rhodes (Ala.)*, 79 So. 462, 1 A. L. R. 568, 680, citing § 648, vol. 2, ante. (*McQuillin, Mun. Ord.*, § 17.)

Penal ordinances in Alabama, held, not void although they may

**§ 649. Ordinances must harmonize with the public policy and the common law of the state.**

Thus if a farmer who sells the products of his farm along the street of a city is not a peddler or a hawker within the meaning of the statute on the subject, the city or town cannot by ordinance definition make him one.<sup>85</sup> As the municipal corporation cannot legislate regarding any subject matter unless so authorized by the state, so is the corporation powerless to extend or widen the scope of its powers and by the arbitrary and unauthorized definition of words or terms so as to include more than was intended by the legislature.<sup>86</sup> Accordingly, the rule is well settled that under general grant of power, ordinances which infringe the spirit of a general state law or are repugnant to the general policy of the state are void.<sup>87</sup>

conflict with statutes in view of the constitution, and statutes of that state. *Montgomery v. Orpheum Taxi Co.* (Ala. 1919), 82 So. 117.

<sup>85</sup> "The municipal corporation is powerless, by definition or otherwise, to embrace in an ordinance a class of persons as peddlers and subject them to penalties for the violation of this ordinance who by a general law of the state are within the exception of the terms of the statute defining the class who are in fact peddlers. It may be that the ordinance might include a class not embraced in the statute but about that it is unnecessary to express an opinion but it is certainly clear that a class cannot be embraced in the ordinance that the statute expressly eliminates from the class defined by the statute to be peddlers." Such ordinance is not in harmony with the policy of the state as manifested by its gen-

eral laws on the subject. The regulation and licensing of peddlers and hawkers is one in which the people of the entire state have an interest, and is a subject to which general legislation may be directed, and is not a subject which can be limited to one of strictly municipal concern; and when the state speaks upon the subject by a general enactment its force and vitality are not limited to any particular locality. *St. Louis v. Meyer*, 185 Mo. 583, 595, 597, 598, 84 S. W. 914.

<sup>86</sup> *Trenton v. Clayton*, 50 Mo. App. 535, 539, 540.

<sup>87</sup> *Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285; *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872, Ann. Cas. 1912D, 675, note; *Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192.

Ordinance cannot abridge the exercise of the police powers of the state. *Georgia Ry. & Power Co.*



“Where the state has expressed through legislation a public policy with reference to a subject a municipality cannot ordain in respect to that subject to an effect contrary or in qualification of the public policy so established by the state, unless there is a specific, positive, lawful grant of power by the state to the municipality to ordain otherwise; in which event the specific, positive, lawful grant is from the same source of authority that may and has been expressed through legislation the policy of the state.”<sup>88</sup>

The public policy of the state is found in its constitution and statutes, and when they are silent in its judicial decisions and the constant practice of its public officials.<sup>89</sup>

It is the policy in some states to permit its municipalities to exercise discretion in passing ordinances differing in terms and limits from statutes, so long as those limits are not broader than, and in conflict with, statutory pro-

v. Georgia Railroad Com. (Ga. 1919), 98 S. E. 696.

<sup>88</sup> Ward v. Markstein (Ala.), 79 So. 41, 45, holding void an ordinance relating to liquor regulations and inspecting articles for sale, and amount of liquor a person may receive and possess during a specified period.

“Exercising as it does the legislative power of the state, the test of a municipal ordinance is its reasonableness, which is but another way of saying that a municipality cannot go beyond its delegated powers, if it be a city organized under the statute. If it be a city of the first class operating under a freeholders’ charter, it cannot, except in the exercise of its police power, or in the performance of strictly municipal functions, go beyond the zone of policy as declared by the state legislature; that is, to say, in matters

involving a public policy having no definite relation either to the police power or the governmental functions of a municipality, a city is powerless to act.” Malette v. Spokane, 68 Wash. 578, 123 Pac. 1005, 1007, holding void an ordinance fixing a minimum wage for labor on public improvements done by the city at the cost of property owners, but this holding on a second hearing was overruled and in view of the state constitution conferring a large measure of local self government, it was held that the city might prescribe a higher rate of wage than the prevailing rate, etc., 77 Wash. 205, 37 Pac. 496, with three dissenting judges.

<sup>89</sup> Marengo v. Rowland, 263 Ill. 531, 105 N. E. 285; Zeigler v. Illinois Trust and Savings Bank, 245 Ill. 180, 91 N. E. 1041, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127.

visions,<sup>90</sup> e. g., an ordinance fixing a standard for milk sold or offered for sale.<sup>91</sup>

### § 650. Ordinances must be enacted in good faith.<sup>92</sup>

An ordinance, in the exercise of the police power, affecting personal and property rights must be a reasonable regulation, in good faith designed to accomplish the general public good for which its adoption is authorized.<sup>93</sup> The enactment of an ordinance not in good faith is, in effect, an abuse of public power.<sup>94</sup>

An ordinance which plainly purports to be enacted in the interest of public health, safety or welfare is presumed valid and enacted in good faith,<sup>95</sup> and may be de-

<sup>90</sup> "The police regulations of a municipality may differ from those of the state upon the same subject, if they are not inconsistent therewith." *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872, 874, Ann. Cas. 1912D, 675.

<sup>91</sup> *St. Louis v. Scheer*, 235 Mo. 721, 731, 139 S. W. 434; *St. Louis v. Schulte*, 235 Mo. 734, 139 S. W. 449.

<sup>92</sup> § 672, post; § 672, vol. 2, ante.

*Pease v. Rockford City Traction Co.*, 279 Ill. 445, 117 N. E. 81, reversing 203 Ill. App. 336.

<sup>93</sup> *Rochester v. Gutberlett*, 211 N. Y. 309, 105 N. E. 548; *Sligh v. Kirkwood*, 237 U. S. 52, 61, 35 Sup. Ct. 501, 50 L. ed. 835; *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828, 831; *Emporia v. Atchison, T. & S. F. Ry. Co.*, 88 Kan. 611, 129 Pac. 161; *State ex rel. v. New Orleans*, 141 La. 788, 75 So. 683; *Ex parte Barmore*, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688; *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, 148, citing § 893, vol. 3, ante. (*McQuillin, Mun. Ord.*, § 432.)

<sup>94</sup> Ordinance enacted as a mere

subterfuge to aid a contractor for the removal and disposal of garbage, to purchase the plant or to raise money by bond issue to pay therefor, held ultra vires. *Riddle v. Atlantic City*, 89 N. J. L. 99, 97 Atl. 790, 792.

Ordinance forbidding future burials of human bodies in particular cemetery, not a legitimate exercise of the police power, but in the interest of land owners. *Union Cemetery Assn. v. Kansas City*, 252 Mo. 466, 504, 161 S. W. 261.

<sup>95</sup> *People ex rel. v. Ludwig*, 218 N. Y. 540, 113 N. E. 532, affirming 158 N. Y. S. 208, 172 App. Div. 41.

"A city council, as well as a state legislature, is presumed to act in good faith in legislating on public questions." *Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816, citing *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 32 Sup. Ct. 152, 56 L. ed. 240, where it is said: "We cannot lightly at-

clared invalid only when it clearly appears that the ordinance does not tend in any appreciable degree to that end and that the power to legislate has been exercised arbitrarily in the enactment of an ordinance which is plainly unreasonable.<sup>96</sup>

### § 651. Ordinances must be definite and certain.<sup>97</sup>

A municipal law may be constitutional and yet void for uncertainty.<sup>98</sup> An ordinance or statute should be framed in terms sufficiently clear and definite as to show what it intends to require or prohibit and punish; otherwise it is void for uncertainty.<sup>99</sup> An ordinance by fair

tribute improper motives to the law-making power."

Where the constitutionality of an ordinance is attacked as going too far in the exercise of the police power, e. g., regulation of brick yards, the court will accord good faith to the municipality in the absence of a clear showing to the contrary. *Hadacheck v. Los Angeles*, 239 U. S. 394, 413, 414, 36 Sup. Ct. 143, 60 L. ed. 348, affirming 165 Cal. 416, 132 Pac.

Bad faith in the passage of an ordinance (e. g., regulating and licensing jitney busses) "cannot be presumed by the courts from the mere enactment of regulations not in themselves illegitimate." *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18, 28.

<sup>96</sup> *Stubbe v. Adamson*, 159 N. Y. S. 751, 173 App. Div. 305.

<sup>97</sup> *Carmi v. Miller*, 173 Ill. App. 283; *Chicago v. German Catholic Orphan Asylum*, 160 Ill. App. 45; *State v. Forman*, 50 La. Ann. 1022, 24 So. 603; *Huntsville v. Eatherton* (Mo. App.), 182 S. W. 767, 769; *McGuire v. Wilson* (Mo. App.), 187 S. W. 612; *State v. Gurry*, 121 Md. 534, 88 Atl. 546, 47 L. R. A.

(N. S.) 1087; *Henderson v. Enterprise* (Ala. 1918), 80 So. 115, 118, holding street paving ordinance sufficiently definite in description.

"It might be indefinite when applied to some states of a case, but it was not indefinite as applied to the one we have." *Galanty & Alper v. Maysville*, 176 Ky. 523, 196 S. W. 169, 173.

How far judicial construction may make an ordinance certain and definite, when from context it appears that words have been omitted. *Continental Oil Co. v. Santa Fe* (N. Mex. 1918), 177 Pac. 742.

An ordinance so vague and uncertain as to fail to prescribe a rule of action is wholly inoperative, and the court cannot correct it by construction, but the power that ordained it may only do so. *Continental Oil Co. v. Santa Fe* (N. Mex. 1918), 177 Pac. 742, 745.

<sup>98</sup> *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 137, doubt whether ordinance intended to establish a street or a boulevard.

<sup>99</sup> *Hammond v. Baddeau*, 137 La. 1096, 69 So. 850.

and natural construction must convey a reasonable certainty of meaning; it must be certain to a common intent. "An ordinance is a law of the municipality, and those who must obey it, as well as those whose duty it is to enforce it, must be able to know when it has been violated."<sup>1</sup>

Although the general rule uniformly applied is that an ordinance must be precise, definite and certain in expression,<sup>2</sup> it is equally well settled that courts will not by construction defeat the purpose and objects intended by an ordinance, if it is sufficiently definite to be understood with reasonable certainty.<sup>3</sup>

An ordinance prescribing a penalty for operating an automobile on city streets "in a careless or reckless manner," is too uncertain and indefinite to be capable of enforcement.<sup>4</sup>

In creating an office the ordinance need not declare in

<sup>1</sup> "In the light of the evidence in this case the place wherein this ordinance is expected to be in force is uncertain. The rule requiring a statute or municipal ordinance to be sufficiently certain as to the place of its operation that persons who are expected to obey it will know when they have violated it, is so fundamental and of such general acceptance that no argument is necessary to support it." *Chesapeake & O. Ry. Co. v. Mellon*, 162 Ky. 738, 172 S. W. 1067.

<sup>2</sup> Certainty of ordinance relative to compelling fire escapes in specified buildings. *Birmingham Ry. Light & Power Co. v. Milbrat* (Ala. 1917), 78 So. 224.

Ordinance held void on account of its omissions and vagueness. *Kennahan v. New York*, 147 N. Y. S. 835, 163 App. Div. 364.

Compensation fixed by commissions. *Brown v. Amarillo* (Tex. Civ. App.), 180 S. W. 654.

"Dead load" instead of "live

load," relating to warehouse floors, held not to invalidate. *O'Rourke v. Fulton Bag & Cotton Mills*, 133 La. 955, 63 So. 480.

Ordinance for an election to annex territory, sustained against contention that it was unintelligible. *State ex rel. v. West Plains*, 163 Mo. App. 166, 147 S. W. 163.

<sup>3</sup> *Fred Geiger & Sons v. Schmitt*, 186 Ind. 292, 116 N. E. 50, following *Smith v. New Albany*, 175 Ind. 279, 93 N. E. 73, and citing § 651, vol. 2, ante (*McQuillin, Mun. Ord.*, § 20), sustaining the following ordinance: "No horse shall be left unattended in any street or highway unless securely fastened or unless the wheels of the vehicle to which it is harnessed are securely tied, fastened or chained, and the vehicle is of sufficient weight to prevent it being dragged at a dangerous speed with the wheels so secured."

<sup>4</sup> *Hays v. State*, 11 Ga. App. 371, 75 S. E. 523, 527.

express words or terms that such office is created. Any language showing an intent to create the office is sufficiently definite.<sup>5</sup>

The physical conditions which shall constitute a nuisance need not be defined in an ordinance regulating the installation of water closets, nor need the ordinance specify who shall find the nuisance.<sup>6</sup>

Complexity in an ordinance is not a fatal infirmity, as an ordinance changing the grade of streets, condemning lands and easements, providing for the construction of a viaduct, prescribing means of payment, etc., where all are interdependent parts of one general public improvement.<sup>7</sup>

An ordinance may by reference adopt the provisions of other laws, either statutes or ordinances.<sup>8</sup> Thus an ordinance may provide that one adjudged guilty of a misdemeanor under the laws of the state shall be punished by the municipality. Such ordinance is sufficiently definite.<sup>9</sup>

## § 652. Ordinances of cities of same class may vary.

Constitutional provisions designed to secure the uniform operation of law have no application to ordinances of municipalities.<sup>10</sup>

## § 653. Notice to be taken of ordinances.

The law will presume that the inhabitants of the municipality know the provisions of its ordinances.<sup>11</sup>

<sup>5</sup> *People ex rel. v. Chicago*, 202 Ill. App. 105, 114.

<sup>6</sup> *Chicago v. Atwood*, 269 Ill. 624, 110 N. E. 127.

<sup>7</sup> *Kansas City v. Woerishoeffer*, 249 Mo. 1, 39, 40, 155 S. W. 779.

<sup>8</sup> Ordinance may properly refer to state statutes by chapter and section numbers, and when reference is made to such numbers not existing the reference will be treated as nugatory, "but under the maxim '*falsa demonstratio non nocet*' this reference can do no

harm if there is sufficient otherwise to identify the act intended to be incorporated." *Southern Operating Co. v. Chattanooga*, 128 Tenn. 196, 159 S. W. 1091, 1093, citing section 677, vol. 2, ante. (*McQuillin, Mun. Ord.*, § 137.)

<sup>9</sup> *Sloss-Sheffield Steel Co. v. Smith*, 175 Ala. 260, 57 So. 29; *Montgomery v. Davis*, 15 Ala. App. 606, 74 So. 730.

<sup>10</sup> *Welch v. Cleveland (Ohio)*, 120 N. E. 206.

<sup>11</sup> *Boonville v. Stephens*, 238 Mo.

**§ 654. Who are bound by ordinances?**<sup>12</sup>**§ 655. Ordinances are operative upon property within the corporate limits.**<sup>13</sup>**§ 657. Territorial operation of ordinances.**<sup>14</sup>

Although the general rule is that an ordinance designed for the city at large operates throughout its boundaries, whatever their change,<sup>15</sup> an existing ordinance fixing a rate for water service, supported by a valuable consideration, between a private consumer who lives outside the city limits and a public utility company operating within the city, it has been held, is not abrogated, and hence, the parties are not bound by the city's water rates *ipso facto* when the consumer is taken into such city by the extension of its limits. The rule that in all ordinance matters and things the ordinances of an annexing town or city are

339, 357, 141 S. W. 1111, approving *Palmyra v. Morton*, 25 Mo. 593, 597.

<sup>12</sup> "The ordinance of the city regulating and governing the supply of water to citizens constitute such rules and regulations which are not only binding upon the city, but in faith of which the consumer will be presumed to have entered into such relationship with the city and such ordinances held to be alike binding on each." *Fairbank Co. v. Chicago*, 153 Ill. App. 140, 144.

<sup>13</sup> Knowingly permitting his hog to run at large within the town, applicable, of course, to non-resident who is liable "regardless of whether he resided within or without the limits of the municipality." *Marshall v. Patterson*, -105 Ark. 698, 150 S. W. 694, following *De Queen v. Fenton*, 100 Ark. 504, 140 S. W. 716.

Ordinances operate against resi-

dents and non-residents within the municipality, and also against the property of non-residents situated within the corporate limits of the city. *Shows v. Dallas* (Tex. Civ. App.), 172 S. W. 1137.

<sup>14</sup> Cannot operate beyond the local police jurisdiction of the municipality. *Standard Chemical & Oil Co. v. Troy* (Ala. 1917), 77 So. 383, 385, citing § 657, vol. 2, ante.

Restricted to territorial limits, etc. *Mineral County Court v. Piedmont*, 72 W. Va. 296, 78 S. E. 63.

An ordinance limited to the municipality by which enacted cannot in any event have an extramural effect. *Hall v. Johnson* (Or.), 169 Pac. 515.

<sup>15</sup> § 293, ante; § 293, vol. 1, ante; § 657, vol. 2, ante; *People v. Detroit United Ry. Co.*, 162 Mich. 460, 463, 125 N. W. 700, 127 N. W. 748, 17 Det. Leg. N. 673.

at once and automatically extended over the annexed territory does not affect existing private contracts which were not subject to regulations by ordinance at the time they were made.<sup>16</sup>

### § 658. Places within municipal jurisdiction.

An ordinance directing the filling in of named lands belonging to the state, is unauthorized since a city has no power to order the filling in of such lands.<sup>17</sup>

### § 662. Judicial limitation of operation of ordinances.

In New Jersey it has been declared: "The rule is well settled in this state that an ordinance that may operate reasonably in some instances or circumstances and unreasonably in others is not wholly void and should not be set aside *in toto*." <sup>18</sup> "It is not necessary that an entire ordinance should be annulled in order that objections to certain applications of it may be questioned as and when they are placed before the courts for specific determination. \* \* \* The proper judicial action, if the objection to certain provisions of an ordinance lie well founded is not to vacate the ordinance *in toto*, but refuse to give effect to the part of it that is, on this hypothesis, invalid." <sup>19</sup>

### § 665. Ordinances applying to part of city—improvement ordinances.<sup>20</sup>

<sup>16</sup> State ex rel. v. Eastin, 270 Mo. 193, 202-209, 192 S. W. 1006, overruling State ex rel. v. Geiger, 246 Mo. 74, 154 S. W. 486.

<sup>17</sup> Re Willard Parker Hospital, 217 N. Y. 1, 111 N. E. 256, affirming 151 N. Y. S. 641, 166 App. Div. 106.

<sup>18</sup> Schwarz Bros. Co. v. Jersey City Board, 84 N. J. L. 735, 87 Atl. 463, affirming 83 N. J. L. 81, 83 Atl. 762; Neuman v. Hoboken, 82 N.

J. L. 275, 82 Atl. 511; North Jersey St. Ry. Co. v. Jersey City, 75 N. J. L. 349, 67 Atl. 1072.

<sup>19</sup> Cain v. Bayonne, 81 N. J. L. 15, 78 Atl. 663, following Pennsylvania R. R. Co. v. Jersey City, 47 N. J. L. 286, and Gaslight Co. v. Rahway, 58 N. J. L. 510, 34 Atl. 3.

<sup>20</sup> Public improvement ordinances must necessarily apply to districts or parts of the city. Bige-

## § 666. When do ordinances take effect.<sup>21</sup>

## § 669. Expiration and suspension of ordinances.<sup>22</sup>

low v. Springfield, 178 Mo. App. 463, 162 S. W. 750, 753, citing § 665, vol. 2, ante.

<sup>21</sup>When passed and approved by mayor; posting and publication is not essential to its validity. State ex rel. v. Dalles City, 72 Or. 337, 143 Pac. 1127.

If law does not provide otherwise ordinance may be made effective immediately upon publication. Denton v. Missouri, K. & T. Ry. Co., 90 Kan. 51, 133 Pac. 558, 47 L. R. A. (N. S.) 829.

Initiative; adopted by voters, thirty days after adoption. Re Doerr, 97 Neb. 562, 150 N. W. 625.

Franchise not until accepted; conditions of ordinance held to be conditions precedent. Until performed ordinance cannot become effective. Allegheny v. Millville, Etna & S. St. Ry. Co., 159 Pa. 411, 28 Atl. 202.

Improvement ordinance, under some charters take effect in the order in which they are approved by mayor where passed at same session. Marshal v. Elgin (Tex. Civ. App.), 143 S. W. 670.

Emergency necessary for preservation of health, peace, safety, etc., may be declared. Shryock v. Zanesville, 92 Ohio St. 375, 110 N. E. 937; Thielke v. Albee, 79 Or. 48, 153 Pac. 793.

Effect of declaring emergency, construction. Michelson v. Sacramento, 173 Cal. 108, 159 Pac. 431.

Under some laws an ordinance declaring an emergency is in force from its passage, without publica-

tion. Pittsburgh, C. C. & St. L. Ry. Co. v. Macy, 59 Ind. App. 125, 107 N. E. 486, 492.

Whether such emergency existed as to warrant its being made effective at once rests in the judgment and discretion of the council. State ex rel. v. Dillon (Fla. 1918), 79 So. 29.

In case of public emergency, the declaration of the legislative body as to its existence is ordinarily exclusive. Day v. State, 68 Tex. 526, 4 S. W. 865; McLane v. Paschal, 8 Tex. Civ. App. 398, 28 S. W. 711.

The charter provided that no ordinance should be finally passed on the day of its introduction, except in case of public emergency. The ordinance involved provided for the increase of the salary of the mayor. It was passed on the day it was introduced with the declaration of public emergency, held valid. Bradshaw v. Marmion (Tex. Civ. App.), 188 S. W. 973.

Whether an emergency clause is valid, it affects only the time the ordinance shall go into operation, and if invalid it does not render the ordinance void. Barton v. Recorder's Court, 60 Or. 273, 119 Pac. 349, relying on Sears v. Multnomah County, 49 Or. 42, 88 Pac. 522.

<sup>22</sup>Stubbe v. Adamson, 220 N. Y. 459, 116 N. E. 372, affirming 159 N. Y. S. 751, 173 App. Div. 305.

Action to annul alleged void ordinance, having been in effect repealed or annulled by legislative act, denied. Burns National Detec-



Apart from a restriction in the ordinance, or a limitation in the law from which it emanated, its continuance in force will be presumed until the contrary is shown.

tive *Agency v. New Orleans*, 135 La. 163, 65 So. 16.

Valid ordinance presumed to continue in force until contrary appears. *Pittsburgh, C. C. & St. L. Ry. Co. v. Macy*, 59 Ind. App. 125, 107 N. E. 486, citing § 850, vol. 2, ante.

Unofficial announcement that an ordinance as to fire limits, wooden buildings, etc., after a great fire would be suspended as to temporary wooden buildings, etc., held ordinance continued in force unaf-

ected in the slightest degree. *Howell v. City of Hamburg Co.*, 165 Cal. 172, 131 Pac. 130.

Ordinance regulating speed was violated by a railroad which was repealed after violation and accident and before trial in suit involving its violation. Held, ordinance can be admitted in evidence since the right of action was not given by the ordinance. *Gibbons v. Aurora, E. & C. R. Co.*, 263 Ill. 266, 104 N. E. 1063, affirming 177 Ill. App. 572.

## CHAPTER 16.

### THE ENACTMENT OF ORDINANCES.

- § 671. What body to enact ordinances.
- § 671a. Power to enact ordinances.
- § 672. The ordinance must relate to corporate as distinguished from private affairs.
- § 672a. The ordinance must relate to municipal as distinguished from state concerns.
- § 673. Ordinances regulating civil rights and liabilities.
- § 674. Same — civil action for breach of ordinance.
- § 676. Charter method of enactment exclusive.
- § 677. Form of ordinance.
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- § 680. Ordinance need not recite necessity of enactment.
- § 681. One subject and title.
- § 682. Same—illustrative cases.
- § 685. Title in revision of ordinance.
- § 686. Preamble.
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- § 688. Time of introduction and passage.
- § 689. Same—double board.
- § 691. Signing and approval of ordinance by mayor.
- § 692. Veto of mayor.
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- § 694. Ordinances passed and approved by electors—initiative and referendum.
- § 694a. Same — exercising the power.
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- § 695. Recording ordinances.
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- § 697. Publication of ordinances and notice of pendency.
- § 698. Time and frequency of publication.
- § 699. Method of publication.
- § 700. Amendment on passage.
- § 702. Consideration of mayor's veto.
- § 703. Courts will not inquire into legislative motives.
- § 704. Same—rule limited—ministerial acts.
- § 705. Injunction to restrain passage of ordinance.
- § 705a. Injunction to restrain enactment of ordinance by initiative.
- § 706. Validating void ordinance by municipality.
- § 707. Curative power of legislature over void ordinances.

#### § 671. What body to enact ordinances.

Apart from organic limitation, if any, the legislature has power to grant authority to pass local laws not only, but also power to prescribe the method and the agency

through or by whom the same may be enacted.<sup>1</sup> It may provide for direct legislation in cities and towns by the initiative and referendum,<sup>2</sup> or delegate to general or local boards the authority to enact ordinances of a specified kind.<sup>3</sup>

### § 671a. Power to enact ordinances.

In the powers of municipal corporations, authority to enact and enforce ordinances is frequently expressly recited.<sup>4</sup> Aside from curative legislative act,<sup>5</sup> the proposi-

<sup>1</sup> Tomlison Bros. v. Hoges, 110 Ark. 528, 162 S. W. 64.

A village board may pass ordinances if power so to do is conferred by the legislature. People v. Paynter, 197 Ill. App. 78.

<sup>2</sup> Tomlinson Bros. v. Hodges, 110 Ark. 528, 532, 162 S. W. 64, citing § 671, vol. 2, ante.

Ordinance may be enacted only by board of commissioners, (commission form) or by electors under power of the initiative and referendum. Holland v. Cranfill (Tex. Civ. App.), 167 S. W. 308.

<sup>3</sup> Relating to public safety. Commonwealth v. Slocum (Mass. 1918), 119 N. E. 687; Commonwealth v. Maletski, 203 Mass. 241, 247, 87 N. E. 245.

"There can be no valid ordinance until it is properly passed by the legally constituted governing department of a municipality." Monk v. Moultrie, 145 Ga. 843, 90 S. E. 11.

Police and fire commissioners may adopt ordinances. Skowhegan v. Heselton, 117 Me. 17, 102 Atl. 773.

Board of park commissioners given power to adopt ordinances. Board of Park Comrs. v. Nashville, 134 Tenn. 612, 185 S. W. 694, 700.

Board of health; concurrent with

commission council. New Orleans v. Sanford, 137 La. 628, 68 So. 35.

Municipal explosives commission of New York empowered by statute to make regulations for "the better prevention of fires," and when made such regulations constitute a chapter in the code of ordinance in the city. Re McIntosh, 211 N. Y. 265, 105 N. E. 414, affirming 145 N. Y. S. 763, 160 App. Div. 563.

Corporations created to preserve and cultivate forests and flora and fauna, usually known as forest preserve districts, are frequently given power to enact ordinances. Perkins v. Cook County Comrs., 271 Ill. 449, 111 N. E. 580.

<sup>4</sup> New Orleans v. Le Blanc, 139 La. 113, 71 So. 248; Corinth v. Sharp, 107 Miss. 696, 704, 65 So. 888, 64 So. 379.

Power "to make and enforce local police sanitary and other laws and regulations." Ex parte Hitchcock (Cal. App.), 666 Pac. 849.

Council given power to adopt ordinances not inconsistent with the constitution and statutes. Ex parte Bogle (Tex. Cr. App.), 179 S. W. 1193.

<sup>5</sup> Section 707, post; section 707, vol. 2, ante.

tion is indisputable that no given ordinance can have force or vitality unless it emanates from power existing in the municipal corporation at the time of its adoption.<sup>6</sup> In brief, an ordinance can be sustained only on express or necessarily implied power.<sup>7</sup>

The existence of inherent power to pass and enforce police ordinances has been denied.<sup>8</sup> Moreover, general power to enact ordinances is to be restricted to the legislative powers committed to the particular municipality.<sup>9</sup>

The power to enact ordinances may be granted by the constitution,<sup>10</sup> or it may be found in the charter or a legislative act applicable in express terms, or it may exist by implication as necessary, not simply desirable, in order to enable the municipality to carry out the powers expressly granted, or it may be essential, not merely convenient, to the declared objects and purposes of the corporation.<sup>11</sup> Therefore, one claiming under an ordinance must be able to point to existing power, either granted in express terms, or in terms from which the power is fairly and necessarily implied.<sup>12</sup> Here as in the exercise of every power by the municipal corporation should any reasonable doubt arise as to the existence of the power such doubt will be resolved against the corporation and the

<sup>6</sup> *Greene v. Cook*, 219 Mass. 121, 106 N. E. 573; *St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777; *McCabe v. New York*, 213 N. Y. 468, 107 N. E. 1049, affirming 140 N. Y. S. 127, 155 App. Div. 262; *Mobridge v. Brown*, 39 S. D. 270, 164 N. W. 94.

<sup>7</sup> *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378; *Rosa v. Brandon*, 71 Or. 510, 142 Pac. 339; *Jeffery v. Smith*, 63 Or. 514, 128 Pac. 822; *MacDonald v. Lane*, 49 Or. 530, 90 Pac. 181.

<sup>8</sup> *Bishop of Chicago v. Palos Park*, 286 Ill. 400, 121 N. E. 561.

<sup>9</sup> *United Fuel & Gas Co. v. Commonwealth*, 159 Ky. 34, 166 S. W.

783, denying power to impose a fine on a utility corporation furnishing gas to the local inhabitants for unreasonable discrimination.

<sup>10</sup> *Grobbe v. Detroit Water Comrs.*, 181 Mich. 364, 149 N. W. 674; *State ex rel v. MacQueen*, 82 W. Va. 44, 95 S. E. 666.

<sup>11</sup> *Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285; *Chicago v. M. & M. Hotel Co.*, 248 Ill. 264, 93 N. E. 755; *Chicago v. Weber*, 249 Ill. 304, 92 N. E. 859, 34 L. R. A. (N. S.) 306.

Section 352, vol. 1, ante, § 352, ante; § 724, vol. 2, ante, § 724, ante.

<sup>12</sup> *Stoessand v. Frank* (Ill. 1918), 119 N. E. 300.

power denied.<sup>13</sup> And in ascertaining the existence of the power courts often follow the rule of strict construction, especially if the ordinance involved affects the personal liberty, property, immunity or privilege of the individual, e. g., compulsory vaccination.<sup>14</sup> Whether a strict or liberal construction should be invoked in determining the power to pass any given ordinance, like the exercise of other powers, will depend upon the nature of the legislation under review and the particular conditions.<sup>15</sup>

The legislature has the undoubted authority to authorize municipalities to pass ordinances relating to any of the subjects of municipal regulation, except such as may be inhibited by the constitution or the municipal form of government recognized in the particular jurisdiction.<sup>16</sup>

An ordinance may derive its validity from several different grants of power and not depend solely upon any single clause or section of a statute or the municipal charter.<sup>17</sup> And by the state organic law power may be given to voters of the municipality "to propose an ordinance on any subject by them deemed vital or material to their general welfare, without limitation or restriction as to

<sup>13</sup> *Chicago v. Mandel Bros.*, 264 Ill. 206, 106 N. E. 181; *Chicago v. Ross*, 257 Ill. 76, 100 N. E. 159, 43 L. R. A. (N. S.) 205.

Section 353, ante; § 353, vol. 1, ante.

<sup>14</sup> *Waldschmit v. New Braunfeld* (Tex. Civ. App.), 193 S. W. 1077.

<sup>15</sup> Sections 353 and 354, ante; §§ 353 and 354, vol. 1, ante.

<sup>16</sup> *Spear v. Ward* (Ala.), 74 So. 27, 29.

Sections 321 to 324, ante; §§ 321 to 324, 351, vol. 1, ante.

Aldermen "may pass any ordinance which they may deem wise and proper for the good order, good government, or general welfare of the city, provided it does not contravene the laws and constitution of the state." State v.

*Darnell*, 166 N. C. 300, 81 S. E. 338.

The legislature may, if not forbidden by the constitution, delegate to municipal corporations authority to enact ordinances for the purpose of local government. Indeed, the constitution recognizes the existence of such power by providing that local laws shall not be inconsistent with the general laws of the state. *Tomlinson Bros. v. Hodges*, 110 Ark. 528, 162 S. W. 64.

<sup>17</sup> *Williams v. Chicago*, 266 Ill. 267, 107 N. E. 599; *Spiegler v. Chicago*, 216 Ill. 114, 74 N. E. 718; *Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230; *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44, 48, L. R.

time or extent if they pursue the mode prescribed for presenting the legislation they demand.”<sup>18</sup>

In the absence of a valid provision to the contrary the council of a municipal corporation having authority to legislate on any given subject may exercise that authority at will by enacting or repealing an ordinance in relation to such subject-matter.<sup>19</sup>

**§ 672. The ordinance must relate to corporate as distinguished from private affairs.<sup>20</sup>**

An ordinance cannot grant a special privilege to a single individual to conduct a private business of a character subject to general police regulations and in which no public interest can be said to be subserved, e. g., a restaurant with the privilege in connection therewith of selling and serving or otherwise disposing of wine, malt and spiritous liquors in sealed packages.<sup>21</sup>

**§ 672a. The ordinance must relate to municipal as distinguished from state concerns.**

It must be local legislation, as an ordinance defining conspiracies to injure trade, business or commerce in

A. 230; *Holzman v. Canton*, 180 Ill. App. 641.

<sup>18</sup> *State ex rel. v. MacQueen*, 82 W. Va. 44, 95 S. E. 666.

<sup>19</sup> *State ex rel. v. Rice* (Ohio), 117 N. E. 893.

<sup>20</sup> An ordinance cannot authorize the construction and maintenance of a bridge over a public way solely for private use. *People ex rel. v. Corn Products Refining Co.* (Ill. 1918), 121 N. E. 574, 576, 577.

<sup>21</sup> *State ex rel. v. White*, 36 Nev. 334, 136 Pac. 110, 50 L. R. A. (N. S.) 195, 199, 200, quoting with approval from §§ 645 and 672, vol. 2, ante. (*McQuillin Mun. Ord.* §§ 14, 39).

An ordinance must be in the interest of the public; that is, all of that part of the public to whom it is intended to apply, without discrimination, and not limited to those viewed as “proper persons” to whom the privilege is restricted. *Richmond v. Dudley*, 127 Ind. 112, 115, 28 N. E. 312, 13 L. R. A. 587, 28 Am. St. Rep. 180.

“The law will look to the substance and not the form used. The city council will not be permitted to do indirectly what it cannot do directly. The substance is not to be lost sight of in the mere use of words.” *People ex rel. v. Corn Products Refining Co.* (Ill. 1918), 121 N. E. 574, 576.

the city or town, "since its influence is limited to the municipality by which it was enacted and it could not in any event have a extramural effect." <sup>22</sup>

### § 673. Ordinances regulating civil rights and liabilities.

Late decisions affirm the well established general rule that a municipal corporation cannot create by ordinance a right of action between third persons, nor enlarge the common law or statutory liability of citizens among themselves.<sup>23</sup> Thus an ordinance cannot create a civil liability from one citizen to another, nor relieve one citizen from that liability by imposing it on another.<sup>24</sup>

The decisions present some conflict in the application of this doctrine to cases based on negligence; <sup>25</sup> however, as applied to contractual and like obligations and liabilities it is uniformly sustained. A municipality's lack of power to impose new obligations not reasonably within the duty imposed on public service corporations is the basis for holding that a telephone company cannot be compelled to put in all single instead of party lines.<sup>26</sup>

Nor can an ordinance establish rules of evidence, or prescribe the practice or procedure in state courts, contrary to and out of harmony with the general state laws on the subject.<sup>27</sup> Thus an ordinance declaring that gen-

<sup>22</sup> Hall v. Johnson, 87 Or. 21, 169 Pac. 515.

<sup>23</sup> Bain v. Ft. Smith Light & Traction Co., 116 Ark. 125, 172 S. W. 843, 845.

Cannot fix price for sale of commodity, as ice, without express power. Greene v. Cook, 219 Mass. 121, 106 N. E. 573.

<sup>24</sup> Joplin v. Wheeler, 173 Mo. App. 590, 158 S. W. 924, holding that an ordinance could not require a water company to install and keep in repair service pipes from the mains to the property line when the franchise ordinance made no such requirement.

<sup>25</sup> Section 674, post, section 674, vol. 2, ante.

<sup>26</sup> Home Telephone Co. v. Carthage, 235 Mo. 644, 667, 668, 139 S. W. 547, Ann. Cas. 1912D, 301.

<sup>27</sup> Cohen v. St. Louis Merchants B. & T. Ry. Co., 193 Mo. App. 69, 75, 181 S. W. 1080, citing § 1072, vol. 3, ante.

Ordinance cannot regulate practice and procedure in courts. Badgley v. St. Louis, 149 Mo. 122, 50 S. W. 817; Kilroy v. St. Louis, 242 Mo. 79, 83, 145 S. W. 769; Noble v. Kansas City, 95 Mo. App. 167, 170. But see Minnesota cases in § 174, ante.

eral reputation shall be sufficient to convict a person of keeping a house of ill fame was held void.<sup>28</sup> However, it has been pointed out that "it is no objection to municipal ordinances, in which no contravention of a state enactment is undertaken or effected, that they afford additional regulations complimentary to the end state legislation would effect."<sup>29</sup> Accordingly an ordinance providing that driving an automobile in excess of the rate of speed therein specified, "for a distance of more than two hundred feet shall be presumptive evidence of driving at a speed which is not careful and prudent," was adjudged valid as a reasonable exercise of the police power and not a usurpation of power belonging to the state in prescribing what shall be presumptive evidence, nor an invasion of the right of the court to be governed by the ordinary law of the state and the procedure of such courts in the administration of justice.<sup>30</sup>

#### § 674. Same—civil action for breach of ordinance.

Although the judicial rulings are not uniform late decisions hold that a violation of an ordinance which is the proximate cause of the damage sustained is negligence *per se*, and creates a cause of action.<sup>31</sup> And it has been declared that by virtue of express power a municipality in granting a franchise to construct and operate a street railway may reserve to itself in the ordinance the right as a condition or consideration for the granting of such franchise, the power to pass ordinances

<sup>28</sup> Dixon v. Mayer, 186 Ill. App. 247.

<sup>29</sup> Borok v. Birmingham, 191 Ala. 75, 67 So. 389, holding valid an ordinance providing that certain circumstances when established by the evidence should raise a presumption of guilt of defined unlawful acts, which promulgates the same rule as the statute on the subject, and approving *Ex parte Woodward*, 181 Ala. 97, 67 So. 295.

<sup>30</sup> Young v. Dunlap, 195 Mo. App. 119, 190 S. W. 1041.

<sup>31</sup> Terrance v. Chapman, 196 Ala. 88, 71 So. 707, 709, citing § 674, vol. 2, ante. (*McQuillin*, Mun. Ord. § 41).

Ordinance limiting speed of street car may be relied upon for recovery for injury resulting therefrom. *Speer v. Southwest Mo. R. Co.*, 190 Mo. App. 328, 335, 177 S. W. 329.



for the protection of persons and property of individuals and creating a liability in their favor against the company for a violation of such ordinances, and the company if it accepts the franchise with these provisions would be bound thereby and liable in damages to individuals for a violation of such ordinances.<sup>32</sup>

### § 676. Charter method of enactment exclusive.

No ordinance is valid unless and until the mandatory prerequisites to its enactment and promulgation are substantially observed.<sup>33</sup> The ordinance must be passed by the vote prescribed and published as required by law.<sup>34</sup> A mere departure from the form prescribed will not

<sup>32</sup> *Bain v. Ft. Smith Light & Traction Co.*, 116 Ark. 125, 172 S. W. 843, 846.

<sup>33</sup> *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 478; *Hall v. Mason* (Ga. 1918), 95 S. E. 248, 250; *Elliott v. Monongahela City*, 229 Pa. 618, 79 Atl. 144; *Ex parte Farnsworth*, 61 Tex. Cr. App. 342, 135 S. W. 538; *Commonwealth v. Richmond & R. R. Ry. Co.*, 115 Va. 756, 80 S. E. 796; *Tennent v. Seattle*, 83 Wash. 108, 145 Pac. 83, 85.

"The ordinance can exist only in event the ordaining power has complied with essential requirements embodied in the charter of the city, its fundamental law." *Memphis Street Ry. Co. v. Rapid Transit Co.*, 138 Tenn. 594, 198 S. W. 890, 891, lacking approval of mayor.

Legislature may prescribe the mode of procedure, to be observed in enacting ordinances. *Booten v. Pinson*, 77 W. Va. 412, 89 S. E. 985, 989, L. R. A. 1917A, 1244; *Moundsville v. Yost*, 75 W. Va. 224, 83 S. E. 910.

Question whether ordinance in fact was enacted. *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Tex. Civ. App.), 173 S. W. 619, 623.

Ordinance adopted by vote of people, containing statement of its urgency, taking effect within less time than prescribed, held charter method in particular case, in substance observed. *Los Angeles Gas & Electric Corp. v. Los Angeles*, 163 Cal. 621, 126 Pac. 594.

<sup>34</sup> The charter recited "no ordinance shall have any validity or effect unless passed by the votes of at least three members of the city council," and every ordinance shall be published, etc. "No municipality has any authority except that which may be expressly or impliedly given by its charter, and such authority must be exercised in the manner therein pointed out when it is attempted to be prescribed. If this is not done, that which was attempted to be made an ordinance becomes a nullity, and no rights and no authority may be exercised thereunder." *Bates v.*

necessarily affect its validity unless the controlling law makes such formality vital, as by declaring the ordinance void if the form laid down be not followed.<sup>35</sup>

Where various methods exist for securing public improvements by the exercise of the power of eminent domain and the levy of special assessments an ordinance that comports with any one of such charter methods will be sustained.<sup>36</sup>

If the law is silent as to the mode of procedure no particular formality in the enactment of an ordinance need be adopted. "In the absence of other requirements it is only necessary that there be sufficient proof of the will of the governing body."<sup>37</sup> In such case, the enacting body may choose its own method.<sup>38</sup>

Rules governing the courts in determining whether an act has been passed in accordance with the provisions of the constitution are sometimes applied in determining whether an ordinance has been enacted in accordance with the provisions of the municipal charter.<sup>39</sup>

There is a presumption in favor of an ordinance having been properly passed.<sup>40</sup> After a lapse of twenty years, mere informalities and irregularities in the procedure in adopting a code of ordinances, will not justify a court in setting them aside.<sup>41</sup>

Monticello, 173 Ky. 244, 251, 190 S. W. 1074.

<sup>35</sup> Rogers v. Mendota, 200 Ill. App. 254, 257, citing §§ 606, 607, vol. 2, ante. (McQuillin, Mun. Ord. §§ 115, 116.)

<sup>36</sup> Kansas City v. Woerishoeffer, 249 Mo. 1, 155 S. W. 779.

<sup>37</sup> Ashley v. Minneapolis, St. Paul & S. S. M. Ry. Co., 37 N. D. 147, 163 N. W. 727, 730.

<sup>38</sup> If no mode of enactment is specified, and power is given city to adopt its own rules, such rules may prescribe method. Corinth v.

Sharp, 107 Miss. 696, 705, 65 So. 888, 64 So. 379.

Charter did not prescribe mode of enactment of ordinance. In such case council may prescribe its own rules. Taylor County Court v. Grafton (W. Va.), 86 S. E. 924.

<sup>39</sup> Baltimore v. First M. E. Church (Md. 1919), 107 Atl. 351, 355.

<sup>40</sup> Ruston v. Dewey (La.), 76 So. 719; Ruston v. Lewis, 140 La. 777, 73 So. 862.

<sup>41</sup> Ninth St. Imp. Co. v. Ocean City (N. J. L.), 100 Atl. 568.

**§ 677. Form of ordinance.**

The ordinance must be reduced to writing prior to action thereon by the legislative body.<sup>42</sup>

An ordinance should be clearly drawn, especially when made the basis of criminal action.<sup>43</sup>

A substantial compliance with the charter requirement as to the form of the ordinance is sufficient.<sup>44</sup>

The fact that an ordinance is a mere reiteration of a statute does not affect its validity.<sup>45</sup>

Failure to number an ordinance does not invalidate it.<sup>46</sup>

When a grant of power to a municipality is made by the legislature an ordinance in pursuance thereof need not be in the precise language of the statute, nor need all the powers contained in the grant be exercised.<sup>47</sup>

An ordinance may by reference adopt the provisions of statutes or prior ordinances,<sup>48</sup> and in such case the statute need not be set out in *totidem verbis*, and entered upon the minutes of the corporation.<sup>49</sup>

**§ 679. Recital of authority to enact is not required.<sup>50</sup>**

<sup>42</sup> American Constr. Co. v. See-lig, 104 Tenn. 16, 133 S. W. 429, affirming 131 S. W. 655.

<sup>43</sup> Hammond v. Baddeau, 134 La. 871, 64 So. 803, approving State v. Forman, 50 La. Ann. 1026, 24 So. 603.

<sup>44</sup> Colby v. Medford, 85 Or. 485, 508, 167 Pac. 487, 494; State v. Kelsey, 66 Or. 70, 77, 133 Pac. 806; State v. Dalles City, 72 Or. 337, 350, 143 Pac. 1127, Ann. Cas. 1916B, 855.

Provision as to form of ordinance in general incorporation law, held not to apply to city incorporated under a special act. Colby v. Medford, 85 Or. 485, 508, 167 Pac. 487.

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<sup>45</sup> Chicago v. Moore, 170 Ill. App. 163.

<sup>46</sup> Corinth v. Sharp, 107 Miss. 696, 65 So. 888, 64 So. 379.

<sup>47</sup> Brenham v. Halle & Seelhorst (Tex. Civ. App.), 153 S. W. 345, 347.

<sup>48</sup> Sloss-Sheffield Steel & Iron Co. v. Smith, 175 Ala. 260, 57 So. 29.

<sup>49</sup> Southern Operating Co. v. Chattanooga, 128 Tenn. 196, 159 S. W. 1091, 1093, citing § 677, vol. 2, ante (McQuillin, Mun. Ord. § 137.)

<sup>50</sup> A city's authority to pass an ordinance need not appear on the face of the ordinance. East Prairie v. Greer (Mo. App.), 186 S. W. 952.

# § 680. Ordinance need not recite necessity of enactment.<sup>51</sup>

## § 681. One subject and title.<sup>52</sup>

The usual constitutional provision requiring that bills shall embrace one subject only which shall be expressed accurately in the title, is held inapplicable to municipal ordinances because they are not viewed as "laws" in that relation.<sup>53</sup>

Although a liberal construction is uniformly adopted,<sup>54</sup>

<sup>51</sup> A legislative body need not recite the reasons which moved it to enact a law. The law when enacted furnishes its own reason. *State ex rel. v. Mo. Pac. Ry. Co.*, 262 Mo. 720, 733.

Failure "to state an emergency in the preamble or body of the ordinance," regulating automobiles for hire or jitney service. *Craddock v. San Antonio (Tex. Civ. App.)*, 198 S. W. 634.

<sup>52</sup> California. *Guzzi v. McAlister*, 21 Cal. App. 276, 131 Pac. 336; *Hood v. Melrose*, 24 Cal. App. 355, 141 Pac. 396.

Idaho. *Clyde v. Moscow*, 23 Idaho 592, 131 Pac. 381 (holding a statement of the general purpose sufficient).

Kansas. *De Priest v. Camp*, 101 Kan. 810, 168 Pac. 872; *Kansas City v. Jordan*, 99 Kan. 814, 163 Pac. 188.

Missouri. *St. Louis v. United Rys. Co.*, 263 Mo. 387, 174 S. W. 78.

Pennsylvania. *Murdoch v. Pittsburgh*, 256 Pa. 268, 100 Atl. 869.

Texas. *Ex parte Adlof (Tex. Cr. App. 1919)*, 215 S. W. 222.

Washington. *Seattle v. Goldsmith*, 73 Wash. 75, 131 Pac. 456; *Everett v. Cowles*, 97 Wash. 396, 166 Pac. 786.

If law does not so require ordinance need not be entitled. *De Scheppers v. Chicago R. I. & P. Ry. Co.*, 179 Ill. App. 298, 301.

Provision is not retroactive, and hence does not invalidate an ordinance passed before it became effective. *Driscoll v. Nelson*, 185 Mo. App. 300, 304, 170 S. W. 377.

<sup>53</sup> Alabama. *Ex parte Davis (Ala. App.)*, 76 So. 368, citing § 681, vol. 2, ante.

California. See *Hood v. Melrose*, 24 Cal. App. 355, 141 Pac. 396.

Kentucky. *Owensboro v. Evans*, 172 Ky. 831, 189 S. W. 1153; *Swann v. Murray*, 146 Ky. 148, 142 S. W. 244.

Louisiana. *Ruston v. Dewey*, 142 La. 295, 76 So. 719.

Mississippi. *Corinth v. Sharp*, 107 Miss. 696, 705, 65 So. 888, 64 So. 379.

Oregon. *Wagoner v. La Grande*, 89 Or. 192, 173 Pac. 305, 307; *Colby v. Medford*, 85 Or. 485, 167 Pac. 487.

Texas. *Craddock v. San Antonio (Tex. Civ. App. 1917)*, 198 S. W. 634, citing § 681, vol. 2, ante.

<sup>54</sup> Generality of title will not vitiate unless designed to mislead. *Reinert Bros. Const. Co. v. Tootle*, 200 Mo. App. 284, 206 S. W. 422.

the requirement as to subject and title is generally held mandatory by the late decisions, and, hence, unless the ordinance is given a generic title, or one which may readily be so construed and considered, the specific thing sought to be covered must be expressly stated.<sup>55</sup> The title must be sufficiently broad to include everything contained in the ordinance. That which is not embraced will be held to be invalid. The courts have no power to enlarge or extend or amplify the title, any more than they have to enlarge or diminish or modify or change the ordinance itself.<sup>56</sup> The title is a part of the ordinance as it is of a statute.<sup>57</sup>

It need not be in any particular form.<sup>58</sup> It is sufficient "if it contains well chosen words suggestive of the subject treated." It need not be an index to the contents of the act. It is not required to go into details.<sup>59</sup> But it must not be misleading. It should be sufficiently full and specific to lead to an inquiry into the body of

<sup>55</sup> *Winfield v. Hackney*, 87 Kan. 858, 126 Pac. 1088.

"Subject" means "subject-matter," while "object" as used in the constitution relating to legislative acts is used in the sense of "purpose." *Ruston v. Dewey*, 142 La. 295, 76 So. 719; *State v. De Hart*, 109 La. 570, 33 So. 605; *State v. Ferguson*, 104 La. 249, 28 So. 917, 81 Am. St. Rep. 123.

The word "subject" is broader than the word "object," and one subject may contain many objects. The word "subject" should be given a broad meaning, so that all matter having a logical or natural connection may be included. Duplicity of subject means the act must embrace two or more dissimilar and discordant subjects. *Ruston v. Dewey*, 142 La. 295, 76 So. 719, sustaining an ordinance relating to the suppression of the liquor business.

<sup>56</sup> *Wichita v. Lewis*, 97 Kan. 589, 155 Pac. 948.

<sup>57</sup> *Duquesne Light Co. v. Pittsburgh*, 251 Pa. 557, 97 Atl. 85.

<sup>58</sup> *Board of Improvements v. Carman* (Ark. 1919), 211 S. W. 170.

<sup>59</sup> *Spokane v. Lemon*, 73 Wash. 248, 13 Pac. 853, 855; *State ex rel. v. Nichols*, 50 Wash. 508, 97 Pac. 728.

"It is only the subject-matter of the act that need be described in the title, and the title need not indicate or disclose the details, agency or means by which the subject of the act is to be carried into effect." *Baltimore v. Wollman*, 123 Md. 310, 91 Atl. 339; *Gould v. Baltimore*, 120 Md. 534, 87 Atl. 818; *Levin v. Hewes*, 118 Md. 626, 86 Atl. 233; *Bond v. Baltimore*, 116 Md. 689, 82 Atl. 978.

the ordinance. Nothing more is required.<sup>60</sup> One object of the requirement is to prevent the embodying into the same act distinct and separate matters of legislation, having no connection whatever with each other, and matters not referred to in the title.<sup>61</sup>

**§ 682. Same—illustrative cases.<sup>62</sup>**

The charter restriction that "no bill shall contain more than one subject which shall be clearly set forth in the title," was held not violated by providing in one ordinance the improvement of a particular route as one continuous highway consisting of streets dedicated by different names, where, owing to the topography of the territory this was the only way to secure a reasonable and practicable thoroughfare to serve that part of the city.<sup>63</sup>

<sup>60</sup> *Storch v. Lansdowne*, 239 Pa. 306, 86 Atl. 861.

Title is sufficient if it clearly gives notice of the subject of the ordinance, although the title is broader than the ordinance, where the title deals with all subjects contained in the ordinance. The title dealt with "all penal laws" of the state, whereas the ordinance only dealt with such as are misdemeanors. *Richards v. Magnolia*, 100 Miss. 249, 56 So. 386, approving as expressing the true rule *Mobile Transportation Co. v. Mobile*, 128 Ala. 335, 30 So. 645, 64 L. R. A. 333, 86 Am. St. Rep. 143.

<sup>61</sup> *State v. Gurry*, 121 Md. 534, 88 Atl. 546, 548, 47 L. R. A. (N. S.) 1087, approving statement of rule in *Gans v. Carter*, 77 Md. 1, 25 Atl. 663.

<sup>62</sup> Initiative and referendum. *Duncan v. Dryer*, 71 Or. 548, 143 Pac. 644.

Improvement ordinances. *Re Hamilton Ave.*, 48 Pa. Super. Co.

156; *Gerlach v. Spokane*, 68 Wash. 589, 124 Pac. 121.

<sup>63</sup> "So far as the title is concerned, it is clearly sufficient since it says it is an ordinance to provide for the concrete paving and curbing of a certain highway, describing it. And the body of the ordinance contains nothing except what pertains to the specified improvement of that highway. The only theory on which it can be claimed the ordinance contains more than one subject is that the paving of that portion of each of the streets included in said highway constitutes a separate and distinct subject, that of paving that particular part of that particular street, notwithstanding the designated portions of said streets constitute, in fact, one continuous highway, used as such, and which the city has legislatively determined shall be improved as a single highway. But the object of the city was not the improvement

An ordinance relating to a separation of grades at crossing of a street over railway tracks, enacted pursuant to a statute, although involving the consideration of many questions, was held to contain one subject only.<sup>64</sup>

A title reciting that it was an amendment to an ordinance referred to, which was invalid, was adjudged not to affect the sufficiency of the title where it was complete in other respects.<sup>65</sup>

An expression of a desire to increase the municipal indebtedness and a provision submitting the question to the legal electors for vote may be included in one ordinance.<sup>66</sup>

"An ordinance governing and regulating traffic on the streets of \_\_\_\_\_" was held "sufficient to regulate moving vehicles," etc., since "traffic" has a comprehensive meaning.<sup>67</sup>

"An ordinance regulating the construction \* \* \* maintenance, use \* \* \* and equipment of buildings," was held sufficient to cover a provision forbidding the keeping of more than four animals in a building without a permit.<sup>68</sup>

of the various streets as such, but only the creation of one continuous improved highway made up of, or running over, those portions of said streets. And the selection of that one highway was not an arbitrary or capricious act of the city, nor made so as to fraudulently secure an improvement of those streets which could not be obtained for them separately. The one highway, composed of those portions of said streets, was made necessary by the surrounding country and had, in fact, by use, become one highway, though the portions constituting it, had received different names when they were platted and dedicated to the city. There was, therefore, but one entire improvement, and not separate and distinct improve-

ments of different streets unrelated to each other and incapable of forming one highway. The statute above referred to has reference to the joining of incongruous subjects having no relation or connection with each other." *McQueen v. Van Deusen*, 189 Mo. App. 492, 496, 497, 176 S. W. 1057, citing § 681, vol. 2, ante.

<sup>64</sup> *Cincinnati Union Stock Yards Co. v. Cincinnati*, 1 Ohio App. 452, 455, 34 Ohio Cir. Ct. 251.

<sup>65</sup> *People ex rel. v. Bowman*, 253 Ill. 234, 97 N. E. 304, 308.

<sup>66</sup> *Storch v. Lansdowne*, 239 Pa. 306, 86 Atl. 861.

<sup>67</sup> *Withey v. Fowler Co.*, 164 Iowa 377, 145 N. W. 923, 926.

<sup>68</sup> *Spokane v. Lemon*, 73 Wash. 248, 131 Pac. 853.

“An ordinance amending ordinance No. — to compel the erection and operation of suitable gates, etc., and repealing ordinances in conflict therewith” was held a good title to an ordinance requiring gates, etc., at specified crossings, against the contention that it “embraces more than one subject and distinct matters not covered by the title.”<sup>69</sup>

If the title to an original act is sufficient to embrace the provision contained in an amendatory act the title to the amendatory act is also good and no inquiry need be made as to whether the title of the amendatory act is of itself sufficient. The title to an amendatory ordinance which amply indicates the subject matter of the act amended and the nature and purpose and purport of the amendments is sufficient.<sup>70</sup>

“An ordinance in relation to the registration of dogs in the city of ——— and providing a penalty for the violation thereof,” was held not sufficient to cover taxation of owners of dogs, since the title is limited to the registration of dogs.<sup>71</sup>

Where the only purpose expressed in the title is “extending the limits of the city,” a portion of the ordinance which seeks to exclude territory from the corporate limits, was held ineffective.<sup>72</sup>

Express legislative authority to provide “by a general ordinance of the municipality” that all offenses under the penal laws of the state, amounting to a misdemeanor, shall be offenses against the city, it has been held authorizes an ordinance following the statute although it conflict with another statute forbidding an ordinance from containing more than one subject which shall be clearly expressed in its title.<sup>73</sup>

<sup>69</sup> Council Bluffs v. Illinois Central R. R. Co., 158 Iowa 679, 138 N. W. 891.

<sup>70</sup> St. Louis v. United Railways Co., 263 Mo. 387, 451, 452, 174 S. W. 78.

<sup>71</sup> Winfield v. Hackney, 87 Kan. 858, 126 Pac. 1088.

<sup>72</sup> State v. Hutchinson, 102 Kan. 325, 327, 169 Pac. 1140.

<sup>73</sup> Richards v. Magnolia, 100 Miss. 249, 56 So. 386, following Winfield v. Jackson, 89 Miss. 272, 42 So. 183, and Chrisman v. Jackson, 84 Miss. 787, 37 So. 1015.



### § 685. Title in revision of ordinance.

In the absence of statutory prohibition a municipal legislative body may declare by a single ordinance a compilation of ordinance or proposed ordinances to be in force.<sup>74</sup>

### § 686. Preamble.<sup>75</sup>

### § 687. Ordaining or enacting clause.

Apart from a mandatory law requiring it an enacting or ordaining clause in an ordinance is not necessary.<sup>76</sup> Such clause should be used if the charter or an applicable state law so requires,<sup>77</sup> but its omission is not

<sup>74</sup> *Wabash R. Co. v. Gretzinger*, 182 Ind. 155, 104 N. E. 69, 73; *Bowers v. Indianapolis*, 169 Ind. 105, 112, 81 N. E. 1097, 1099, 13 Ann. Cas. 1198, quoting with approval from opinion in *Garrett v. Janes*, 65 Md. 260, 3 Atl. 597, set out in § 685, vol. 2, ante.

<sup>75</sup> The title and preamble are parts of the ordinance as they are of a statute. *Duquesne Light Co. v. Pittsburgh*, 251 Pa. 557, 97 Atl. 85.

Preamble is not necessary. *Continental Oil Co. v. Santa Fe* (N. Mex. 1918), 177 Pac. 742.

<sup>76</sup> *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 495; *Watson v. Corey*, 6 Utah 150, 21 Pac. 1089; *Ex parte Hudson*, 3 Okl. Cr. 393, 106 Pac. 540, 107 Pac. 735.

"Be it ordained by the city council of the city of \_\_\_\_\_," *American Construction Co. v. See-lig*, 104 Tenn. 16, 133 S. W. 429.

<sup>77</sup> Held, in Oregon that the constitution neither applies to municipal ordinances nor to charter amendments initiated and adopted by the legal voters of a city or

town. Nor does a general state law, being a part of the charters of cities and town incorporated under that law, apply to a city incorporated under a special legislative act. But a law directing that "all measures" submitted to the people shall contain such clause was held applicable to charter amendments as well as ordinances so submitted, whether initiated by the people or submitted by the council. An ordinance to amend a charter containing no enacting clause was amended by the council making an enacting clause unnecessary, the day before the election, and it was held the charter amendment was valid. "The election was the vitalizing act, and when that occurred the measure itself was complete. The votes of the electorate operated upon a measure which contained all the formalities required by positive legislation." To hold otherwise would be subordinating substance to form. *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 495.

A like constitutional provision

fatal to the validity of the ordinance.<sup>78</sup>

The rule is different as to state legislative acts, and the constitutional requirement in this respect is construed as mandatory.<sup>79</sup>

An enacting clause is good although it does not exactly coincide with the form prescribed where there is no difference in the meaning of the term employed.<sup>80</sup>

### § 688. Time of introduction and passage.

If the charter or applicable statute prescribes a definite method for the enactment of ordinances, including the time of introduction, reading and passage, such requirements are generally construed as mandatory.<sup>81</sup> Provisions are common that no ordinance shall be passed on its

was held in Oklahoma to apply only to direct legislation of the people, hence a measure enacted by the legislature is valid, although it omits an enacting clause. *Ex parte Hudson*, 3 Okl. Cr. 393, 106 Pac. 540, 107 Pac. 735.

<sup>78</sup> *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487.

Law prescribing caption, held directory merely. *Glenn v. Prattville*, 14 Ala. App. 621, 71 So. 75; *Lane v. Tuscaloosa*, 12 Ala. App. 599, 604, 67 So. 778, 779; *Bell v. Jonesboro*, 3 Ala. App. 652, 57 So. 138.

<sup>79</sup> *Commonwealth v. Illinois Central R. Co.*, 160 Ky. 745, 170 S. W. 171, L. R. A. 1915B, 1060 note.

A legislative act without such clause, and without date, held void. *The Seat of Government Case*, 1 Wash. Terr. 115.

<sup>80</sup> Thus charter: "The people of the city of — do ordain or resolve," etc., and the enacting clause: "Resolved that the people of the city of —," etc., held valid. *State ex rel. v.*

*Kelsey*, 66 Or. 70, 133 Pac. 806, 809..

Varying from the prescribed form, is not vital, where equivalent terms are used, e. g., "ordain" is equivalent to "be it enacted." *State ex rel. v. Dalles City*, 72 Or. 337, 143 Pac. 1127, 1131.

"Be it ordained by the city council of the city of —," held same as "Be it ordained by the city of —." *Brownsville v. Fernandez* (Tex. Civ. App. 1918), 202 S. W. 112, 115.

Literal observance of the form prescribed is not required. Words used in a different arrangement, yet form adopted being substantially same as prescribed will be sanctioned. Every word prescribed was found in the enacting clause, but the position of the words were not the same. *Fowler v. Oakdale*, 158 Ky. 603, 166 S. W. 195, 199.

<sup>81</sup> Section 676, ante; § 676, vol. 2, ante.

*Albany v. McGoldrick*, 79 Or. 462, 155 Pac. 717, holding under

final reading at the meeting at which it is introduced.<sup>82</sup> Under such provision reading the title to an ordinance and referring it to a committee at one meeting, and at a subsequent meeting a report by the committee of a com-

particular charter an ordinance granting gas franchise might be passed at the meeting it was presented.

*Cathright v. Byllesby & Co.*, 154 Ky. 106, 157 S. W. 45, 53, holding an ordinance granting a franchise might under particular charter be passed the same day on which introduced, where the law provided "free discussion."

Certain ordinances required to be filed for public inspection, e. g., those authorizing the making of contracts. Ordinance authorizing the issuance of bonds for a municipal electric lighting plant and system of street lighting, held such ordinance. *O'Beirne v. Elgin*, 187 Ill. App. 581, 585.

No mode of enactment was prescribed. The law did not provide for any number of readings. The bill was read three times and passed at a single session and the ordinance was held valid. "What rules of procedure the council adopted are not disclosed by the record. Whatever they are they may provide for suspension." *Taylor County Court v. Grafton* (W. Va.), 86 S. E. 924.

"An order of the board of aldermen may be passed through all its stages at one session by unanimous consent, but if one member objects the measure shall be postponed for at least one week." The order was presented at one meeting and referred to a committee. The committee at a sub-

sequent meeting reported unanimously in favor of the adoption of the order. The vote on the move for its adoption stood: 16 for and 3 against. Held, order properly passed. *Fuller v. Haines*, 224 Mass. 176, 112 N. E. 873.

The law provided "Every ordinance shall be read three times before passage and between such readings any number of meetings during a period of not more than four months may have intervened, at which no action may have been taken on said ordinance." Held, in course of adoption of an ordinance, at a regular meeting laying over its consideration till the next regular meeting, and at that meeting no action on the ordinance was taken, did not deprive the council of jurisdiction. The law allows the successive steps to be taken at the pleasure of the council, and puts the public on inquiry as to action at any and every meeting from introduction to final passage. *Loudenslager v. Atlantic City*, 84 N. J. L. 120, 86 Atl. 51.

Failure to comply with requirements of the charter. Insufficient time elapsing between the introduction and passage. *Tennent v. Seattle*, 83 Wash. 108, 145 Pac. 83, following *Savage v. Tacoma*, 61 Wash. 1, 112 Pac. 78.

<sup>82</sup> "Intended to prevent hasty and ill advised legislation." *Tennent v. Seattle*, 83 Wash. 108, 145 Pac. 83.

plete ordinance which was passed at that meeting is not a compliance. Such provision permits an ordinance properly presented at one meeting to be amended at a subsequent meeting and passed at the meeting at which it is amended.<sup>83</sup>

Under a requirement that the ordinance shall be passed at two sessions held on different days it was held that regular sessions were not meant, but that a special session could be included.<sup>84</sup> The purpose of requiring the ordinance to be read at more than one session or meeting is to prevent undue haste and secure deliberation by the legislative body before the final passage of an ordinance or resolution. Such provision should be construed as mandatory, especially where the provision is that the ordinance or resolution can be passed only by reading it at two or more meetings "and not otherwise."<sup>85</sup>

#### § 689. Same—double board.<sup>86</sup>

#### § 691. Signing and approval of ordinance by mayor.

Whether to complete the ordinance it should be approved and signed by the mayor, must depend, of course, on the local law.<sup>87</sup> This is often required,<sup>88</sup> and if under

<sup>83</sup> "This can be done where the amendment is in matter of form, or in the addition of new matter which does not alter the effect and scope of the ordinance; but it does not permit the substitution of an entirely new and different ordinance for the one originally introduced, nor does it sanction the gross attempt at subterfuge practiced in this instance. The requirement that an ordinance shall not be passed at the meeting at which it is introduced has a purpose. It is intended to prevent hasty and ill advised legislation." *Tennent v. Seattle*, 83 Wash. 108, 145 Pac. 83, 85.

<sup>84</sup> *Tandy & Fairleigh Tobacco*

*Co. v. Hopkinsville*, 174 Ky. 189, 192 S. W. 46.

<sup>85</sup> *Moundville v. Yost*, 75 W. Va. 224, 83 S. E. 910.

<sup>86</sup> *Re Black Street in Pittsburgh*, 236 Pa. 395, 84 Atl. 918, holding ordinance introduced on prior day may be passed on same day by both branches of the council.

"Ordinances for raising revenue" must originate in board of council. *Central Construction Co. v. Lexington*, 162 Ky. 286, 172 S. W. 648.

<sup>87</sup> *Fry v. Seely*, 55 Ind. App. 670, 104 N. E. 774; *Jeffreys v. Versailles*, 55 Pa. Super. Ct. 85; *People ex rel. v. Kennedy*, 207 N. Y.

the applicable law so providing the requirement should be construed as mandatory, failure prevents the ordinance from taking effect.<sup>89</sup>

The local laws prescribe the method and time of presentation,<sup>90</sup> usually the mode and time of approval,<sup>91</sup> and the time of return of the ordinance approved or vetoed.<sup>92</sup>

533, 101 N. E. 442, affirming 139 N. Y. S. 896, 154 App. Div. 558; *Friel v. New York*, 134 N. Y. S. 1025, 150 App. Div. 317; *Kimball v. James*, 136 N. Y. S. 541; *Boonton v. Logan*, 86 N. J. L. 486, 92 Atl. 97; *Wolcott v. Wilmington* (Del. Ch.), 95 Atl. 303; *Logan v. Boonton*, 87 N. J. L. 449, 95 Atl. 141.

<sup>88</sup> *Parker-Washington Co. v. Field* (Mo. App. 1919), 214 S. W. 402; *Memphis Street Ry. Co. v. Rapid Transit Co.*, 138 Tenn. 594, 198 S. W. 890.

<sup>89</sup> *Baltimore v. First M. E. Church* (Md. 1919), 107 Atl. 351, 353; *Baker Mfg. Co. v. Richmond* (Mo. App.), 198 S. W. 1128.

New Jersey State Traffic Act, authorizing cities to pass ordinance which apply to a special condition existing in such municipality—one of which is “regulating governing the parking of vehicles on streets and portions of streets,” but such ordinance must be approved by commissioner of motor vehicles. If not approved it is void. *Eveler v. Atlantic City*, 91 N. J. L. 135, 102 Atl. 898.

A provision that “every ordinance of the council and every resolution passed by that body, shall, before it takes effect, be presented, certified by the clerk, to the mayor” for his approval or disapproval is mandatory. The mayor may formally approve it or

disapprove it or tacitly approve it by failure to return it within the time specified. *Hall v. Macon* (Ga. 1918), 95 N. E. 248, 250, approving Opinion of the Justices, 135 Mass. 594, and distinguishing *Woodruff v. Stewart*, 63 Ala. 206.

<sup>90</sup> Presentation to mayor, what is, etc. *State ex rel. V. Roderick*, 129 Minn. 94, 151 N. W. 904.

<sup>91</sup> Ordinance to be approved or vetoed within ten days after presentation to mayor; time begins to run only after ordinance has been in fact presented. *Dimick v. Barry*, 211 Mass. 165, 97 N. E. 909.

Ordinance must be endorsed “approved by the mayor with his official signature.” “Approved” appeared on the ordinance in typewriting, with mayor’s signature which was held valid. *Albuquerque v. Water Supply Co.* (N. Mex. 1918), 174 Pac. 217.

Ordinances are to be approved separately. Order in which approved, of course, is a question of fact. Presumption is that approval was given in numerical order, when ordinances are consistent, but if inconsistent the last approved will prevail. *Marshall v. Elgin* (Tex. Civ. App.), 143 S. W. 670, 673.

<sup>92</sup> Ordinance to be presented to the mayor. “The mayor shall return such bill to the council within ten days after receiving it, and if he does not disapprove it, it

It has been held that the mayor may direct another to sign his name for him.<sup>93</sup> But a city clerk, of course, is without power to sign the name of the mayor to an ordinance.<sup>94</sup>

In the absence of the mayor, action on the ordinance may be taken by the officer designated,<sup>95</sup> but where such officer possesses "the powers of the mayor only in matters not admitting of delay," he cannot pass on an ordinance that admits of delay, and such matter must be determined according to the usual course of judicial procedure as each case arises.<sup>96</sup>

### § 692. Veto of mayor.<sup>97</sup>

Under some laws an ordinance can become effective only (1) by approval of the mayor, (2) by refusal of the mayor to sign the ordinance or return the same to the place designated, with his objections in writing within the time specified, or (3) by its passage over the mayor's veto. The effectiveness of the mayor's veto depends, of course, on the controlling law. Some laws require the mayor to return the ordinance with his objections in writing to the legislative body within a named time, or where it is composed of two branches, to the branch in which it originated. Under some laws, to make the veto effective the mayor only need return the ordinance to the officer or place named with his objections in writing within a named time after the passage of the ordinance.

shall become an ordinance." *State ex rel. v. Gill*, 87 Wash. 201, 151 Pac. 298.

<sup>93</sup> *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 461, 173 S. W. 11; *Porter v. R. J. Boyd Paving & Const.*, 214 Mo. 1, 11, 112 S. W. 235.

<sup>94</sup> *Rhodes v. Haxturn* (Colo. 1919), 185 Pac. 264.

<sup>95</sup> In mayor's absence the president of the council may perform his duties. He may approve ordinance. *Barton v. Recorder's Court*, 60 Or. 273, 119 Pac. 349.

Mayor pro tem may sign ordinance. *Wilkerson v. Lexington* (Ky. 1920), 222 S. W. 74, 77.

<sup>96</sup> The mayor was ill and away from his office, and an order laying out a public way was approved by the acting mayor; held, void as it was a matter that could admit of delay. *Dimick v. Barry*, 211 Mass. 165, 97 N. E. 909.

<sup>97</sup> *Dimick v. Barry*, 211 Mass. 165, 97 N. E. 909; *Kimball v. James*, 136 N. Y. S. 541; *Miller v. Oelwein*, 155 Iowa 706, 136 N. W. 1045.

Sometimes no provision is made for its filing with the officer named. Under such latter provision it was held that the return of the ordinance to the officer named, here the city clerk, in person, together with the written objections of the mayor, within the time required, was sufficient to make the mayor's veto effective.<sup>98</sup>

Under some laws the time within which the mayor may veto an ordinance commences to run on the presentation to him of the ordinance. A withdrawal of the ordinance at the request of the mayor, and presentation the next day, it has been held, is ineffectual to extend the time.<sup>99</sup>

If the mayor disapproves of the ordinance the usual provision is that when he returns it he shall specify his objections thereto in writing.<sup>1</sup> The object of such provision is that the mayor shall state his reasons in order that they may be weighed and considered by the body passing the ordinance upon whom alone rests the duty of deciding whether the objections urged by the executive are sound.<sup>2</sup>

### § 693. Return of bill or ordinance by mayor.<sup>3</sup>

<sup>98</sup> After mayor has vetoed the ordinance and returned it to the city clerk as required by law "no failure of the clerk thereafter to lay the ordinance and the mayor's written objections thereto before the board of council could in any wise affect the veto. Nor could any subsequent remark or act on the part of the mayor give life to the ordinance, which had been vetoed and returned to the city clerk in the manner provided by the statute. The only way that the ordinance could thereafter be made effective was to pass it over the mayor's veto by a vote of two-thirds of the whole number of councilmen elected." *Browne v. Winchester*, 153 Ky. 502, 155 S. W. 1157.

<sup>99</sup> *State ex rel. v. Roderick*, 129 Minn. 94, 151 N. W. 904.

<sup>1</sup> *State ex rel. v. Gill*, 87 Wash. 201, 151 Pac. 498.

<sup>2</sup> Objections of mayor to authority to one to erect a garage on the ground that some policy as to erecting garages in residential districts should be adopted by the city were held sound, and not "whimsical or absurd." *Storer v. Downey*, 215 Mass. 273, 102 N. E. 321, distinguishing *Lowell v. Dadman*, 191 Mass. 370, 77 N. E. 717.

<sup>3</sup> *Dimick v. Barry*, 211 Mass. 165, 97 N. E. 909.

If the ordinance is not returned by the mayor within the time specified it becomes a law. *Boonton v. Logan*, 86 N. J. L. 486, 92 Atl. 97; *Logan v. Boonton*, 87 N. J. L. 449, 95 Atl. 141; *Friel v. New York*, 134 N. Y. S. 1025, 150 App. Div. 317.

**§ 694. Ordinances passed and approved by electors—  
initiative and referendum.**

The power of direct legislation is frequently given to the qualified voters of a municipality by the initiative and referendum. Constitutions often reserve this right to the electors of the state and political subdivisions thereof.<sup>4</sup> In the enactment of ordinances of certain kinds, in recent years, the initiative and referendum are frequently invoked. Whether such power can be conferred will depend upon the state constitution, and whether it exists in the municipality will depend upon its charter and the state statute applicable thereto. It has been held that the power of initiative and referendum may be conferred upon the voters of a municipality under a constitutional provision that the municipal charter shall provide a legislative body which was established.<sup>5</sup> A municipality cannot submit an ordinance to a vote of the electors without legal authorization.<sup>6</sup>

Sometimes the right to a referendum is unlimited, including all ordinances and resolutions and practically all action of the council.<sup>7</sup> Constitutions and laws extend it to all laws or ordinances of municipalities excepting such as may be necessary for the immediate preservation of the public health, peace or safety, support of the state government and its existing public institutions.<sup>8</sup> The limitation is quite general that no order of referendum shall be allowed upon any ordinance for the exer-

<sup>4</sup> *Lowther v. Nissley*, 38 Okl. 797, 135 Pac. 3; *Reed v. Wing*, 168 Cal. 706, 144 Pac. 964; *Tennett v. Seattle*, 83 Wash. 108, 145 Pac. 83; *Pearce v. Roseburg*, 77 Or. 195, 150 Pac. 855; *Thielke v. Albee*, 76 Or. 449, 150 Pac. 854.

<sup>5</sup> *State ex rel. v. Duluth*, 134 Minn. 355, 159 N. W. 792.

<sup>6</sup> *Levering v. Board of Supervisors*, 129 Md. 335, 99 Atl. 360.

An ordinance provided that on compliance with certain conditions

stated therein it shall be the duty of the election officers to submit the question or questions of public policy petitioned for or authorized to the electors of the city to obtain their opinion, held unauthorized by city charter. *Mills v. Sweeney*, 219 N. Y. 213, 114 N. E. 65.

<sup>7</sup> *Meade v. Dane County*, 155 Wis. 632, 145 N. W. 239.

<sup>8</sup> *State ex rel. v. Davis* (S. D. 1919), 170 N. W. 519.



cise of police powers. But it has been held that the "exercise of the police powers," is employed in a restricted sense so as not to include the granting of franchises or matters in relation thereto, e. g., the passage of an ordinance changing the rates of a public utility—a light and power company.<sup>9</sup>

On the other hand, the power of the initiative is frequently restricted. It has no application under some laws, it has been held, to rates and service of public service corporations.<sup>10</sup> And constitutions sometimes reserve it to matters "on general county and municipal business."<sup>11</sup> And some laws do not extend the power to the granting of certain franchises.<sup>12</sup>

The power of initiative and referendum is generally restricted to ordinances and resolutions constituting the exercise of legislative power,<sup>13</sup> as a telephone franchise ordinance,<sup>14</sup> or the selection of a site for a city hall by the legislative body.<sup>15</sup> Administrative action, involving discretion usually is not subject to the exercise of such right as the action of a council in ordering the sale of an electric light plant.<sup>16</sup>

Referendum may be invoked under some laws in granting or extending a franchise as the right to occupy or use streets.<sup>17</sup> And it has been held applicable to the question of licensing of saloons,<sup>18</sup> to a resolution of a council con-

<sup>9</sup> Terral v. Arkansas Light & Power Co. (Ark. 1919), 210 S. W. 139.

<sup>10</sup> Dallas v. Dallas Consol. Electric St. Ry. Co. (Tex. Civ. App.), 159 S. W. 76.

<sup>11</sup> Tomlinson Bros. v. Hodges, 110 Ark. 528, 162 S. W. 64.

<sup>12</sup> Des Moines City Ry. Co. v. Susong, 168 Ia. 128, 150 N. W. 6.

To furnish electric light. Tomlinson Bros. v. Hodges, 110 Ark. 528, 162 S. W. 64.

<sup>13</sup> Hopping v. Richmond, 170 Cal. 605, 150 Pac. 977, 982.

<sup>14</sup> State ex rel. v. Superior Court, 87 Wash. 582, 152 Pac. 11.

<sup>15</sup> Harbor Center Land Co. v. Richmond (Cal. App. 1918), 176 Pac. 50, following Hopping v. Richmond, 170 Cal. 605, 150 Pac. 977, 170 Cal. 618, 150 Pac. 982.

<sup>16</sup> Yarborough v. Donaldson (Okl. 1918), 170 Pac. 1165.

<sup>17</sup> Kelty v. Flynn, 223 Mass. 369, 111 N. E. 857.

<sup>18</sup> Re Doerr, 97 Neb. 562, 150 N. W. 625.

senting to increase of street car fares,<sup>19</sup> and to an ordinance fixing salaries of specified municipal officers.<sup>20</sup>

**§ 694a. Same—exercising the power.**

The method of the exercise of the power of initiative and referendum may sometimes be prescribed by the electors of the community in adopting a municipal charter,<sup>21</sup> or the manner of its exercise may be provided for by ordinance.<sup>22</sup>

Its exercise can only be enjoyed by observing in substance the mandatory steps outlined in the controlling law. Thus although by the constitution the voters may exercise the power of initiative and referendum, and by the constitution may adopt their own charters, the legislative body of a municipality has no power to initiate an ordinance and submit it to the voters as an initiative measure without first enacting it.<sup>23</sup>

The requirement as to the publication of the ordinance for information of the voters,<sup>24</sup> publication of notice of the initiative measure,<sup>25</sup> and the requirement of printing "a true copy of the title and text of each ordinance or amendment to be submitted,"<sup>26</sup> has each been held mandatory, and failure to observe the substance thereof is fatal. The form and sufficiency of the petition to exercise the power of initiative or referendum, when necessary, will depend upon the proper construction of the applicable local laws, whether certain requirements thereof are mandatory or directory, and whether the substance of the essential provisions have been in good faith observed.<sup>27</sup>

Usually a designated officer passes on the sufficiency of

<sup>19</sup> *International Ry. Co. v. Rann*, 224 N. Y. 83, 123 N. E. 153.

<sup>20</sup> *State ex rel. v. Davis* (S. D. 1919), 170 N. W. 519.

<sup>21</sup> *St. Louis Charter*, effective Aug. 29, 1914.

<sup>22</sup> *Pearce v. Roseburg*, 77 Or. 195, 150 Pac. 855.

<sup>23</sup> *Thielke v. Albee*, 76 Or. 449, 150 Pac. 854.

<sup>24</sup> *Newport v. Glazier*, 175 Ky. 608, 194 S. W. 771.

<sup>25</sup> *Staples v. Astoria*, 81 Or. 99, 158 Pac. 518.

<sup>26</sup> *Palmberg v. Kinney*, 63 Or. 222, 127 Pac. 32; *Wright v. McMinnville*, 59 Or. 397, 117 Pac. 298.

Publication, etc. *Palmberg v. Kinney*, 65 Or. 220, 132 Pac. 538.

<sup>27</sup> Form of petition, affidavits,

the petition. No other officer or body may exercise such power.<sup>28</sup> Ordinarily these laws direct that each of the several parts of the petition shall be verified by one of the electors who signs the same. Failure in this respect will usually invalidate that part of the petition. It seems that the provision is regarded as mandatory.<sup>29</sup>

Usually such laws provide that if the original petition is found insufficient amendment thereof may be made in a manner prescribed. Under such law it has been held that amendments filed after the ordinance takes effect are without force and do not suspend the operation of the ordinance.<sup>30</sup>

After a petition has been finally passed upon the signers thereof are precluded from withdrawing their names.<sup>31</sup>

The time and method of submission of the proposition or propositions to the electors is dependent, of course, upon the requirements of the controlling laws, and the measure of discretion, if any, vesting in the acting authorities.<sup>32</sup>

etc., held directory. *Terral v. Arkansas Light & Power Co.* (Ark. 1919), 210 S. W. 139.

Sufficiency of petition as to the number of signers under particular law. *Commonwealth v. Wilkes-Barre*, 258 Pa. 130, 101 Atl. 929.

Signatures to petition, verification, authentication, inspection and certification. Time of filing a referendum petition, held mandatory. *Ferle v. Parsons* (Mich. 1920), 177 N. W. 397.

<sup>28</sup> When the petition is filed, often a named officer, as the city clerk, is to ascertain from the registration list of voters whether the petition is sufficiently signed. Ordinarily it is sufficient if the clerk in good faith complies with this provision. *Aad Temple Bldg. Ass'n v. Duluth*, 135 Minn. 221, 160 N. W. 682.

Clerk to certify petition to proper election officers within reasonable time, if no time is prescribed. *State v. Rupert* (Ohio 1919), 122 N. E. 39.

Ascertaining the genuineness of the signatures, sufficiency of the petition, and draft of the ordinance or proposed measure under particular law. *Buohl v. Beverly*, 89 N. J. L. 378, 98 Atl. 270, 100 Atl. 328.

<sup>29</sup> *Aad Temple Bldg. Ass'n v. Duluth*, 135 Minn. 221, 160 N. W. 682.

<sup>30</sup> *Aad Temple Bldg. Ass'n v. Duluth*, 135 Minn. 221, 160 N. W. 682.

<sup>31</sup> *Locher v. Walsh*, 17 Cal. App. 727, 121 Pac. 712.

<sup>32</sup> Referendum, submission to be at the next general municipal election or at a special election, as the council in its discretion may

If all of the mandatory legal steps have been taken the submission of the measure to the qualified electors may be required by mandamus.<sup>33</sup>

Where an ordinance would be invalid if approved by the electors, it has been held, the authorities cannot be compelled by mandamus to submit it to a vote.<sup>34</sup> On the contrary, it has been held that an election duly called to initiate legislation cannot be enjoined on the ground that the proposed legislation would be unconstitutional.<sup>35</sup>

### § 694b. Same—initiative.<sup>36</sup>

Under the initiative power, a specified number of qualified electors may petition the legislative body to pass a particular ordinance. The initiative may be exercised by means of a verified petition filed with a named officer as the clerk of the legislative body, accompanied by the proposed legislation, or a measure in the form of an ordinance requesting that such ordinance be submitted to a vote of the people in event the legislative body fails to pass it.<sup>37</sup> The council may not initiate an ordinance and

decide. *Arnold v. Carroll* (Wash. 1919), 179 Pac. 801.

<sup>33</sup> *Hopping v. Richmond*, 170 Cal. 605, 150 Pac. 977.

Petition requesting repeal or submission to vote. Mandamus to compel submission will lie. *State ex rel. v. Pratt Board of Comrs.*, 92 Kan. 247, 139 Pac. 1191.

<sup>34</sup> *State ex rel. v. White*, 36 Nev. 334, 136 Pac. 110.

<sup>35</sup> *Pitman v. Drabelle*, 267 Mo. 78, 98, 183 S. W. 1055.

<sup>36</sup> *Pitman v. Drabelle*, 267 Mo. 78, 183 S. W. 1055.

<sup>37</sup> *Ex parte Griggs* (Okl.), 163 Pac. 325; *Perrault v. Robinson*, 29 Idaho 267, 158 Pac. 1074.

Submission of ordinances on petition of electors to council; construction of particular law. Com-

monwealth v. *Heinly*, 248 Pa. 518, 94 Atl. 191.

Laws provide that the proposed measure or ordinance shall be submitted to the council or proper board by petition, signed by a named percentage of the electors of the municipality, to be ascertained in a manner specified, and if the council or board chooses it may enact the ordinance, or if the petition so requests, submit it to popular vote. After submission of a petition a named officer examines it within the time stated and if he finds that it does not comply with the law returns it to the filers thereof. If the officer thinks the petition is defective he presents it to a justice of the supreme court, with his objections,

submit it to popular vote without first enacting it.<sup>38</sup> If the designated officer on examination accepts the petition and files it jurisdiction is complete and thereafter the signers can not withdraw.<sup>39</sup>

Upon the certification of the sufficiency of the petition by the proper officer the legislative body may either pass the measure or ordinance or submit it to a vote of the electors.<sup>40</sup>

A constitutional provision as to the style of bills and the enacting clause was held not to apply to charter amendments initiated and adopted by electors.<sup>41</sup>

The initiative measure, if valid, becomes effective when the proper officer or board ascertains and declares the result of the election. Of course, it must be carried by the prescribed vote whether a majority or some other proportion. Ordinances passed by vote of the electors can only be amended or repealed by such vote.<sup>42</sup>

### § 694c. Same—referendum.

The referendum is not applicable to an ordinance passed by a legislative body pursuant to a petition of a specified number of the qualified electors.<sup>43</sup> Nor, as a rule, is it applicable to an emergency ordinance which takes effect at once.<sup>44</sup> Nor is it applicable to certain other acts of the legislative body, specified elsewhere.<sup>45</sup>

who by summary examination determines the question of sufficiency. *Ford v. Gilbert*, 89 N. J. L. 482, 99 Atl. 621.

<sup>38</sup> *Thielke v. Albee*, 76 Or. 449, 150 Pac. 854.

<sup>39</sup> *Ford v. Gilbert*, 89 N. J. L. 482, 99 Atl. 621; *Currie v. Atlantic City*, 66 N. J. L. 140, 48 Atl. 615, affirmed in 66 N. J. L. 671, 50 Atl. 504; *Wilson v. Collingswood*, 80 N. J. L. 628, 77 Atl. 1033.

<sup>40</sup> *State ex rel. v. Superior Court*, 70 Wash. 352, 126 Pac. 920.

<sup>41</sup> *Colby v. Medford*, 85 Or. 485, 508, 167 Pac. 487.

<sup>42</sup> *Dallas v. Dallas Consol. Electric St. Ry. Co.* (Tex. Civ. App.), 159 S. W. 76; *Holland v. Cranfill* (Tex. Civ. App.), 167 S. W. 308.

<sup>43</sup> *Perrault v. Robinson*, 29 Idaho 267, 158 Pac. 1074.

<sup>44</sup> Referendum allowed unless an emergent ordinance which takes effect at once, that is an ordinance necessary for the immediate preservation of the public peace, health or safety, which shall be declared in the ordinance. *Arnold v. Carroll* (Wash. 1919), 179 Pac. 801.

<sup>45</sup> Section 694, ante.

To exercise the power of referendum the first step is an appropriate petition signed by the prescribed number of electors protesting against a particular ordinance or measure, which is presented to the legislative body within the time specified.<sup>46</sup>

The requirement as to the time within which the petition of electors to review the action of the municipal legislative body must be filed, it has been held, "is mandatory, not merely directory and must be obeyed."<sup>47</sup>

When a sufficient petition is presented within the time provided it has the effect of suspending the ordinance or measure against which it is directed.<sup>48</sup> The legislative body may then reconsider the ordinance or measure, and repeal it, but if not repealed, it is submitted to the electors. If thereafter the legislative body repeals the ordinance it has no power to pass the same ordinance again, nor "an ordinance in all essential features like the one against which the petition protested. This would plainly be to nullify the referendum provisions of the charter. But it is equally clear that the council is not prevented from legislating on the subject matter of the dead ordinance. It doubtless may, if it acts

<sup>46</sup> The time within which the referendum petition begins to run is from the final passage of the ordinance by the council, and this is when signed by the mayor, or in event of his veto, when passed over his veto. *Solomon v. Alexander*, 161 Cal. 23, 118 Pac. 217.

Signatures, verification, authentication, inspection and certification. *Ferle v. Parsons* (Mich. 1920), 177 N. W. 397.

<sup>47</sup> *Kelty v. Flynn*, 223 Mass. 369, 111 N. E. 857; *Ferle v. Parsons* (Mich. 1920), 177 N. W. 397.

<sup>48</sup> *Rigdom v. San Diego*, 30 Cal. App. 107, 157 Pac. 513.

Reservation of right of suspension of ordinance submitted to the people by referendum, pending the

vote, although the law did not expressly so provide. *Stetson v. Seattle*, 74 Wash. 606, 134 Pac. 494.

The ordinance is prevented from taking effect until it has been submitted to a vote of the people, and carried by a designated vote, usually a majority. *People v. Wanmer*, 276 Ill. 460, 114 N. E. 1015.

When the referendum is invoked it "shall operate to suspend the taking effect of the ordinance" to be submitted to the electors for their ratification or rejection at the next general municipal election or at a special election as the council in its discretion may decide. *Arnold v. Carroll* (Wash. 1919), 179 Pac. 801.

in good faith and with no intent to evade the effect of the referendum petition pass an ordinance covering the same subject matter that is essentially different from the ordinance protested against, avoiding perhaps the objections made to the first ordinance.”<sup>49</sup>

### § 695. Recording ordinances.<sup>50</sup>

The requirement that an ordinance shall be recorded is designed to provide a permanent record and substantial evidence of the existence of the ordinance,<sup>51</sup> and of its lawful enactment.<sup>52</sup> Under particular laws this requirement has been held directory only,<sup>53</sup> but under others, failure to observe it has been held to preclude the ordinance from taking effect.<sup>54</sup>

### § 695a. Attesting ordinances.

A statute providing that the duty of the city clerk shall

<sup>49</sup> Re Megnella, 133 Minn. 98, 157 N. W. 991.

<sup>50</sup> All ordinances to be recorded in a book kept for the purpose. Wolfe v. Abbott, 54 Colo. 531, 131 Pac. 386.

Law required recording in an ordinance book. Ordinance copied on typewriter, and sheets upon which the copy appeared were pasted in the ordinance book, held sufficient compliance. Schwartz v. Gallup (N. Mex.), 165 Pac. 345.

<sup>51</sup> Malvern v. Cooper, 108 Ark. 24, 156 S. W. 845.

<sup>52</sup> Ordinance to be registered in a book duly kept for that purpose, showing its adoption. Corinth v. Sharp, 107 Miss. 696, 65 So. 888.

<sup>53</sup> Recorded, signed by presiding officer and attested by the clerk, held directory, only. Wabash R. Co. v. Gretzinger, 182 Ind. 155, 104 N. E. 69, 73.

Ordinance relating to exercise of ministerial functions, held valid

though not transcribed in the ordinance book as required. Huntingdon v. Huntingdon Water Supply Co., 258 Pa. 309, 101 Atl. 989, following Kolb v. Tamaqua Borough, 218 Pa. 126, 67 Atl. 44; Seitzinger v. Tamaqua & Edison Electric Illuminating Co., 187 Pa. 539, 41 Atl. 454.

If passed and published, held valid although not recorded and certified by the clerk as prescribed by law. These requirements do not go to the legal existence of the ordinance, but have reference only to the manner of authenticating and proving it merely directory. Clark v. Uniontown, 4 Ala. App. 264, 58 So. 725; Bell v. Jonesboro, 3 Ala. App. 652, 57 So. 138.

<sup>54</sup> Ordinance not recorded in the ordinance book with the certificate of the secretary thereon as required by law, held not in force. Ulrich v. Coaldale Borough, 53 Pa. Super. Ct. 246.

be to attest all ordinances and all signatures of the mayor when necessary, but which did not prescribe that the ordinance shall fail of validity if that is not done, was held directory.<sup>55</sup>

**§ 697. Publication of ordinances and notice of pendency.<sup>56</sup>**

Where publication is made a prerequisite to the ordinance taking effect, the requirement is clearly mandatory,<sup>57</sup> and to render the ordinance valid and enforceable

<sup>55</sup> Newcombe v. Kramer, 189 Mo. App. 538, 541, 176 S. W. 1072.

<sup>56</sup> Gainesville Gas & Electric Power Co. v. Gainesville, 63 Fla. 425, 58 So. 785; Salina City v. Lewis (Utah), 172 Pac. 286.

Of proposed charter amendment to be submitted to electors. Jackson v. Harrington, 160 Mich. 550, 125 N. W. 383.

To relieve a public service company from a burden, e. g., giving transfers at certain points imposed by charter of company, ten days' advertisement of pendency of ordinance. Commonwealth v. Richmond & R. R. Ry. Co., 115 Va. 756, 80 S. E. 796.

Publication serves as notice. Where published as prescribed by law no further notice is required. Neumann v. Hoboken, 82 N. J. 275, 82 Atl. 511.

By some laws an ordinance declaring an emergency is in force from its passage without publication. Pittsburgh C. C. & St. L. Ry. Co. v. Macy, 59 Ind. App. 125, 107 N. E. 486.

<sup>57</sup> Law made publication of penal ordinance a condition precedent to its taking effect. An amendment thereto although prescribing no penalty is of the or-

iginal ordinance which is penal, and hence must be published. Texas Traction Co. v. Scoggins (Tex. Civ. App.), 175 S. W. 1128.

Ordinances of a general and permanent nature and those imposing fine, penalty or forfeiture, were required to be published in a newspaper. It was made a defense to fine, penalty or forfeiture to show omission of publication. Not to be in force till five days after publication. Where part of ordinance was not published, held it never took effect. Wolfe v. Abbott, 54 Colo. 531, 131 Pac. 386.

"While there are many cases holding that charter provisions with reference to the publication of ordinances are merely directory, such is not the rule where publication is made a prerequisite to the ordinance taking effect." Newport v. Newport National Bank, 148 Ky. 213, 146 S. W. 377, 379, following Bybee v. Smith, 22 Ky. Law Rep. 1684, 61 S. W. 15; Muir's Adm'r v. Bardstown, 120 Ky. 739, 27 Ky. Law Rep. 1150, 87 S. W. 1096.

"The ordinance was not posted in the village, and not having been published as required by statute, it never took effect as an ordi-



publication must be in substantial conformity with the provisions of the law<sup>58</sup> as to time, place and manner.<sup>59</sup> Laws of this character are often construed as directory, as for example, in the absence of a provision to the effect that the ordinance shall not take effect until published.<sup>60</sup> In the absence of such requirement, it has been

nance. It is a matter of right that ordinances making appropriations shall be published either in a newspaper published in the municipality or by posting so that taxpayers may have notice of the appropriations, and may be advised whether they are within the law and the power of the corporate authorities." *People ex rel. v. Read*, 256 Ill. 408, 100 N. E. 230.

Requirement is mandatory and until complied with an ordinance cannot be effective. "Publication is a duty imposed upon the corporate officers, and until it is performed no rights are granted and the observance of no duties is enjoined by the ordinance which can be enforced by or against the municipality." *Commonwealth ex rel. v. Kelly*, 250 Pa. 18, 95 Atl. 322; *Carpenter v. Yeadon Borough*, 208 Pa. 396, 57 Atl. 837.

<sup>58</sup> The ordinance as published must show that it was published by authority of the city. *Taylor v. Illinois Central R. Co.*, 154 Ill. App. 222, 227.

"In two newspapers of opposite politics if such there be." If no newspaper, by posting copies, etc. *Elmwood Place v. Schanzle*, 91 Ohio St. 354, 110 N. E. 922.

Published in newspaper circulated in place is sufficient where none is printed there. *Hadlock v. Tucker*, 93 Neb. 510, 141 N. W. 192.

"Published in some newspaper of the municipality or by posting in three or more public places within the corporate limits for three weeks." *Slidell v. Levy*, 128 La. 809, 55 So. 413.

<sup>59</sup> Sufficiency of certificate of publication. *Strickland v. Samson* (Ala. App. 1918), 80 So. 166.

Law required appropriation ordinance to be published in the city or village. "It is immaterial where the printing is done, but the place of publication of a newspaper is the place where it is first put in circulation, where it is first issued to be delivered or sent by mail or otherwise to its subscribers." *People ex rel. v. Read*, 256 Ill. 408, 100 N. E. 230; *Ricketts v. Hyde Park*, 85 Ill. 110; *Tonawanda v. Price*, 171 N. Y. 415, 64 N. E. 191; *State v. Bass*, 97 Me. 484, 54 Atl. 1113.

<sup>60</sup> *Vernakes v. South Haven*, 186 Mich. 595, 152 N. W. 919.

The following Michigan cases have held publication essential to the validity of the ordinances, where the law provided they should not take effect till published: *Richter v. Harper*, 95 Mich. 221, 54 N. W. 768; *People v. Keir*, 78 Mich. 98, 43 N. W. 1039; *Vah Alstine v. People*, 37 Mich. 523.

held, publication is not necessary to validate an ordinance.<sup>61</sup>

### § 698. Time and frequency of publication.<sup>62</sup>

### § 699. Method of publication.

All provisions as to the manner of publication should be followed.<sup>63</sup> If the publication may be by posting

<sup>61</sup> *Corinth v. Sharp*, 107 Miss. 696, 708, 65 So. 888, 64 So. 379.

If ordinance prescribes no penalty it is not necessary that it be published. *De Scheppers v. Chicago, Rock Island & P. Ry. Co.*, 179 Ill. App. 298.

Ordinances involving expenditure of money were required to be published. Ordinance fixing term of office of city surveyor, held not to be such ordinance. *Schneider v. Atkinson*, 86 N. J. L. 392, 92 Atl. 81.

<sup>62</sup> Requirement was that ordinance should be published at least two weeks just preceding the election—means full two weeks, any less is fatal. *Central Construction Co. v. Lexington*, 162 Ky. 286, 172 S. W. 648.

A requirement that publication be at least once in three days after the ordinances become a law, held directory and substantially observed by publishing an ordinance on the 19th of the month when passed on the 13th, time reasonable. *State ex rel. v. Superior Court*, 77 Wash. 593, 138 Pac. 277.

"We think the ordinance was published as required by law. It was published for six weeks instead of four, but even if it was not published in strict conformity with the requirement it is not fatal

to the validity of the ordinance, since the requirement is merely directory." *Logan v. Boonton*, 87 N. J. L. 449, 95 Atl. 141.

**Memorial Day**, publication held good. *St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777.

**Sunday publication** does not constitute legal publication. "Sunday is dies non. *Commonwealth v. Matthews*, 152 Pa. 166, 25 Atl. 548, 18 L. R. A. 761; *Knight v. Press Co.*, 227 Pa. 185, 75 Atl. 1083. No citizen is required to take notice of any publication directed to be published by law, if it appears only in a Sunday newspaper." *Commonwealth ex rel. v. Kelly*, 250 Pa. 18, 95 Atl. 322.

Sunday is not a judicial day. No one is bound to read or take notice of a Sunday publication. *Central Construction Co. v. Lexington*, 162 Ky. 286, 172 S. W. 648.

<sup>63</sup> Publication of the original ordinance, with a later and void addition, held not to invalidate the original. *Depue v. Banschbach*, 273 Ill. 574, 113 N. E. 156, 160.

The law provided that every ordinance shall be published in the official paper of the village and also in each other newspaper actually printed in the village,

or in a newspaper, either mode will be sufficient.<sup>64</sup> An ordinance or notice published in a newspaper in a foreign language (German); it has been held, is not good, even though the ordinance or notice is printed in the English language in such newspaper.<sup>65</sup>

**§ 700. Amendment on passage.<sup>66</sup>**

**§ 702. Consideration of mayor's veto.<sup>67</sup>**

The time and method of consideration of the mayor's veto is generally controlled to some extent at least by parliamentary procedure,<sup>68</sup> but the proper construction of the applicable local law is more important.<sup>69</sup>

once each week for two consecutive weeks, and a printed copy thereof posted conspicuously in at least three public places in the village for at least ten days before the same shall take effect. It was held that all provisions must be observed as to publishing and posting. The village must show that all formalities necessary to make the proposed ordinance effective have been complied with, and until publication thereof was made in the manner provided, the ordinance was invalid. *People v. Chapman*, 152 N. Y. S. 204, 83 Misc. Rep. 469.

<sup>64</sup> Law authorized publication in newspaper or by posting in three public places, held posting as prescribed is sufficient without newspaper publication. *Bardwell v. Tegethoff*, 148 Ky. 545, 146 S. W. 1093.

Law said, in newspaper or by handbills, and requiring publication before the ordinance would be in force, held posting type-written copies in eight or ten conspicuous places in the city was suf-

ficient. *Gesser v. McLane*, 156 Ky. 743, 161 S. W. 1118.

<sup>65</sup> *Perkins v. Cook County Commissioners*, 271 Ill. 449, 111 N. E. 580.

<sup>66</sup> Franchise, condition that it "be advertised for sealed proposals," held under particular facts an amendment before passage, concurred in by the bidder, did not invalidate. *Saginaw Power Co. v. Saginaw*, 193 Fed. 1008.

<sup>67</sup> *Kimball v. James*, 136 N. Y. S. 541; *Browne v. Winchester*, 153 Ky. 502, 155 S. W. 1157; *Warner v. Coatesville Borough*, 231 Pa. 141, 80 Atl. 576; *Dockett v. Old Forge Borough*, 240 Pa. 98, 87 Atl. 421.

<sup>68</sup> When the measure is returned, with objection, a motion to reconsider the vote by which the measure was adopted is proper. If this prevails a motion to adopt the measure notwithstanding the mayor's veto, or that it be passed, over the veto, is proper. If the required majority adopt such motion the measure stands adopted, if not, the veto is effective. Ab-

### § 703. Courts will not inquire into legislative motives.<sup>70</sup>

“Courts are not concerned with the motives which actuate members of a legislative body in enacting a law, but in the result of their action. Bad motives might inspire a law which appeared on its face and proved valid and beneficial, while a bad and invalid law might be, and

sense of the motion to reconsider the vote by which the measure was adopted, is not material. Mere departure from proper form will not invalidate the action unless the controlling law makes such formality vital. *Rogers v. Mendota*, 200 Ill. App. 254, 257, citing §§ 606, 607, vol. 2, ante. (*McQuillin*, Mun. Ord. §§ 115, 116.)

Mayor returned the order to the board of aldermen where it originated, with his objections. The aldermen passed the order over the veto and sent it to the common council, where a vote to pass the order failed. At the next meeting, in accordance with the rules, a motion to reconsider prevailed and the order passed notwithstanding the veto, and the order was held valid. “On principle in our opinion a vote upon the question whether a measure shall be passed by either branch of a city council notwithstanding the objections of the mayor may be reconsidered, provided that it is in accordance with the rules governing the procedure.” *Nevins v. Springfield*, 227 Mass. 538, 116 N. E. 881, 885.

<sup>69</sup> Failure to take action, on veto at the meeting at which the ordinance is returned, when returned in time, invalidates the ordinance. *Dockett v. Old Forge Borough*, 240 Pa. 98, 37 Atl. 421.

“The objections of the mayor

shall be entered at large upon the journal of the council, and published in the city official newspaper. The council shall, not less than five days after such publication, and within thirty days after such bill shall have been so returned, reconsider and vote upon the same; and if the same on reconsideration be again passed by an affirmative vote of not less than two-thirds of the members elected, the president shall certify the fact on the bill, and when so certified the bill shall become an ordinance with like effect as if it had not been disapproved by the mayor.” *State ex rel. v. Gill*, 87 Wash. 201, 151 Pac. 498.

Over the mayor's veto the ordinance was passed in council of nine by vote of eight to one. The law provided that if vetoed the ordinance shall take effect if passed by an affirmative vote of not less than two-thirds of all the members elected. The ordinance ordered a street paved and charter required such ordinance to have two-thirds vote, but without petition of property owners, by unanimous vote. Held, legally passed over the veto. *State ex rel. v. Gill*, 87 Wash. 201, 151 Pac. 498.

<sup>70</sup> *Gray v. S. T. Woodring Lumber Co.* (Tex. Civ. App.), 197 S. W. 231, 233, citing § 703, vol. 2, ante; *Mosher v. Phoenix* (Ariz. 1919), 181 Pac. 170, following

sometimes is, passed with good intent and the best of motives." <sup>71</sup>

Notwithstanding the general, if not universal rule, forbidding judicial inquiry into legislative motives, if the exercise of the discretion vested in a municipal legislative body is abused to such an extent that it may be fairly concluded that no discretion at all was exercised, the courts are not precluded from making inquiry. Thus in an ordinance vacating a street, while it is not competent for a court to inquire into the motives of the city council in passing it, it is within judicial power and duty to inquire into the purpose of such ordinance, and in doing

*Hadacheck v. Alexander*, 169 Cal. 616, 147 Pac. 259; *People ex rel. v. Chicago*, 154 Ill. App. 578.

Parol evidence as to motive, rejected. *Melnick v. Atlanta* (Ga. 1918), 94 N. E. 1015, citing § 703, vol. 2, ante; *Hill v. Kimball*, 269 Ill. 398, 110 N. E. 18, 22; *Amboy v. Illinois Central R. R. Co.*, 236 Ill. 236, 86 N. E. 238.

"His conduct is to be judged by the expression which it takes in the enactment adopted." *Hadacheck v. Alexander*, 169 Cal. 616, 147 Pac. 259.

The courts will not substitute their judgment for that of the legislative body. *Ex parte Hadacheck*, 165 Cal. 420, 132 Pac. 586.

"It is well settled that the motives of a city council in passing an ordinance or of a legislature in enacting a statute, as a general rule, cannot be inquired into by the courts." *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883, 892, holding the motives of city council in passing an ordinance to regulate jitney service could not be investigated whether enacted for benefit of street railway system.

New York statute authorizing a justice of the Supreme Court to order a summary examination in public of any member of the board of aldermen, etc., construed. *Mitchell v. Cropsey*, 164 N. Y. S. 336, 177 App. Div. 663.

Courts will not inquire into the motives of city officers, legislative or administrative, in reducing salaries. *People ex rel. v. Prendergast*, 164 N. Y. S. 1042, 1050.

"It has been uniformly held that a city council, when acting upon subjects over which it has the power to legislate, is an entirely independent lawmaking body, and cannot be interfered with nor subjected to inquiry by the courts as to its motives, reasons or purposes in enacting ordinances." *Houston Electric Co. v. Houston* (Tex. Civ. App. 1919), 212 S. W. 198, 200, citing § 703, vol. 2, ante.

<sup>71</sup>*People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053.

Ordinance cannot be declared invalid because of the bad motive of members of the legislative body which enacted it. *Ex parte Sumida* (Cal.), 170 Pac. 823.

so to determine whether its purpose is to serve a public benefit or a private use.<sup>72</sup>

**§ 704. Same—rule limited—ministerial acts.<sup>73</sup>**

**§ 705. Injunction to restrain passage of ordinance.<sup>74</sup>**

**§ 705a. Injunction to restrain enactment of ordinance by initiative.**

An election called pursuant to a municipal charter provision under a legal plan for initiative legislation and proper petitions will not be restrained by injunction on the ground that the ordinances as proposed are unconstitutional. Usually, during the process of legislation in any mode the work of the law-makers is not subject to judicial arrest or control, nor open to judicial inquiry.<sup>75</sup> After the enactment of the legislation, if unconstitutional, injunction may be invoked to prevent its enforcement.<sup>76</sup>

**§ 706. Validating void ordinance by municipality.<sup>77</sup>**

<sup>72</sup> *People ex rel. v. Corn Products Refining Co.*, 286 Ill. 226, 121 N. E. 574, 577.

<sup>73</sup> *Gray v. S. T. Woodring Lumber Co.* (Tex. Civ. App.), 197 S. W. 231, 233, citing § 704, vol. 2, ante.

<sup>74</sup> *Norman v. Allen* (Okla.), 147 Pac. 1002, 1007, quoting with approval the greater part of § 705, vol. 2, ante.

In granting or modifying a franchise, the discretion of the legislative body will not be disturbed by the courts. *Arkansas Light & Power Co. v. Cooley* (Ark. 1919), 664, 666, following *Little Rock Ry. & El. Co. v. Dowell*, 101 Ark. 223, 142 S. W. 165, Ann. Cas. 1913D, 1086, and *Asher v. Hutchinson Water, L. & P. Co.*, 66 Kan. 496, 71 Pac. 813, 61 L. R. A. 52.

<sup>75</sup> Section 705, ante; § 705, vol. 2, ante; § 2503, vol. 5, ante.

<sup>76</sup> Section 805, vol. 2, ante; § 2504, vol. 5, ante.

“After the law making department of the government in any of its forms or by any of its agencies has finished its work and the act of legislation in which it was engaged has become fait accompli and is clothed with the outward forms of law, the question of the constitutionality of the completed bill or ordinance becomes one for ultimate determination by the judiciary.” *Pitman v. Drabelle*, 267 Mo. 78, 89, 183 S. W. 1055.

<sup>77</sup> *McDonald v. Ludowici*, 17 Ga. App. 523, 87 S. E. 807; *Bienfield v. Van Ness*, 176 Cal. 585, 169 Pac. 225; *Lassiter v. Atlantic City*,

**§ 707. Curative power of legislature over void ordinances.**

The legislature may ratify any act of a municipality which it might have originally authorized.<sup>78</sup> Thus it may cure defects in ordinances extending corporate limits. As it could have authorized the annexation in the first instance, it may therefore ratify it after it is made.<sup>79</sup>

A statutory provision that ordinances "now in force shall remain in force until altered or repealed," it was held, did not validate a void ordinance.<sup>80</sup>

86 N. J. L. 87, 90 Atl. 675, holding amendment of an ordinance pending proceedings to review its validity in the courts wherein it was declared void, did not cure ordinance.

**Contract of purchase** made under an ordinance void because not signed by the mayor cannot be ratified, e. g., by paying for the article. *Baker Mfg. Co. v. Richmond* (Mo. App.), 198 S. W. 1128.

**Curative proceeding in condemnation** of property to widen street by supplemental ordinance sanctioned by municipal charter. *Kansas City v. St. Louis and K. C. Land Co.*, 260 Mo. 395, 406, 169 S. W. 62; *State ex rel. v. Seehorn*, 246 Mo. 541, 549-551, 151 S. W. 716.

<sup>78</sup> *Illinois. People ex rel. v. Rock Island*, 271 Ill. 412, 111 N. E. 291 (annexation proceedings).

*New York. Stubbe v. Adamson*, 220 N. Y. 459, 116 N. E. 372, affirming 159 N. Y. S. 751, 173 App. Div. 305.

*Pennsylvania. Taylor v. Philadelphia* (Pa. 1918), 104 Atl. 766; following *Donley v. Pittsburgh*, 147 Pa. 348, 23 Atl. 394, 30 Am. St. Rep. 738.

*Wisconsin. State ex rel. v. Milwaukee*, 150 Wis. 616, 138 N. W. 76 (dividing city into wards).

*United States. Ashland Electric Power & Light Co. v. Ashland*, 217 Fed. 158, 160.

<sup>79</sup> *Mason v. Kansas City*, 103 Kan. 275, 173 Pac. 535, citing § 707, vol. 2, ante.

<sup>80</sup> *Mills v. Sweeney*, 219 N. Y. 213, 320, 114 N. E. 65; *East Tennessee Tel. Co. v. Russellville*, 106 Ky. 667, 673, 21 Ky. L. Rep. 305, 51 S. W. 308.

## CHAPTER 17.

### PENALTIES OF MUNICIPAL ORDINANCES.

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|---|--|
| § 710. Power to enforce ordinance by penalties.                         | § 715. Penalty by imprisonment.          |
| § 714. Power to inflict penalty of forfeiture—animals running at large. | § 716. Other penalties—costs.            |
|   | § 717. Penalty must be certain.          |
|   | § 720. Penalty must be reasonable—limit. |

#### § 710. Power to enforce ordinance by penalties.<sup>1</sup>

An ordinance without a penalty, it has been held, is not necessarily void.<sup>2</sup> But such ordinance, it has also been declared, would be inoperative—entirely incapable of being given any effect by the courts.<sup>3</sup>

<sup>1</sup> *Yellow Taxicab Co. v. Gaynor*, 143 N. Y. S. 279, 82 Misc. Rep. 94, affirmed in 144 N. Y. S. 299, 159 App. Div. 893, 144 N. Y. S. 494, 159 App. Div. 888; *Kalamazoo v. Kalamazoo Circuit Judge* (Mich. 1918), 166 N. W. 998; *Jones v. Lanford*, 141 Ga. 646, 81 S. E. 885; *Blake v. Pleasantville*, 87 N. J. L. 426, 95 Atl. 113.

By fine or imprisonment. *State ex rel. v. McDonald*, 121 Minn. 207, 141 N. W. 110, 112.

Both fine and imprisonment allowed. *Seattle v. Oliver*, 78 Wash. 586, 139 Pac. 626.

Fine to be collected by civil action, limited to, held not power to declare violation of ordinance a misdemeanor. *Chapman v. Selover*, 159 N. Y. S. 632, 172 App. Div. 858.

Where the grant of power to the city is limited to the imposition of fines only, clearly the ordinance

cannot provide for both fine and imprisonment, since it would be plainly in excess of the power conferred. *Tooele City v. Hoffman*, 42 Utah 596, 134 Pac. 558.

"The derivative power of a municipality to fine and imprison can only exist under and in the due enforcement of authority clearly committed to the municipality." *People ex rel. v. Lent*, 152 N. Y. S. 18, 166 App. Div. 550.

<sup>2</sup> *Indianapolis Traction & Terminal Co. v. Hensley*, 186 Ind. 479, 115 N. E. 934, 16 N. C. C. A. 556.

Ordinance valid though it prescribes no penalty. *De Scheppers v. Chicago, R. I. & P. Ry. Co.*, 179 Ill. App. 298, 301.

Ordinance establishing a saloon district, held valid although it prescribed no penalty for its violation. *Brownsville v. Fernandez* (Tex. Civ. App. 1918), 202 S. W. 112, 115.

<sup>3</sup> "In this state a statute or



On the other hand, an ordinance purely regulative in its nature and which does not profess to impose a penalty is not void for failure to prescribe a penalty for its violation.<sup>4</sup> Moreover, omission of a penalty in a section of an ordinance requiring a penalty to make it effective, will not render nugatory the remaining sections, where the defective section is clearly separable from the rest of the ordinance.<sup>5</sup> And in event of the imposition of alternative penalties and one of which is unauthorized and therefore illegal, the ordinance will not be declared void as a whole, where the legal penalty is separable from the illegal.<sup>6</sup>

In some jurisdictions where an ordinance covers an offense denounced by a statute, it must prescribe the same penalty.<sup>7</sup> On the other hand, power to regulate the subject by penalties, it has been held, is authority to impose different penalties than those imposed by statute.<sup>8</sup>

ordinance which contents itself with announcing that a certain act shall be a crime or offense, without at the same time attaching a penalty for the doing of it, would be inoperative—entirely incapable of being given any effect by the courts.” *New Orleans v. Stein*, 137 La. 652, 69 So. 43.

<sup>4</sup> *Blake v. Pleasantville*, 87 N. J. L. 426, 429, 95 Atl. 113, stating that *Tomlin v. Cape May*, 63 N. J. L. 429, 44 Atl. 209, failed to distinguish between an ordinance which is nugatory and unenforceable because it had no penalty and an ordinance which does not profess to impose a penalty, and therefore it was expressly disapproved in *Doran v. Camden*, 64 N. J. L. 666, 46 Atl. 724.

<sup>5</sup> *Blake v. Pleasantville*, 87 N. J. L. 426, 430, 95 Atl. 113.

<sup>6</sup> *Shill Rolling Chair Co. v. Atlantic City*, 87 N. J. L. 399, 94 Atl. 314, 316, following *Doran v. Cam-*

*den*, 64 N. J. L. 666, 46 Atl. 724; *Rosencrans v. Eatonton*, 80 N. J. L. 227, 234, 235, 77 Atl. 88; *Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18.

<sup>7</sup> *Ex parte Farley* (Tex. Cr. App. 1912), 144 S. W. 530; *Ex parte Goldberg* (Tex. Cr. App. 1918), 200 S. W. 386.

A penalty can be prescribed only when authorized. *Ib.*

“No municipal ordinance shall fix a penalty for violation thereof at less than that imposed by statute for the same offense.” *Kentucky Constitution. Owensboro v. Evans*, 172 Ky. 831, 189 S. W. 1153.

<sup>8</sup> *Tooele City v. Hoffman*, 42 Utah 596, 134 Pac. 558.

Statutory penalty may be increased by ordinance when power so to do has been expressly given. *Fennan v. Atlantic City*, 88 N. J. L. 435, 97 Atl. 150.

**§ 714. Power to inflict penalty of forfeiture—animals running at large.<sup>9</sup>**

**§ 715. Penalty by imprisonment.<sup>10</sup>**

**§ 716. Other penalties—costs.<sup>11</sup>**

**§ 717. Penalty must be certain.<sup>12</sup>**

<sup>9</sup> *Whitley v. Stephens* (Ky. 1919), 211 S. W. 770.

<sup>10</sup> May be inflicted as a punishment, not merely to coerce the payment of a fine. *State ex rel. v. McDonald*, 121 Minn. 207, 141 N. W. 110, 112.

Valid, if within the limits of grant, thirty days. *Seattle v. Oliver*, 78 Wash. 586, 139 Pac. 626.

Limit fixed by charter, of course, cannot be exceeded, e. g., where charter says not to exceed sixty days, an ordinance saying ninety days, is void, however only for the excess over the charter limit. *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487, 491, approving *Greenville v. Pridmore*, 86 S. C. 442, 68 S. E. 636, 138 Am. St. Rep. 1058.

Invalidity of imprisonment penalty, held not to affect penalty of fine which was valid, as the parts were separable. *Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18.

<sup>11</sup> **Fine.** For violation of ordinance limiting speed of motor vehicles, held could impose fine to be collected by a civil action, but could not declare violation a misdemeanor. *Chapman v. Selover*, 159 N. Y. S. 632, 172 App. Div. 858.

**Hard labor.** On conviction, on appeal, on trial de novo punishment by fine, imprisonment or hard

labor on the streets is authorized by Alabama Code. *Cooper v. Gadsden*, 10 Ala. App. 609, 65 So. 715; *Clerk v. Uniontown*, 4 Ala. App. 264, 58 So. 725.

Hard labor may be imposed without the imposition of a fine. *Feagin v. Andalusia*, 12 Ala. App. 611, 67 So. 630.

May be sentenced to labor on city streets or on public works without condition of discharge upon payment of a fine. *Jones v. Lanford*, 141 Ga. 646, 81 S. E. 885.

<sup>12</sup> An ordinance requiring all buildings to be rat-proofed, prescribing a definite sum each day as a penalty for its violation, is certain as to penalty. "It is next said that the penalty is not certain or fixed because it is so much for each day. What more certainty and fixation is needed than this we cannot imagine." *New Orleans v. Mangiarisina*, 139 La. 605, 71 So. 886.

An ordinance providing for "imprisonment or hard labor not exceeding six months" as punishment, was not rendered invalid by failure to specify the kind or place of imprisonment or hard labor, where the controlling law contains the requisite specifications. *Cooper v. Gadsden*, 10 Ala. App. 609, 65 So. 715.

**§ 720. Penalty must be reasonable—limit.**

The penalty must be within the limit prescribed in the grant of power,<sup>13</sup> and it must not be excessive.<sup>14</sup> Where an ordinance fixes a penalty greater than that authorized, some laws allow it to be reduced within the legal limit, and thus prevent the ordinance from being invalid.<sup>15</sup>

In the absence of special authorization as to imposing penalties, ordinance penalties must conform to the general statute on the subject.<sup>16</sup>

<sup>13</sup> *Owensboro v. Evans*, 172 Ky. 831, 189 S. W. 1153; *Seattle v. Oliver*, 78 Wash. 586, 139 Pac. 626.

Cannot exceed amount prescribed by statute. *Cook v. Pascagoula* (Miss. 1919), 83 So. 305.

An ordinance fixing a penalty not within the limits of the statute authorizing its enactment, renders the penalty void. *Assaria v. Wells*, 68 Kan. 787, 75 Pac. 1026; *Re Van Tuyl*, 71 Kan. 659, 81 Pac. 181.

A penalty in a bond given as security for observance of the law in dispensing liquor, and which under the ordinance regulating the matter could not arise until after a conviction and which exceeded the sum prescribed by state law, renders the ordinance void. *Roswell v. Jacoby*, 21 N. Mex. 702, 158 Pac. 419.

Power to impose a penalty not to exceed \$100 for any one offense, authorizes a minimum fine of \$10 and a maximum of \$100. *Stark v. Geiser*, 90 Kan. 504, 135 Pac. 666; *Minneola v. Naylor*, 84 Kan. 147, 113 Pac. 309.

<sup>14</sup> If the penalty for violating an ordinance limiting the price at which gas may be supplied is not excessive in each particular case, it is not excessive as a matter of law. "The purpose of the penalty is to secure the enforcement of the ordinance." *Kalamazoo v. Kalamazoo Circuit Judge* (Mich. 1918), 166 N. W. 998.

Private money lender for charging usurious interest, a fine not to exceed \$40 or imprisonment for thirty days in jail, was sustained. *Columbia v. Phillips*, 101 N. C. 391, 85 S. E. 963.

In New Jersey, although an ordinance authorizes a penalty in excess of that allowed by statute, it will not be declared void in its entirety on certiorari. *Ninth Street Improvement Co. v. Ocean City* (N. J. L. 1918), 103 Atl. 186.

<sup>15</sup> *Little Rock v. Reinman*, 107 Ark. 174, 155 S. W. 105, 108.

<sup>16</sup> *Ex parte Goldberg* (Tex. Cr. App. 1918), 200 S. W. 386.

## CHAPTER 18.

### REASONABLENESS OF ORDINANCES, AND HEREIN ORDINANCES IN RESTRAINT OF TRADE.

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| § 724. Express power to pass.                                | § 730. Rules as to the reasonable- |
| § 725. General grant and implied<br>or incidental powers.    | ness under general and im-         |
| § 726. Mode of exercise of power<br>must be reasonable.      | plied powers.                      |
| § 727. Same—illustrative cases.                              | § 731. Same subject.               |
| § 728. Same—uniform rule neces-                              | § 732. Same subject.               |
| sary.  | § 734. Same—illustrative cases.    |
| § 729. Reasonableness is a question<br>of law for the court. | § 738. Ordinances must not un-     |
|  | reasonably discriminate—           |
|  | classification.                    |
|  | § 739. Same—illustrative cases.    |

#### § 724. Express power to pass.

If an ordinance emanates by virtue of express power, it will not be set aside by the courts for mere unreasonableness where in its enactment the grant of power was followed in substance and in a reasonable manner, for in such case it is as though it were an act of the legislature itself and questions as to the expediency and wisdom of the legislation rest alone with the state law-making power.<sup>1</sup> And this is true although such ordinance would

<sup>1</sup> Alabama. Birmingham Ry. L. & P. Co. v. Keyser (Ala. 1919), 82 So. 151, 156.

Illinois. Catholic Bishop of Chicago v. Palos Park, 286 Ill. 400, 121 N. E. 561; Chicago v. Ripley, 249 Ill. 466, 94 N. E. 931.

Indiana. Indianapolis v. College Park Land Co. (Ind. 1918), 118 N. E. 356, 358.

Louisiana. State ex rel. v. St. Louis, I. M. & S. Ry. Co., 138 La. 714, 70 So. 621, 624.

Missouri. St. Louis v. United

Railways Co., 263 Mo. 387, 456, 174 S. W. 78.

Nebraska. Union Pacific R. Co. v. State, 88 Neb. 247, 129 N. W. 290.

N. Carolina. Lawrence v. Nissen, 173 N. C. 359, 91 S. E. 1036, 1037, citing §§ 724, and 725, vol. 2, ante.

Virginia. Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, 148, citing § 724, vol. 2, ante.

In such case there must be a strict compliance with the statute.

have been regarded as unreasonable if it had been passed under the implied or incidental powers of the municipality.<sup>3</sup> However, all courts have not uniformly observed this distinction, but in most instances it has been recognized.<sup>3</sup>

"If an ordinance be passed in virtue of express legislative power and substantially follows the power granted a court will sustain it regardless of its opinion as to its reasonableness. If passed in virtue of incidental or implied power granted by the legislature, courts will review the question of reasonableness, and if in excess of powers granted may declare them invalid. But the unreasonable character of the ordinance must plainly appear."<sup>4</sup>

*Decatur v. Gould* (Ia. 1919), 170 N. W. 449.

"Where there is an express legislative grant to a municipality of power to ordain to a particular effect or to do a particular thing the municipal ordinance expressive of that power cannot be inquired into with respect to its policy or reasonableness." *Montgomery v. Orpheum Taxi Co.* (Ala. 1919), 82 So. 117, 121, per McCelland, J.

<sup>2</sup>If the municipal corporation had the power to enact the ordinance its reasonableness is not for the court to decide. *Lawrence v. Nissen*, 173 N. C. 359, 91 S. E. 1036, saying that "neither is it necessary that we should find that conditions actually exist that require the enactment of the ordinance. It is sufficient if a state of facts could exist which would justify it," sustaining an ordinance restricting the location of hospitals.

<sup>3</sup>"While there is ample authority for the contention that where the legislature has granted special authority to pass ordinances of a

specified purpose and defined character, if the power thus delegated does not conflict with the constitution, the validity of an ordinance passed thereunder cannot be impeached because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation. \* \* \* Yet it appears from an examination of the Texas authorities that our courts have not uniformly observed this distinction, though in many instances they have recognized it." *Gray v. S. T. Woodring Lumber Co.* (Tex. Civ. App.), 197 S. W. 231, 233 (citing § 725, vol. 2, ante). *Houston, etc., R. Co. v. Dallas*, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850.

"Where municipal legislative action proceeds from authority expressly granted, 'the rule seems to be universally that which applies to the action of all legislative bodies.'" *Maercker v. Milwaukee*, 151 Wis. 324, 139 N. W. 199, 202, citing § 724, vol. 2, ante. (*McQuillin, Mun. Ord.*, § 181.)

<sup>4</sup>*Huston v. Des Moines*, 176

It is sometimes said that the power of the court to declare an ordinance unreasonable is limited to cases in which the ordinance was passed under the supposed implied or incidental powers of the corporation merely.<sup>5</sup> If the grant of power is general rather than specific the reasonableness of the ordinance may be open to inquiry.<sup>6</sup> But an ordinance regulative in character and which is, in substance, in conformity with the statute from which it derives its force, will not be rendered inefficacious if it fails to embrace, in terms, all the provisions of the statute.<sup>7</sup>

### § 725. General grant and implied or incidental powers.

While courts are reluctant to disturb an ordinance en-

Iowa 455, 156 N. W. 883, 892, citing § 724, vol. 2, ante. (McQuillin, Mun. Ord., § 181.)

Where power to pass a speed ordinance has been specifically conferred it cannot be declared void for unreasonableness. *Gibbons v. Aurora, Elgin & Chicago R. Co.*, 177 Ill. App. 572, 583; *Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 65 L. ed. 1229, sustaining an ordinance passed pursuant to police power conferred by statute prohibiting billiard halls, etc.

If a statute expressly authorized the adoption of the ordinance the policy or reasonableness of its adoption cannot be questioned. *Ridgeway v. Bessemer*, 9 Ala. App. 470, 473; *Dreyfus v. Montgomery*, 4 Ala. App. 270, 58 So. 730, citing § 724, vol. 2, ante.

If an ordinance is adopted under special authority of the legislature or if approved by that body after its adoption, evidence to show its unreasonableness is inadmissible. *Stubbe v. Adamson*, 222 N. Y. 459,

116 N. E. 372, affirming 159 N. Y. S. 751, 173 App. Div. 305.

The ordinance must be reasonable, not oppressive. *Ogden City v. Leo* (Utah, 1919), 188 Pac. 530.

<sup>5</sup> *Lawrence v. Nissen*, 173 N. C. 359, 91 S. E. 1036 (quoting with approval from §§ 724, 725, vol. 2, ante); *State v. Ray*, 131 N. C. 814, 42 S. E. 960, 60 L. R. A. 634, 92 Am. St. Rep. 795; *State v. Thomas*, 118 N. C. 1221, 1225, 1226, 24 S. E. 535.

"The reasonableness of an ordinance is a judicial question. An ordinance is reviewable by the courts when it is enacted pursuant to a general power, or under implied powers but not where the power is given to the municipality by the legislature to enact an ordinance of a special kind." *Dangel v. Williams*, Del. Ch. (1916), 99 Atl. 84.

<sup>6</sup> *New Orleans v. Le Blanc*, 139 La. 113, 71 So. 248, ordinance relating to the operation of jitneys.

<sup>7</sup> *Blake v. Pleasantville*, 87 N. J. L. 426, 98 Atl. 1084.

acted in pursuance of a general grant of power or one emanating by virtue of implied or incidental powers, and designed to promote the health, security and comfort of the inhabitants of a given community, it was an ancient jurisdiction of judicial tribunals to pronounce upon its reasonableness and consequent validity, and this rule has been uniformly applied by the decisions of the courts of last resort of the several states.<sup>8</sup> "It was always the doctrine of courts that every ordinance or by-law must be reasonable and not inconsistent with the general principles of the law of the land, particularly those having relation to the liberty of the citizen and the rights of private property."<sup>9</sup>

<sup>8</sup> Iowa. *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883, 891, citing § 725, vol. 2, ante. (McQuillin, Mun. Ord., § 182.)

Illinois. *Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192; *People ex rel. v. Oak Park*, 266 Ill. 365, 107 N. E. 636; *People ex rel. v. Ericsson*, 263 Ill. 368, 373, 105 N. E. 315.

Missouri. *State ex rel. v. Missouri Pacific Ry. Co.*, 262 Mo. 720, 174 S. W. 73, 77; *American Tobacco Co. v. St. Louis*, 247 Mo. 374, 157 S. W. 502.

N. Carolina. *Lawrence v. Nissen*, 173 N. C. 359, 91 S. E. 1036 (citing § 725, vol. 2, ante); *Berger v. Smith*, 156 N. C. 323, 72 S. E. 376 (ordinance forbidding the construction and operation of mills within designated area).

Oregon. *Churchill v. Albany*, 65 Or. 442, 133 Pac. 632.

Texas. *Munger Oil & Cotton Co. v. Groesbeck* (Tex. Civ. App.), 194 S. W. 1121.

Virginia. *Parrish v. Richmond*, 119 Va. 180, 89 S. E. 102.

United States. *Guidoni v.*

*Wheeler*, 230 Fed. 93, 144 C. C. A. 391.

<sup>9</sup> *Mobile v. Orr*, 181 Ala. 308, 61 So. 920.

The presumption is that it was not intended that the power authorizing the enactment of the ordinance should be exercised by passing an unreasonable ordinance. *Brenham v. Holle* (Tex. Civ. App.), 153 S. W. 345.

"The power of the legislative department of city government is limited. It may not act arbitrarily beyond the scope of reason. *Corrigan v. Gage*, 68 Mo. 541; *Plattsburg v. Hagenbush*, 98 Mo. App. 669, 673, 73 S. W. 725.

"Such bodies necessarily have large discretion but they cannot abuse such discretion by wanton, capricious or arbitrary enactments," relating to an ordinance establishing sewers. *Newcombe v. Kramer*, 189 Mo. App. 538, 176 S. W. 1072.

It is an "indisputable proposition that courts will declare void ordinances which are unreasonable and oppressive in their attempted

### § 726. Mode of exercise of power must be reasonable.<sup>10</sup>

While the courts recognize that broad latitude must be accorded to the municipal authorities in the exercise of discretionary powers, nevertheless the general rule is uniformly applied that powers granted in comprehensive terms must be reasonably exercised. It is the province of the court to protect the individual from unreasonable, oppressive or arbitrary exercise of power within the limits of our constitutional and legal system.<sup>11</sup>

### § 727. Same—illustrative cases.<sup>12</sup>

An ordinance was sustained as reasonable which provided for the supervision by the police of the business of private detectives.<sup>13</sup> Likewise an ordinance was held reasonable providing for the exercise of the initiative and referendum powers authorized by the constitution.<sup>14</sup> So an ordinance forbidding any person from removing night soil and other refuse other than the city scavenger was held a reasonable exercise of the police power.<sup>15</sup>

On the other hand, an ordinance making it unlawful to

exercise of the police power.”  
*Pinney and Boyle Co. v. Los Angeles Gas & Electric Corp.*, 168 Cal. 12, 141 Pac. 620, holding valid and reasonable an ordinance fixing rates for supplying electricity.

<sup>10</sup> *Florida. Pounds v. Darling* (Fla. 1918), 77 So. 666.

*Illinois. Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192; *Carmi v. Miller*, 173 Ill. App. 283; *Koy v. Chicago*, 263 Ill. 122, 104 N. E. 1104.

*Kansas. Emporia v. Atchison T. & S. F. Ry. Co.*, 94 Kan. 718, 147 Pac. 1095.

*Maryland. State v. Gurry*, 121 Md. 534, 88 Atl. 546, 47 L. R. A. (N. S.) 1087.

*Maine. Skowhegan v. Heselton*, 117 Me. 17, 102 Atl. 772.

*Michigan. People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053.

*New York. People ex rel. v. Miller*, 146 N. Y. S. 403, 161 App. Div. 138.

*Wisconsin. Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882.

<sup>11</sup> *Bishop of Chicago v. Palos Park*, 286 Ill. 400, 121 N. E. 561.

<sup>12</sup> *Williams v. Chicago*, 266 Ill. 267, 107 N. E. 599, sustain building ordinance regulations.

<sup>13</sup> *Lebon v. Atlanta*, 16 Ga. App. 64, 84 S. E. 608.

<sup>14</sup> *Pearce v. Roseburg*, 77 Or. 195, 150 Pac. 855.

<sup>15</sup> *Ex parte Howell*, 71 Tex. Cr. App. 71, 158 S. W. 535, following *Anderson v. State*, 53 Tex. Cr. R. 243, 109 S. W. 193.



use earth closets in named parts of the municipal area, irrespective of the fact of nuisance, was held an unreasonable exercise of the police power.<sup>16</sup> So an ordinance forbidding the establishment or conducting of any kind of business whatever on a designated public street of the city, with a view of rendering the street exclusively residential, was declared unreasonable.<sup>17</sup>

### § 728. Same—uniform rule necessary.<sup>18</sup>

“An ordinance enacted in the alleged or ostensible exercise of any of the well-defined purposes of the police

<sup>16</sup> *Malone v. Quincy*, 66 Fla. 52, 62 So. 922.

<sup>17</sup> *Calvo v. New Orleans*, 136 La. 480, 67 So. 338.

<sup>18</sup> *Alabama. Birmingham Ry. L. & P. Co. v. Kyser* (Ala. 1919), 82 So. 151, 153, citing § 728, vol. 2, ante; *Talladega v. Sims*, 8 Ala. App. 471, 62 So. 958, citing § 728, vol. 2, ante (*McQuillin, Mun. Ord.*, § 184), holding ordinance giving discretion to chief of police to grant or refuse permit to excavate in street, etc., an unlawful delegation of power.

*California. Ex parte Keppelmann*, 166 Cal. 770, 138 Pac. 346; *Ex parte Dart*, 172 Cal. 47, 155 Pac. 63, holding unreasonable certain ordinance provisions regulating soliciting contributions for charity, making the right to solicit dependent on the arbitrary will of a commission; *Ex parte Hitchcock* (Cal. App.), 166 Pac. 849 (regulating the granting of permits to conduct private patrol service in city).

*Georgia. Thorpe v. Savannah*, 13 Ga. App. 767, 79 S. E. 949, holding reasonable an ordinance relating to keeping cattle within the city wherein certain discretion was

reposed in a city officer as to granting or refusing application for permit.

*Kansas. Smith v. Hosford* (Kan. 1920), 187 Pac. 685.

*Missouri. Hays v. Poplar Bluff*, 263 Mo. 516, 173 S. W. 676.

*N. Carolina. State v. Bass*, 171 N. C. 780, 87 S. E. 972, holding unreasonable, as not providing a uniform rule, an ordinance forbidding the building of a privy, stables or stalls nearer neighbor's residence than a named distance, etc.

*New York. Regulating public hack stands, hackmen, licensing, rates, etc. Yellow Taxicab Co. v. Gaynor*, 143 N. Y. S. 279, 82 Misc. Rep. 94, affirmed in 144 N. Y. S. 299, 159 App. Div. 893, 144 N. Y. S. 494, 159 App. Div. 888.

*Oregon. Thielke v. Albee*, 79 Or. 48, 153 Pac. 793 (licensing and regulating motor busses).

*Texas. Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301 (regulating and licensing motor busses, jitneys).

*Wisconsin. Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882, holding valid and reasonable an ordinance regulating public dance

power must be general in its nature and applicable alike to all who may properly come within its purview." <sup>19</sup>

An ordinance relating to the construction of such viaducts over and tunnels under streets or railroad tracks as should be determined by the mayor and commissioners to be necessary for the safety and convenience of the public, was held unreasonable. <sup>20</sup>

An ordinance prohibiting digging in streets to lay gas pipes "without the consent of the council of the town entered upon the records of said town," is unreasonable, arbitrary and discriminatory, since it does not provide a uniform rule applicable to all alike. <sup>21</sup>

An ordinance requiring a permit to erect a building in a fire zone which fixes no standard for determining whether a permit shall be issued, but which vests in the officers unregulated and arbitrary power of determination is unreasonable and void. <sup>22</sup> But an ordinance fixing a fire zone, and providing that no permit shall be granted to erect therein a building except of stone or brick cov-

halls, requiring report by police, and license.

W. Virginia. *Lynch v. Northview*, 73 W. Va. 609, 81 S. E. 833, 835, 52 L. R. A. (N. S.) 1038, quoting with approval part of § 728, vol. 2, ante; *Lynch v. Northview*, 73 W. Va. 609, 81 S. E. 833, 52 L. R. A. (N. S.) 1038, holding void an ordinance prohibiting digging in the streets to lay gas pipes without the council's consent entered upon the records, since this vests in the council arbitrary authority, and which may result in oppression and discrimination.

United States. *Enbanks v. Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192.

<sup>19</sup> Ex parte *Lerner* (Mo. 1920), 218 S. W. 331, 334.

Ordinance as to granting permit which confers arbitrary and unregulated power on an officer, or in effect puts the granting of the permit at his will or whim is unconstitutional. *Smith v. Hosford* (Kan. 1920), 187 Pac. 685.

<sup>20</sup> *Emporia v. Atchison T. & S. F. Ry. Co.*, 94 Kan. 718, 147 Pac. 1095.

<sup>21</sup> *Lynch v. Northview*, 73 W. Va. 609, 81 S. E. 833, 52 L. R. A. (N. S.) 1038.

<sup>22</sup> The ordinance merely prohibited any person from erecting any building within the area without permission of the board of trustees under penalty. *Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555.

ered with a slate or metal roof, is reasonable, since no discrimination appears, and no arbitrary power exists.<sup>23</sup>

An ordinance prohibiting the establishment of a junk shop in a block in which two-thirds of the buildings are stores or residences, unless a majority of the property owners consent in writing, was adjudged reasonable.<sup>24</sup>

So an ordinance requiring the consent in writing of the owners of a majority of the frontage on both sides of the street in any block to erect billboards, it has been held, does not render the ordinance invalid.<sup>25</sup>

An ordinance cannot arbitrarily discriminate between citizens of the same class. The ordinance must operate uniformly upon all of the inhabitants of the community who are similarly situated. Where special privileges are granted by an ordinance they must be opened to the enjoyment of all upon the same terms and conditions.<sup>26</sup> Thus an ordinance seeking to restrict for the public good the rights of the individual otherwise incident to the ownership of property must do so by a rule applicable to all alike under the same circumstances, and cannot make his enjoyment of his own depend upon the arbitrary will or caprice of the municipal officers.<sup>27</sup>

<sup>23</sup> *Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555.

<sup>24</sup> *Smolensky v. Chicago*, 282 Ill. 131, 118 N. E. 410, distinguishing *People v. Busse*, 240 Ill. 338, 88 N. E. 831, decided prior to grant of power to direct the location of junk shops.

<sup>25</sup> *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530, 37 Sup. Ct. 290, 61 L. ed. 191, affirming 267 Ill. 344, 108 N. E. 340, 8 Ann. Cas. 1916C, 488.

Consent to location of garage. *People v. Ericsson*, 263 Ill. 368, 105 N. E. 315.

Consent to location of saloon. *Swift v. People*, 162 Ill. 534.

<sup>26</sup> *Sullivan v. Cloe*, 277 Ill. 56, 115 N. E. 135, holding void as not

providing a uniform rule an ordinance forbidding use of streets and alleys for the erection of poles and wires and other fixtures without permission of mayor and council committee, and approving as controlling *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155, and *Chicago v. Trotter*, 136 Ill. 430, 26 N. E. 359.

<sup>27</sup> "The vice most important in this ordinance is its general scheme by which the city council places its paternal hand upon the interests of the people of the city with the manifest intention of gathering to itself the undefined and arbitrary power to determine who shall have the special privilege of erecting

If an ordinance, therefore, prescribes no rule for the conduct of a particular business with which it undertakes to deal, applicable alike to all who may bring themselves within its terms, but confers upon the council power to issue a certain class of permits without defining the exercise of the power in that relation but which leaves the power absolute it will be held unreasonable. The ordinance in question prescribes no conditions upon which the class of permits involved should be granted and furnished no rule by which the impartial exercise of the power vested in the council might be secured. The discretion of the body was in no way regulated, or controlled, and was purely arbitrary. In such case the court need not await actual exercise of the power because "the test of validity of a law is not what has been done, but what may be done under its provisions."<sup>28</sup>

**§ 729. Reasonableness is a question of law for the court.<sup>29</sup>**

Courts may declare an ordinance unreasonable, (1) if

buildings of combustible materials in these areas, and who shall be denied, without being entitled to the courtesy of a reason. This cannot be done." *Hays v. Poplar Bluff*, 263 Mo. 516, 534, 536, 173 S. W. 676, holding void an ordinance relating to fire limits forbidding the construction of buildings therein without special permission of the mayor and city council.

If an ordinance upon its face restricts the right of dominion which the individual might otherwise exercise without question, not according to any uniform rule, but so as to make the absolute enjoyment of his own depend upon the arbitrary will of the city authorities, it is invalid, because it fails to furnish a uniform rule of action and leaves the right of property subject to the will of such authorities who

may exercise it so as to give exclusive powers or privileges to particular persons. *Elkhart v. Murray*, 165 Ind. 304.

An ordinance forbidding under penalties the operation of a stone quarry without permission of the municipal assembly is void. *St. Louis v. Atlantic Quarry & Construction Co.*, 244 Mo. 479, 487, 148 S. W. 948.

A constitutional provision forbidding the passage by the legislature of special laws and those granting special privileges is applicable to municipal corporations. *Hays v. Poplar Bluff*, 263 Mo. 516, 533, 173 S. W. 676; *St. Louis v. Atlantic Quarry & Construction Co.*, 244 Mo. 479, 488, 148 S. W. 948.

<sup>28</sup> *Richmond v. Model Steam Laundry*, 111 Va. 758, 69 S. E. 932.

<sup>29</sup> *Alabama. Briggs v. Birmingham*

ham Ry. Light & P. Co., 188 Ala. 262, 266, 66 So. 95, citing § 729, vol. 2, ante.

Arkansas. *North Little Rock v. Rose* (Ark. 1918), 206 S. W. 449 (holding unreasonable an ordinance regulating the operation of moving picture shows); *Pierce Oil Corporation v. Hope* (Ark.), 191 S. W. 405.

Colorado. *Munson v. Colorado Springs*, 35 Colo. 506, 9 Ann. Cas. 970.

Delaware. *Dangel v. Williams* (Del. Ch.), 99 Atl. 84.

Florida. *Cary v. Ellis* (Fla. 1919), 82 So. 781.

Illinois. *Chicago v. Mayer* (Ill. 1919), 124 N. E. 842; *Hill v. Kimball*, 269 Ill. 398, 110 N. E. 18; *Murphy v. Chicago, Rock Island & Pac. Ry. Co.*, 247 Ill. 614, 93 N. E. 381; *Koy v. Chicago*, 263 Ill. 122, 104 N. E. 1104; *Belleville v. Mitchell*, 273 Ill. 136, 112 N. E. 369 (ordinance imposing special assessments for street improvement, holding that the objection that the ordinance was unreasonable was a legal objection under the law of Illinois); *Chicago v. Chicago & N. W. Ry. Co.*, 275 Ill. 30, 113 N. E. 847 (regulating, milk supply).

Kentucky. *Owensboro v. Evans*, 172 Ky. 831, 889 S. W. 1153 (prescribing standard for milk).

Kansas. *Emporia v. Atchison, T. & S. F. Ry. Co.*, 94 Kan. 718, 147 Pac. 1095 (ordinance relating to construction of viaducts over and tunnels under streets or railroad tracks, held unreasonable).

Maine. *State v. Maheu*, 115 Me. 316, 98 Atl. 819 (inspection of meat).

Michigan. *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053.

North Carolina. *State v. Bass*, 171 N. C. 780, 783, 87 S. E. 972, citing §§ 726-729, vol. 2, ante.

Oregon. *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378, 380.

Virginia. *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139.

United States. *Yee Gee v. San Francisco*, 235 Fed. 757 (regulating laundries).

"Whether a particular ordinance is unreasonable, and therefore void, is a question of law for the court, and not for the jury." *Chicago v. Mayer* (Ill. 1919), 124 N. E. 842; *State v. Bass*, 171 N. C. 780, 87 S. E. 972, 974, citing §§ 726-729, vol. 2, ante.

If on its face an ordinance is unreasonable or if by evidence its application is unreasonable a court will declare it void, notwithstanding municipal corporations are prima facie the sole judges of the necessity of their ordinances. *Monett v. Campbell* (Mo. App. 1918), 204 S. W. 32.

In passing on an ordinance regulating the sale and delivery of milk it was said: "The question of regulation, in the first instance, rests with the municipal authorities, but whether its exercise in a particular case is reasonable is a judicial question. There must be some logical connection between the object sought to be accomplished by such an ordinance and the means prescribed to accomplish the end. An unreasonable ordinance will be held void by the court." *Chicago v. Chicago & N. W. Ry. Co.*, 275 Ill. 30, 38, 113 N. E. 1017, citing § 893, vol. 3, ante.

on inspection it is so,<sup>30</sup> or (2) on a showing of a state of facts which render it so.<sup>31</sup>

The general rule that the unreasonableness of an ordinance must be determined from the ordinance itself, has been often stated.<sup>32</sup> Obviously, there is no arbitrary formula by which the reasonableness of an ordinance can be tested. Rather its validity depends upon the surrounding circumstances and the purposes and operation of the particular ordinance.<sup>33</sup> The reasonableness of an ordinance, while a question of law, is dependent upon the particular facts in each case.<sup>34</sup> Courts possess power, therefore, to investigate and determine the reasonableness of ordinances.<sup>35</sup> Thus in passing on an ordinance in grading a street to the city limits, the court may ascertain its use and benefit, if any, in connecting two municipalities eight miles distant from each other, and moreover, that the improved street will connect with a county road to be presently improved.<sup>36</sup> "The court having the question to determine will take relevant evidence to advise its judgment upon the issue of unreasonableness *vel non*." <sup>37</sup>

It is recognized in most states that evidence bearing upon the reasonableness or unreasonableness of an ordinance, as applied to the subject-matter or to local conditions, is admissible.<sup>38</sup> If the ordinance does not indicate

<sup>30</sup> Stegmann v. Weeke (Mo. 1919), 214 S. W. 137, 140; Lancaster v. Reed (Mo. App. 1919), 207 S. W. 868.

<sup>31</sup> Windsor v. Bast (Mo. App.), 199 S. W. 722; St. Louis v. St. Louis Theater Co., 202 Mo. 690, 699, 100 S. W. 627.

<sup>32</sup> Delta v. Charlesworth (Colo. 1918), 170 Pac. 965.

<sup>33</sup> Carroll Blake Const. Co. v. Boyle (Tenn.), 203 S. W. 945; Jones v. Nashville, 109 Tenn. 557, 72 S. W. 985; Farmer v. Nashville, 127 Tenn. 516, 15 S. W. 189, 45 L. R. A. (N. S.) 240.

<sup>34</sup> Lusk v. Dora, 224 Fed. 650, 652, holding unreasonable an ordinance limiting the speed of interstate trains to six miles an hour, and as imposing an unreasonable burden on interstate commerce.

<sup>35</sup> Union Cemetery Assn. v. Kansas City, 252 Mo. 466, 499, 161 S. W. 261.

<sup>36</sup> Shaw v. Stoeltzing, 130 Mo. App. 113, 167 S. W. 1158.

<sup>37</sup> Briggs v. Birmingham Ry. Light & Power Co., 188 Ala. 262, 66 So. 95, citing § 729, vol. 2, ante.

<sup>38</sup> People v. Gibbs, 186 Mich. 127,

on its face that it is arbitrary, unjust or oppressive, it is only by the introduction of evidence showing the existing situation and conditions that the alleged unreasonable-ness of the ordinance can be made to appear.<sup>39</sup> "It is well settled that in case of an act of the legislature, or of a municipal ordinance which has been expressly ratified by the legislature, evidence may not as a general rule, be introduced for the purpose of showing that the statute or ordinance is unreasonable, and therefore unconstitutional, while in the case of an ordinance or municipal regulation adopted under authority of the legislature, but not specially ratified after adoption, it may be attacked on the ground that it is unreasonable, and to support this claim evidence may be introduced."<sup>40</sup>

Relating to the reasonableness of a billboard ordinance requiring the consent of a majority of the residence property owners, evidence tending to show that the residence territory of the city is not so well protected with fire extinguishing apparatus as is the business district is admissible. So is evidence that billboards offer protection to disorderly and lawbreaking persons and that residence districts are not afforded as full police protection as other districts.<sup>41</sup>

It is incumbent on the one attacking the reasonableness of an ordinance to aver and prove facts showing the

152 N. W. 1053, 1056; *People v. Detroit United Ry.*, 134 Mich. 682, 97 N. W. 36, 63 L. R. A. 746, 104 Am. St. Rep. 626.

<sup>39</sup> *Belleville v. Mitchell*, 273 Ill. 136, 112 N. E. 368.

<sup>40</sup> *Anderson v. Steinway & Son*, 165 N. Y. S. 608, 178 App. Div. 507, affirmed in 117 N. E. 575.

"In some cases evidence is admissible to show that an ordinance is unreasonable, and this is necessary so where compliance with the ordinance is impossible, or compliance could not affect the public health, safety or welfare, or

the interference with constitutional rights thereby would be out of all proportion to the benefit to be derived by the public on compliance with the ordinance. \* \* \* And this is the general rule with respect to special regulations made under a general delegation of power." *Stubbe v. Adamson*, 159 N. Y. S. 751, 760, 761, 173 App. Div. 305.

<sup>41</sup> *Thomas Cusack Co. v. Chicago*, 267 Ill. 344, 108 N. E. 340, approving *Gunning Advertising Co. v. St. Louis*, 235 Mo. 99, 137 S. W. 929.

ordinance is unreasonable.<sup>42</sup> If the facts are undisputed the well established rule is that the question of reasonableness of a given ordinance is purely a judicial question.<sup>43</sup> Many decisions hold that in all cases the question is for the court, not the jury.<sup>44</sup> But on this point judicial utterances are not entirely consistent. The rule submitting to a jury the reasonableness of an ordinance is of limited application. If the facts are controverted a jury may find them,<sup>45</sup> but whether the facts relied upon show an ordinance unreasonable is a question for the court.<sup>46</sup>

<sup>42</sup> *Belleville v. Mitchell*, 273 Ill. 136, 112 N. E. 368; *Munger Oil & Cotton Co. v. Groesbeck* (Tex. Civ. App.), 194 S. W. 1121, 1123.

Good consideration—reasonableness as question of fact, burden of proof. *Brenham v. Holle & Seelhorst* (Tex. Civ. App.) 153 S. W. 345.

<sup>43</sup> Where the evidence shows conclusively that the ordinance is reasonable, e. g., extending the corporate limits, there is no question of reasonableness to be submitted to the jury. *Kraetzer Cured Lumber Co. v. Moorhead* (Miss. 1918), 80 So. 4.

“Whether in any given case, where the facts are undisputed, a city council has exceeded its power by enactment of an unreasonable ordinance, is purely a judicial question, to be considered substantially the same as that of whether the legislature has exceeded its statutory authority; reasonable doubt being resolved in favor of the municipality.” *Stafford v. Chippewa Valley Electric Ry. Co.*, 110 Wis. 331, 351, 85 N. W. 1036, 1042, quoted and approved as the true rule in *Maercker v. Milwaukee*, 151 Wis. 324, 139 N. W. 199, quoting § 729, vol. 2, ante, stating that

the rule that the reasonableness of an ordinance is a question for the jury “is of limited application and the decisions conflicting. \* \* \* Even in *Clason v. Milwaukee*, 30 Wis. 316, it is held that ordinarily the question of reasonableness is for the court.”

<sup>44</sup> “When the unreasonableness vel non of an ordinance or by-law is asserted or urged the question thus made is to be decided by the Court, not the jury. *Marion v. Chandler*, 6 Ala. 899, 902; *Johnson v. Fayette*, 148 Ala. 497, 42 So. 621. \* \* \* A qualification of this doctrine appears to have commended itself to the Supreme Court in *Atlantic and Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, 166, 23 Sup. Ct. 817, 47 L. ed. 995; but the conclusion in this respect, of our cases, as well as the texts cited above, seem to us to afford the sounder, more practical rule, and will be adhered to.” *Briggs v. Birmingham Ry. Light & Power Co.*, 188 Ala. 262, 66 So. 95, citing § 729, vol. 2, ante.

<sup>45</sup> *Berger v. Smith*, 156 N. C. 323, 72 S. E. 376, approving *Small v. Edenton*, 146 N. C. 530, 60 S. E. 413, 20 L. R. A. (N. S.) 145.

<sup>46</sup> *Munger Oil & Cotton Co. v.*



**§ 730. Rules as to the reasonableness under general and implied powers.<sup>47</sup>**

Judicial decisions disclose a wide diversity of opinion and lay down no principle or definite standard by which reasonableness or unreasonableness can be tested.<sup>48</sup> However, a few general rules are well settled. "In order to justify a court in annulling an ordinance or by-law on the ground that it is unreasonable it must be 'demonstrably shown' that it is unreasonable; 'equipoise of opinion' on the matter will not warrant the setting aside of the ordinance or by-law on the ground of unreasonableness."<sup>49</sup> "A court will not hold an ordinance void as unreasonable where there is room for a fair difference of opinion on the question even though the correctness of the legislative judgment may be doubtful, and the court may regard the ordinance as not the best which might be adopted for the purpose."<sup>50</sup>

In New Jersey, the rule is well settled that an ordinance that may operate reasonably in some instances or

Groesbeck (Tex. Civ. App.), 194 S. W. 1121, 1123.

<sup>47</sup> Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, 148, citing § 730, vol. 2, ante. (McQuillin, Mun. Ord., § 186.)

<sup>48</sup> "A by-law is not unreasonable merely because particular judges may think it goes further than is prudent or necessary, or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. In matters which directly concern the people of the municipality who have the right to choose those whom they think best fitted to represent them in their council, such representatives may be trusted to understand their own requirements better than most judges. There is a wide diversity of judicial opinion

on such subjects and judges can lay down no definite principle or standard by which reasonableness or unreasonableness may be tested." Re By-Law 92, Town of Winnipeg Beach, 50 Dominion Law Report (Can.), 712, 714.

<sup>49</sup> Briggs v. Birmingham Ry. Light & Power Co., 188 Ala. 262, 66 So. 95, citing § 729, vol. 2, ante; Marion v. Chandler, 6 Ala. 899, 902.

<sup>50</sup> Hartman v. Chicago (Ill. 1918), 118 N. E. 731.

"The unreasonableness of an ordinance may appear on its face, independent of its actual operation. All reasonable doubts as to the reasonableness of an ordinance are to be resolved in favor of the ordinance." Dangel v. Williams (Del. Ch.), 99 Atl. 84.

circumstances and unreasonably in others is not wholly void and should not be set aside *in toto*.<sup>51</sup> Accordingly if an ordinance is reasonable in part it will not be set aside but permitted to stand, leaving open the reasonableness of its operation in particular cases.<sup>52</sup>

Where the ordinance purports to be and is obviously enacted in the interest of the public health, safety and welfare, it is presumed to be valid, and may be declared invalid only when it plainly appears that it does not tend in any appreciable degree to that end, and that the power to legislate has been exercised arbitrarily in the enactment of an ordinance which is clearly unreasonable.<sup>53</sup>

“The test of the validity and constitutionality of a particular ordinance is not what has been done under it but what the law or ordinance authorizes to be done under its provision.”<sup>54</sup>

Much latitude in the exercise of discretionary power must be left to the municipal authorities. Their action within the limits of their power must be very clearly shown to be unreasonable before it will be nullified by the courts. Where general power to enact the ordinance in question exists, its mere passage makes out a *prima facie* case for its reasonableness. When the courts are called upon to exercise the judicial power in declaring an ordinance unreasonable, they will make such a declaration only when the *prima facie* case made by the passage of the ordinance is overcome in the most satisfactory manner.<sup>55</sup> Otherwise stated: “Before the court will be justified in declaring the ordinance invalid the unreasonableness should be made to appear clearly. It should be manifest

<sup>51</sup> Schwarz Bros. Co. v. Jersey City Board of Health, 84 N. J. L. 735, 87 Atl. 463, affirming 83 N. J. L. 81, 83 Atl. 762; Cain v. Bayonne, 81 N. J. L. 15, 78 Atl. 663.

<sup>52</sup> Neumann v. Hoboken, 82 N. J. L. 275, 82 Atl. 511; North Jersey Street Ry. Co. v. Jersey City, 75 N. J. L. 349, 67 Atl. 1072.

<sup>53</sup> Stubbe v. Adamson, 159 N. Y.

S. 751, 760, 173 App. Div. 305, affirmed in 220 N. Y. 459, 116 N. E. 372.

<sup>54</sup> Star Co. v. Brush, 172 N. Y. S. 320, 324.

<sup>55</sup> Shaw v. Stoeltzing, 180 Mo. App. 113, 117, 167 S. W. 1158; Hislop v. Joplin, 250 Mo. 588, 599, 157 S. W. 625.

that the discretion reposed in the municipal authorities has been abused in the exercise of the power conferred." <sup>56</sup>

Where the validity of an ordinance depends upon facts of which the court cannot take judicial notice and the uncontroverted facts show that there is no basis upon which it can stand it may be declared unreasonable and void; but where a controverted question of fact is presented, and there is some evidence to sustain the legislation, it is the duty of the court to declare it valid. <sup>57</sup>

An ordinance bearing no onerous features on its face is presumed to be reasonable, and therefore, valid, hence where a defense is sought to be made of oppressiveness and inequality the facts showing wherein the objectionable features exist must be pleaded, or facts must be stated from which these defects can be determined. Ordinarily it is incumbent on a defendant to point out specifically in his answer wherein an ordinance is unreasonable as applied to the facts in the particular case, and usually the burden is on defendant to demonstrate the invalidity of an ordinance. <sup>58</sup>

<sup>56</sup> Thomas Cusack Co. v. Chicago, 267 Ill. 344, 108 N. E. 340, approving Chicago & Alton R. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190.

"The court can declare an ordinance void for unreasonableness where it is made to appear clearly by the evidence that it is arbitrary, unreasonable and oppressive." Des Plaines v. Winkelman, 270 Ill. 149, 110 N. E. 417; Chicago v. Marsh, 238 Ill. 254, 87 N. E. 319; Belleville v. Pfingsten, 225 Ill. 293, 80 N. E. 266.

<sup>57</sup> Stubbe v. Adamson, 159 N. Y. S. 751, 761, 173 App. Div. 305, affirmed in 220 N. Y. 459, 116 N. E. 372, holding this rule to be particularly applicable where as in

that case the question was with respect to the practicability and efficiency of a device required to be installed for the public safety as a condition of granting a license for a business which is subject to regulation and license.

<sup>58</sup> St. Louis v. United Railways Co., 263 Mo. 387, 455, 174 S. W. 78, 94, citing § 1053, vol. 3, ante (McQuillin, Mun. Ord., § 327); State ex rel. v. Missouri Pacific Ry. Co., 262 Mo. 720, 174 S. W. 73, 77, citing § 1057, vol. 3, ante (McQuillin, Mun. Ord., § 327); North Little Rock v. Rose (Ark. 1918), 206 S. W. 449, holding unreasonable an ordinance regulating moving picture theaters. Atlantic Postal Tel.-Cable Co. v. Savannah, 136 Ga. 657, 71 S. E. 1115,

It has often been stated in judicial decisions that if power exists in municipal corporations to enact an ordinance which is not in violation of the constitution it has the force of a legislative enactment and nothing but the most indubitable case of unfairness and oppression will warrant a court in interfering with its enforcement;<sup>59</sup> and that where the ordinance is passed under incidental or implied powers, defendant must plead its unreasonableness and nothing short of a clear case of unfairness or oppression will warrant the court's interference.<sup>60</sup>

If on the other hand, an ordinance on its face is unreasonable or discriminatory, or is shown to be so by the circumstances attending its enforcement, courts may declare it void.<sup>61</sup>

### § 731. Same subject.

Ordinances duly enacted are presumed reasonable and valid, and this presumption can be overcome only by clear and unequivocal proof.<sup>62</sup> "Courts are reluctant to declare a municipal ordinance relating to a subject upon holding unreasonable a tax ordinance.

The presumption that the ordinance is reasonable and valid prevails until the contrary is made to appear. *Briggs v. Birmingham Ry. L. & P. Co.*, 188 Ala. 262, 62 So. 95; *Lusk v. Dora*, 224 Fed. 650; *Chicago v. Washingtonian Home* (Ill. 1919), 124 N. E. 416.

Evidence must be clear and satisfactory. *State ex rel. v. Withnell*, 91 Neb. 101, 135 N. W. 376.

<sup>59</sup> *St. Louis v. United Railways Co.*, 263 Mo. 387, 456, 174 S. W. 78.

<sup>60</sup> *St. Louis v. United Railways Co.*, 263 Mo. 387, 457, 174 S. W. 78.

<sup>61</sup> *Gray v. S. T. Woodring Lumber Co.* (Tex. Civ. App.), 197 S. W. 231, 233.

<sup>62</sup> *Illinois. Riverton v. Horn*, 176

Ill. App. 433, 436 (holding reasonable an ordinance requiring license of bill posters). *Hartman v. Chicago*, 198 Ill. App. 372; *Chicago v. Walden W. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588; *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182.

*Iowa. Iowa City v. Glassman*, 155 Iowa 671, 136 N. W. 899.

*Kentucky. Galanty & Alper v. Maysville*, 176 Ky. 523, 196 S. W. 169.

*Maryland. Baltimore v. Wollman*, 123 Md. 310, 91 Atl. 339, 343; *Gould v. Baltimore*, 120 Md. 534, 87 Atl. 818; *Etchison v. Frederick City*, 123 Md. 283, 91 Atl. 161.

*Missouri. Windsor v. Bast* (Mo. App.), 199 S. W. 722; *St. Louis v. Warner Corn, etc., Co.*, 226 Mo. 148, 156, 126 S. W. 166; *St. Louis v. St. Louis Theater Co.*, 202 Mo.

which the municipal council has statutory authority to legislate, invalid on the ground that it is unreasonable, arbitrary or oppressive." <sup>63</sup> If, however, the inherent character of any of the provisions of an ordinance appear upon its face to be unreasonable, or if on a state of fact shown it so appears, the court must declare such unreasonable provisions void. <sup>64</sup>

### § 732. Same subject. <sup>65</sup>

In passing upon the reasonableness of an ordinance the

690, 700, 100 S. W. 627; Shaw v. Stoeltzing, 180 Mo. App. 113, 167 S. W. 1158.

Michigan. People v. Gibbs, 186 Mich. 127, 152 N. W. 1053.

New York. Stubbe v. Adamson, 220 N. Y. 459, 116 N. E. 372, affirming 159 N. Y. S. 751, 173 App. Div. 305.

New Jersey. Neumann v. Hoboken, 82 N. J. L. 275, 82 Atl. 511.

Texas. Ex parte Savage, 63 Tex. Cr. App. 285, 141 S. W. 244; Gray v. S. T. Woodring Lumber Co. (Tex. Civ. App.), 197 S. W. 231, 233.

Virginia. Elsnor Bros. v. Hawkins, 113 Va. 47, 73 S. E. 479, citing § 731, vol. 2, ante. (McQuillin, Mun. Ord., § 186.)

Courts will not look closely into mere matters of judgment where there is a fair basis for difference of opinion. Hislop v. Joplin, 250 Mo. 558, 599, 157 S. W. 625.

"It is incumbent upon any one who seeks to have it set aside as unreasonable to point out or show affirmatively, by clear and definite proof, wherein such unreasonableness exists." Chicago v. Mayer (Ill. 1919), 124 N. E. 842; Chicago v. Shaw Livery Co., 258 Ill. 409, 101 N. E. 588.

<sup>63</sup> Versailles v. Kentucky Highland R. Co., 153 Ky. 83, 154 S. W. 388; Silva v. Newport, 150 Ky. 781, 150 S. W. 1024; Tacoma v. Keisel, 68 Wash. 685, 124 Pac. 137; Jeffery v. Smith, 63 Or. 514, 128 Pac. 822.

<sup>64</sup> People v. Gibbs, 186 Mich. 127, 152 N. W. 1053.

Court's inquiry is directed to whether the regulations have reference to public health, safety and welfare, and such was the object sought by the ordinance. "The reason of public policy which prompted the city lawmakers to pass the ordinance may not appear on the face of the legislation, or in relator's petition, or in the evidence adduced at the trial of the case. Gardiner v. Omaha, 85 Neb. 681, 124 N. W. 105. The inquiry, therefore, is not necessarily limited to the city's authority to prevent or abate nuisance, but extends to every phase of police power delegated in any form to the municipality." State ex rel. v. Withnell, 91 Neb. 101, 135 N. W. 376.

<sup>65</sup> Hopkins v. Richmond, 117 Va. 692, 86 S. E. 139, 148, citing § 732, vol. 2, ante.

good faith or motives of the legislative body are not matters of judicial inquiry.<sup>70</sup>

### § 734. Same—illustrative cases.<sup>71</sup>

Ordinances relating to fire limits,<sup>72</sup> and necessary regulations as to the construction, repair and equipment of buildings, looking to their safety, are reasonable and valid.<sup>73</sup>

An ordinance directing the location and regulating the construction and use of public garages forbidding location within two hundred feet of a church and requiring consent of a majority of property owners when location is in a residential district, was held reasonable.<sup>74</sup>

An ordinance creating a small district in which a livery stable had been erected and maintained and prohibiting its maintenance longer, while in other districts "more thickly populated and densely settled and exclusively devoted to residence purposes" permits for the conduct of a like business are liberally granted, operates unreasonably, is discriminatory and oppressive, and void.<sup>75</sup>

<sup>70</sup> Gray v. S. T. Woodring Lumber Co. (Tex. Civ. App.), 197 S. W. 231, 233, citing §§ 703, 704, vol. 2, ante.

<sup>71</sup> Street grading ordinance, held reasonable. Shaw v. Stoeltzing, 180 Mo. App. 113, 167 S. W. 1158.

Excessive tax on peddlers, held unreasonable. Iowa City v. Glassman, 155 Iowa 671, 136 N. W. 899.

Speed ordinance limiting speed of street car is prima facie reasonable. Burden on one who denies to show it is unreasonable. Puget Sound Electric Co. v. Benson, 253 Fed. (C. C. A.) 710.

<sup>72</sup> Prescribing fire limits and forbidding erection of wooden building, etc. Galanty & Alper v. Mayville, 176 Ky. 523, 196 S. W. 169.

<sup>73</sup> Building ordinance sustained as reasonable. St. Louis v. Nash,

266 Mo. 523, 181 S. W. 1145.

Approval of plan for repairing building. Skowhegan v. Heselton, 117 Me. 17, 102 Atl. 772.

Ordinance requiring installation of sprinklers. Reasonableness, when question of fact. People v. Kaye, 212 N. Y. 407, 106 N. E. 122, affirming 146 N. Y. S. 398, 160 App. Div. 644.

Ordinance requiring certain buildings more than two stories high to be supplied with stand fire escapes is reasonable. Birmingham Ry. Light & Power Co. v. Milbrat (Ala. 1918), 78 So. 224.

<sup>74</sup> People ex rel. v. Ericsson, 263 Ill. 368, 105 N. E. 315; People ex rel. v. Oak Park, 266 Ill. 365, 107 N. E. 636.

<sup>75</sup> Curtis v. Los Angeles, 172 Cal. 230, 156 Pac. 462, 464.

An ordinance relating to the erection of billboards in residence districts requiring consent of a majority of property owners on both sides of the street where it is proposed to erect the billboard, was held reasonable because of the liability of fire, that fire and police protection was not so well provided in such districts as elsewhere in the city, and finally because the use to which billboard might be put by disorderly persons and law-breakers, and for immoral purposes.<sup>76</sup>

To be reasonable an ordinance directing a railroad in the construction of a viaduct to eliminate grade crossings need not declare such crossings nuisances.<sup>77</sup>

An ordinance aimed at control of the manner of the construction of a railroad on the company's property, requiring the covering of certain cuts of twenty feet or more in width, within five hundred feet of any dwelling, with solid substantial arches, sufficient to prevent the discharge of smoke and sparks from engines, and requiring open cuts to be walled for a specified distance above the tracks, and that named cuts should be fenced, at a heavy expense, was held unreasonable, arbitrary and oppressive as not designed to conserve the public health or safety, and hence not a valid exercise of the police power.<sup>78</sup>

An ordinance establishing a saloon district in which there were more residences than business houses, was held not for that reason, unreasonable.<sup>79</sup>

An ordinance forbidding retailing meat from vehicles was declared reasonable although no public market had been established in the community.<sup>80</sup>

An ordinance making it unlawful in any public or un-

<sup>76</sup> *Thomas Cusack Co. v. Chicago*, 267 Ill. 344, 108 N. E. 340, distinguishing *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 94 N. E. 920, 34 L. R. A. (N. S.) 998.

<sup>77</sup> *State ex rel. v. Missouri Pacific Ry. Co.*, 262 Mo. 720, 174 S. W. 73.

<sup>78</sup> *Versailles v. Kentucky Highland R. Co.*, 153 Ky. 83, 154 S. W. 388, 390.

<sup>79</sup> *Brownsville v. Fernandez* (Tex. Civ. App. 1918), 202 S. W. 112.

<sup>80</sup> *Hahn v. Newport*, 175 Ky. 185, 194 S. W. 114.

inclosed place in the city, to play any musical instrument, or to sing, or to make any loud or unusual noise, or to call out goods, wares or merchandise, or the attractive features of any amusement, device or place of recreation or refreshment, without a permit so to do, granted on application specifying the kind of amusement or noise desired to be made, was held discriminatory and unreasonable.<sup>81</sup>

An ordinance forbidding any person under eighteen years of age from driving an automobile, "within the city limits," was held unreasonable "because not limited to the regulation of the operation of automobiles upon its streets and alleys, but invades the rights of citizens by including in its territory property over which it has no control."<sup>82</sup>

An ordinance forbidding in the operation of motor vehicles on public way the discharge therefrom of steam, noxious odors, oil, etc., was held reasonable on its face.<sup>83</sup>

Ordinances regulating jitney service, license, bond, etc., are sustained as reasonable.<sup>84</sup>

An ordinance requiring thirty days' experience in operating an automobile in the city to qualify one to operate a jitney bus, was held reasonable.<sup>85</sup> But regulation of jitney service demanding that the applicant for a license to operate shall be the owner of the vehicle he proposes to operate was held unreasonable, as not tending to promote the safety or convenience of the public and therefore not a proper exercise of the police power.<sup>86</sup>

<sup>81</sup> *Ex parte Wisner*, 32 Cal. App. 808, 163 Pac. 868, following the principles announced in *Re Dart*, 172 Cal. 47, 155 Pac. 63, L. R. A. 1916D, 905, and *Los Angeles v. Hollywood Cemetery Assn.*, 124 Cal. 349, 57 Pac. 153, 71 Am. St. Rep. 75.

<sup>82</sup> *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581.

<sup>83</sup> *Chicago v. Walden W. Shaw*

*Livery Co.*, 258 Ill. 409, 101 N. E. 588.

<sup>84</sup> *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883; *Ex parte Parr* (Tex. Civ. App. 1918), 200 S. W. 404.

<sup>85</sup> *Ex parte Cardinal*, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850.

<sup>86</sup> *Parrish v. Richmond*, 119 Va. 180, 89 S. E. 102.



Regulation requiring a permit to open the street when one applies for introduction of water to his premises, was held reasonable.<sup>87</sup>

An ordinance declaring it unlawful under penalty for any person to climb, cling or in any manner attach himself to a wagon, or other vehicle either stationery or in motion, without the consent of the owner, was declared unreasonable.<sup>88</sup>

**§ 738. Ordinances must not unreasonably discriminate—classification.<sup>89</sup>**

An ordinance must be general in its character and operate equally upon all persons within the municipality of the class to which it relates.<sup>90</sup>

“The classification must be germane to the purpose of the law. It must not be based upon existing circumstances only, or so constituted as to preclude additions to the number included within a class, and the law must apply equally to each member of the class, and all classification must be based upon substantial distinctions which make one class different from another.”<sup>91</sup>

The nature of regulations designed to promote public convenience rests largely within the discretion of the legislative body, as for example, an ordinance regulating the operation of taxicabs.<sup>92</sup>

<sup>87</sup> Lee v. Leitch, 131 Md. 30, 101 Atl. 716.

<sup>88</sup> Miller v. Eversole, 184 Ill. App. 362.

<sup>89</sup> Shurman v. Atlanta, 148 Ga. 1, 95 S. E. 698, 703, citing § 738, vol. 2, ante (McQuillin, Mun. Ord., § 193); Schwarz Bros. Co. v. Jersey City Board of Health, 84 N. J. L. 735, 87 Atl. 463, affirming 83 N. J. L. 81, 83 Atl. 762; Columbia v. Phillips, 101 S. C. 391, 85 S. E. 963; Farmer v. Nashville, 127 Tenn. 509, 156 S. W. 189; Salt Lake City v. Utah Light & Ry. Co., 45

Utah 50, 142 Pac. 1067, following Southern Ry. Co. v. Greene, 216 U. S. 417, 30 Sup. Ct. 287, 54 L. ed. 536, 17 Ann. Cas. 1247

<sup>90</sup> Holzman v. Canton, 180 Ill. App. 641, 644.

<sup>91</sup> Maercker v. Milwaukee, 151 Wis. 324, 139 N. W. 199, 201; State v. Evans, 130 Wis. 381, 110 N. W. 241.

<sup>92</sup> Yellow Taxicab Co. v. Gaynor, 212 N. Y. 95, 105 N. E. 803, affirming 144 N. Y. S. 299, 159 App. Div. 893; Hotel Astor v. New York, 144 N. Y. S. 494, 159 App. Div.

### § 739. Same—illustrative cases.<sup>93</sup>

An ordinance may apply only to moving picture theaters. The fact it does not apply to other theaters or other public places of amusement, it has been held, does not render it unduly discriminative.<sup>94</sup>

An ordinance forbidding keeping open on Sunday stores and business places, excepting drug stores, was held proper classification.<sup>95</sup>

An ordinance requiring every able-bodied man of the village above the age of twenty-one years and under fifty years to labor on the streets and alleys, exempting officers and attorneys, was held void because of discrimination.<sup>96</sup>

An ordinance permitting the construction of wooden or combustible buildings within certain limits only on the special permission of the mayor and council and the written consent of all persons owning property within the block in which such proposed building is to be erected or placed, is discriminatory, in that it makes an arbitrary classification and fails to lay down a rule applicable to all alike.<sup>97</sup>

A municipality is not required to grant privileges to all public service corporations on the same terms. Power to permit use of streets is discretionary and need not be

888, affirming the Taxicab Cases, 143 N. Y. S. 279, 82 Misc. Rep. 94, rehearing denied 106 N. E. 1043.

"The doctrine of reasonableness has in cases involving municipal ordinances a wider scope than in cases the court has under consideration (state legislation); municipal ordinances being tested, not only by the constitution, but also by the statutes of the state, and by the common law." *Motlow v. State*, 125 Tenn. 547, 145 S. W. 177, 189.

<sup>93</sup> *Keckevoet v. Dubuque*, 158 Iowa 631, 138 N. W. 540, ordinance imposing wharfage charges, held unreasonable and discriminatory.

Unreasonable discriminations among property owners in conforming to building lines, in erecting structures, bordering on boulevard. *St. Louis v. Handlan*, 242 Mo. 88, 96, 97, 145 S. W. 421.

<sup>94</sup> *North Little Rock v. Rose* (Ark. 1918), 206 S. W. 449, 452.

<sup>95</sup> *State v. Medlin*, 170 N. C. 682, 86 S. E. 597.

Requiring closing certain kinds of business on Sunday. *Ex parte Sumida* (Cal. 1918), 170 Pac. 823.

<sup>96</sup> *Kilbourne v. Blakely*, 184 Ill. App. 370, 374.

<sup>97</sup> *Hays v. Poplar Bluff*, 263 Mo. 516, 536, 173 S. W. 676.

exercised by general ordinances applicable alike in all cases, but each case may be acted on with reference to its own conditions and circumstances. A municipality may grant a right to use streets with or without conditions.<sup>98</sup>

An ordinance requiring the consent of residence owners to erect a billboard in a resident block, was held not discriminatory.<sup>99</sup>

An ordinance forbidding retailing meat from vehicles, it was held, does not discriminate because it does not include wholesaling meat.<sup>1</sup>

An ordinance licensing hawkers and peddlers exempting farmers and gardeners and peddlers of fruit and vegetables from baskets by the person raising the same or his servants, and also the peddling of newspapers, was held valid.<sup>2</sup>

An ordinance forbidding erection of a hospital for pay within one hundred feet of a residence within the city, was held not unduly discriminative.<sup>3</sup>

An ordinance regulating the hours of business of those dealing in general merchandise but omitting all reference to other kinds of business of quite a similar nature, was held unreasonable, arbitrary and discriminatory.<sup>4</sup>

An ordinance which discriminates in its operation between individuals similarly situated, in that it permits those already in possession and ownership of buildings or premises being used for stables to continue to put these structures to such use without a permit, while requiring all persons thereafter wishing to construct any building or premises to be used as a stable, first to obtain a permit to do so, is unreasonable, discriminatory and void.<sup>5</sup>

An ordinance discriminating in like manner relating to

<sup>98</sup> *Springfield v. Interstate Independent Telephone & Tel. Co.*, 279 Ill. 324, 116 N. E. 631, affirming 201 Ill. App. 227.

<sup>99</sup> *Thomas Cusack Co. v. Chicago*, 267 Ill. 344, 108 N. E. 340.

<sup>1</sup> *Hahn v. Newport*, 175 Ky. 185, 194 S. W. 114.

<sup>2</sup> *Holzman v. Canton*, 180 Ill. App. 641.

<sup>3</sup> *Lawrence v. Nissen*, 173 N. C. 359, 91 S. E. 1036.

<sup>4</sup> *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378.

<sup>5</sup> *Ex parte Dondero*, 19 Cal. App. 66, 124 Pac. 884.

the operation of planing mills, etc., was held unreasonable.<sup>6</sup>

An ordinance which prevents the operation of a stone crusher in a sparsely settled territory, much of which is undeveloped and practically uninhabited, and allows its operation in a small area in the center of the city surrounded by "poorer classes of residences," is unreasonable and void, and does not subserve the ends for which the police power exists.<sup>7</sup>

An ordinance to prevent the spread of fire which discriminates between buildings which are equally exposed, e. g., restricting its provisions to two story frame buildings, and declaring that in such buildings the third or attic floor shall not be furnished for the habitation of persons living independently of those on the floor below, and leaving all other buildings erected for the same purpose and equally susceptible to fire immune from the operation of the ordinance, is discriminatory, unreasonable and void.<sup>8</sup>

The right to use the public streets and places for private purposes of gain is simply a privilege and not a vested right, and may be made to depend upon citizenship, as a basis for classification. Thus an ordinance restricting the granting of licenses to run automobiles or motor vehicles for hire to citizens of the United States is reasonable and valid.<sup>9</sup>

In laws authorizing cities to enact ordinances to abate the smoke nuisance, classification of cities may be made, certain included and others omitted.<sup>10</sup>

In the regulation of the speed of vehicles on streets

<sup>6</sup> Ex parte Kordoulis, 27 Cal. App. 4, 148 Pac. 800, distinguishing Re Stoltenberg, 165 Cal. 789, 134 Pac. 971.

Ordinance prohibiting construction and operation of mills within prescribed area. Berger v. Smith, 156 N. C. 323, 72 S. E. 376.

<sup>7</sup> Ex parte Throop, 169 Cal. 93, 145 Pac. 1029, 1031.

<sup>8</sup> State v. McCormick, 120 Minn. 97, 138 N. W. 1032.

<sup>9</sup> Morin v. Nunan (N. J. L. 1918), 103 Atl. 378.

<sup>10</sup> Northwestern Laundry Co. v. Des Moines, 239 U. S. 486, 495, 36 Sup. Ct. 206, 60 L. ed.

and public ways, motor vehicles and automobiles may be put in a distinct class.<sup>11</sup> So jitneys may be put in a class by themselves by state law, since jitneys have distinct functions, and differ in operation from all others.<sup>12</sup> And ordinances, emanating from ample power, may constitute motor busses or jitneys as a distinct class for the purpose of regulating and licensing.<sup>13</sup> So jitneys operating over a particular route, may be put in one class, and service motor cars not confined to any particular route may be put in another class.<sup>14</sup>

<sup>11</sup> "An automobile is a dangerous, if not the most dangerous, vehicle in use upon the streets and highways, since it is possessed of the power of rapid locomotion unconfined by rails or tracks to any definite line upon the traveled way. *State v. Watson*, 216 Mo. 420, 431, 435, 115 S. W. 1011. It is in a class by itself, and the ordinance applies without discrimination to all parts of that class. Hence the legislation cannot be said to be discriminative." *Windsor v. Bast* (Mo. App.), 199 S. W. 722.

<sup>12</sup> *Public Service Com. v. Booth*, 156 N. Y. S. 140, 170 App. Div. 590, affirming 155 N. Y. S. 568.

<sup>13</sup> *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18; *Thielke v. Albee*, 79 Or. 48, 153 Pac. 793; *Morin v. Nunan* (N. J. L. 1918), 103 Atl. 378; *West v. Asbury*, 89 N. J. L. 405, 99 Atl. 190; *Deser v. Wichita*, 96 Kan. 820, 153 Pac. 1194, L. R. A. 1916D, 246; *Memphis St. Ry. Co. v. Rapid Transit Co.*, 133 Tenn. 99,

179 S. W. 635, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1045; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840; *Ex parte Cardinal*, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850; *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301.

Jitneys run for hire, may be made a separate class and regulated and licensed by ordinance. The fact that street cars, and other automobiles and vehicles are not included does not render it class legislation in contravention of the constitutional inhibition. *Ex parte Bogle* (Tex. Cr. App.), 179 S. W. 1193.

Ordinance imposing license tax on automobiles engaged in carrying persons for hire sustained against contention that it discriminated unreasonably. *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541.

<sup>14</sup> *Ex parte Parr* (Tex. Civ. App. 1918), 200 S. W. 404.

## CHAPTER 19.

### CONSTITUTIONALITY OF ORDINANCES.

#### I. IN GENERAL.

#### II. ORDINANCES IMPAIRING THE OBLIGATION OF CONTRACTS.

#### III. ORDINANCES INTERFERING WITH OR ATTEMPTING TO REGULATE FOREIGN OR INTERSTATE COMMERCE.

##### I. IN GENERAL.

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| § 740. Ordinances must be constitutional—enumeration. | § 746. Relating to individual liberty.     |
| § 741. Ordinances in derogation of common rights.     | § 750. Personal liberty—drunkenness.       |
| § 742. Same—use of private property.                  | § 750a. Same—handling intoxicating liquor. |
|   | § 751. Mode of trial.                      |

##### II. ORDINANCES IMPAIRING THE OBLIGATION OF CONTRACTS.

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| § 753. Ordinances cannot impair the obligation of contracts.    | § 759. Ordinances granting franchises as contracts.                        |
| § 754. Ordinance as “law.”                                      | § 760. Same—imposing additional burdens.                                   |
| § 755. Ordinances as contracts.                                 | § 763. Reservation of right to alter, amend or repeal franchise contracts. |
| § 756. The “obligation” of a contract.                          | § 765. Rights vested in contractor for public work.                        |
| § 757. Question is for decision by United States Supreme Court. |  |

##### III. ORDINANCES INTERFERING WITH OR ATTEMPTING TO REGULATE FOREIGN OR INTERSTATE COMMERCE.

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| § 771. Ordinances cannot interfere with or regulate interstate or foreign commerce.             | § 772. Meaning of term “commerce.”                      |
| § 771a. Impracticability of application of state law to instrumentality in intrastate commerce. | § 775. License tax for privilege of selling goods, etc. |
|   | § 777. Same—where goods sold are in the state.          |
|   | § 782. License tax under the police power.              |

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| <p>§ 784. Taxation of property employed in interstate or foreign commerce.</p> <p>§ 784a. Taxing a governmental agency.</p> <p>§ 786. Cannot regulate or tax operations or objects of in-</p> | <p>terstate or foreign commerce.</p> <p>§ 789. Scope of local police power.</p> <p>§ 790. Local police regulations—illustrative cases.</p> <p>§ 793. Harbor and local police regulations.</p> |
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### § 740. Ordinances must be constitutional—enumeration.

In the exercise of its legislative powers, of course, a municipal corporation can enact no ordinance which violates the constitution of the United States or of the state,<sup>1</sup> and this is true of an ordinance enacted pursuant to a statute or grant of power which violates the organic law.<sup>2</sup> But this limitation is uniformly applied: The court will not declare an act or an ordinance unconstitutional merely because it may think it unwise or inexpedient; nor will it strike it down because it will operate harshly upon persons affected by it. It cannot be declared void upon constitutional grounds unless it plainly contravenes some provision of the constitution.<sup>3</sup>

In the exercise of the power of initiative the constitutionality of an ordinance, it has been held, will not be determined by a court until adopted.<sup>4</sup> On the other hand,

<sup>1</sup> *St. Louis v. Dreisoerner*, 243 Mo. 217, 147 S. W. 998.

Charter expressly provided that no ordinance shall "contravene the laws and constitution of the state." *State v. Darnell*, 166 N. C. 300, 81 S. E. 338.

The method prescribed by the constitution for filling named municipal offices cannot be altered by ordinance. *Bloomfield v. Thompson*, 136 La. 519, 67 So. 352.

Particular ordinance was held within the saving clause of a new state constitution, even though inconsistent with such constitution. *Sears v. Akron*, 246 U. S. 242, 252,

38 Sup. Ct. 245, 62 L. ed. 688, 699.

<sup>2</sup> *Henderson v. Lieber*, 175 Ky. 15, 192 S. W. 830.

"An unconstitutional statute and an ordinance founded upon such statute, neither can create any right nor bestow any power." *Cohen v. Henderson* (Ky. 1918), 207 S. W. 4, 7, relying on *Norton v. Shelby County*, 118 U. S. 426, 6 Sup. Ct. 1121, 30 L. ed. 178.

<sup>3</sup> *Hiller v. State*, 124 Md. 385, 92 Atl. 842.

<sup>4</sup> *Pitman v. Drabelle*, 267 Mo. 78, 183 S. W. 1055.

the right to invoke a vote of the electors as to legislation that would, if enacted, be unconstitutional, has been denied.<sup>5</sup> Such is the better and sounder doctrine.

The decision that a municipal ordinance is within the scope of the power conferred on the municipality by the legislature by the state court of last resort is conclusive on the United States Supreme Court, and such decision constitutes such an ordinance a state law within the meaning of the United States Constitution, and the judicial code conferring jurisdiction on the Supreme Court.<sup>6</sup>

**First—retrospective.** An ordinance becoming operative only after its enactment regulating the construction and maintenance of billboards was held neither retrospective or destructive of vested rights although it was made to operate upon pre-existing structures.<sup>7</sup>

<sup>5</sup> State ex rel. v. White, 36 Nev. 334, 136 Pac. 110.

<sup>6</sup> Reinman v. Little Rock, 237 U. S. 171, 176, 35 Sup. Ct. 511, 59 L. ed. 900; Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 555.

<sup>7</sup> "This was an ordinance in pursuance of the police power of the city and enacted upon an adequate showing of public necessity. Such ordinances are enforceable, when otherwise valid, in praesenti as well as in futuro. They do not in a legal sense take the property of persons against whom they are directed. They simply regulate the use of such property by prohibiting its injurious or criminal use by the owner, and hence they do not offend (as claimed by plaintiff) any provision of the organic law protecting vested interests or inhibiting retrospective legislation. This is typified by the provisions of the ordinance under review. None of them either in words or by intentment deprived the plaintiff of the use of any of its property

prior to the adoption of the ordinance. They merely require plaintiff and all others similarly situated to refrain from the use or maintenance of their property after the passage of the ordinance, in a manner which that enactment conclusively determines to be unlawful and injurious. The correctness of these views is demonstrated by the reasoning of Judge Graves in the case of St. Louis v. Warren Commission Investment Co., 266 Mo. 148, 157, 126 S. W. 166, which was a construction of a fire ordinance. The court held that it governed the subsequent maintenance of pre-existing structures, as well as the erection of new ones; and that such prior structures were removable so as to conform to the provisions of the ordinance. The same principle was enunciated by Valliant, C. J., in a case where an ordinance of the city regulating the mixing and making of materials in the public street was attacked on the ground that it was



**Sixth—equal protection of the laws—discrimination.<sup>8</sup>**

Where the constitution reserves the privilege of exercising the right of initiative and referendum to the

contrary to a previous contract executed by the city. In reply to that the court said: 'The city has a dual character, administrative and governmental. In its contract for street improvements it acts in its administrative capacity, and, to some extent, is on a plane with any other party to a business contract. But in the exercise of its police power to protect life and health it acts in its governmental capacity and is not estopped by its contract; it could not abandon its duty in that respect even if it willed to do so.' (State ex rel. v. St. Louis, 207 Mo. 354, 364-365. To the same effect, State v. Heger, 194 Mo. 707, 715.)'' Kansas City Gunning Adv. Co. v. Kansas City, 240 Mo. 659, 676, 677, 144 S. W. 1099.

Ordinance requiring stairways in buildings to be equipped with hand rails, held applicable to buildings existing at the date of the enactment of the ordinance. *De Wolf v. Marshall Field & Co.*, 207 Ill. 542.

<sup>8</sup> *Yellow Taxicab Co. v. Gaynor*, 143 N. Y. S. 279, 82 Misc. Rep. 94, affirmed in 144 N. Y. S. 299, 159 App. Div. 893, 144 N. Y. S. 494, 159 App. Div. 888.

Charge under an ordinance of keeping a house of prostitution or assignation is not a denial of the equal protection of the law. *New Orleans* (La. 1918), 78 So. 745.

Discrimination tax as to non-residents. *Ideal Tea Co. v. Salem*, 77 Or. 182, 150 Pac. 852, 854, citing § 740, vol. 2, ante. (*McQuillin*, Mun. Ord., § 219).

Ordinance fixing rates for electricity held valid. *Pinney & Boyle Co. v. Los Angeles Gas & Electric Corp.*, 168 Cal. 12, 141 Pac. 620.

Unrestrained arbitrary power vested in council by ordinance to grant permits. *Richmond v. Model Steam Laundry Co.*, 111 Va. 758, 69 S. E. 931.

Discretionary power to grant or refuse a license to run a jitney for hire does not render the ordinance void as unreasonable and discriminatory. *Ex parte Bogle*, (Tex. Cr. App.), 179 S. W. 1193.

Ordinance requiring coal to be weighed on city scales applying to coal dealers alone does not deny equal protection of the law. *Brittingham & Hixon Lumber Co. v. Sparta*, 157 Wis. 345, 147 N. W. 635.

Discriminatory ordinance regulating the hours for opening and closing places of business are unconstitutional. *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378.

An ordinance which subdivides general classes, as common carriers making jitney busses a distinct class held constitutional. *Allen v. Billingham*, 95 Wash. 12, 163 Pac. 18, 25.

Ordinance regulating and licensing jitneys run for hire, applicable to all alike, excluding street cars and other automobiles and vehicles run for hire, held not class legislation in violation of the constitution. *Ex parte Bogle* (Tex. Cr. App.), 179 S. W. 1193.

Ordinance regulating automobiles

“legal voters” of a municipality, an ordinance providing for the exercise of the right restricting it to “registered voters” is unconstitutional, as there may be many legal voters who are qualified signers but not registered.<sup>9</sup>

A municipal charter which imposed benefit assessments on the right of way of railways in payments for street improvements was sustained as constitutional against the claim that it denied the equal protection of the laws and deprived an owner of his property without due process of law.<sup>10</sup>

So an ordinance was upheld as valid and constitutional which required dealers in soft drinks and bottled goods to close their establishments at midnight and keep them closed until five o'clock the next morning, since it affected all persons pursuing the same business under substantially the same conditions.<sup>11</sup>

And a smoke abatement ordinance which applied equally to all within its terms was held not to be a denial of equal protection of the law where the classification adopted was reasonable, even though other businesses might have been included.<sup>12</sup>

So the fact that an ordinance regulating brick yards and brick making did not prohibit brick making in all sections of the city, it was held, did not render it unconstitutional as denying equal protection of the law.<sup>13</sup>

So an ordinance forbidding certain locations of hospitals for pay within the city, e. g., within one hundred feet of a residence, was held not violative of the 14th

used for hire, held constitutional. *Craddock v. San Antonio* (Tex. Civ. App.), 198 S. W. 634.

Ordinance allowing tanners already in operation to continue, but in order to establish tanneries thereafter, requiring permits from the city, held constitutional. *State v. Taubert*, 126 Minn. 371, 148 N. W. 281.

<sup>9</sup> *State ex rel. v. Dalles City*, 72 Or. 337, 143 Pac. 1127; *Woodward v. Barber*, 59 Or. 70, 116 Pac. 101.

<sup>10</sup> *Gilsonite Constr. Co. v. St. Louis, Iron Mountain & Southern Ry. Co.*, 240 Mo. 650, 655, 144 S. W. 1086.

<sup>11</sup> *Churchill v. Albany*, 65 Or. 442, 133 Pac. 632.

<sup>12</sup> *Northwestern Laundry v. Des Moines*, 239 U. S. 486, 495, 36 Sup. Ct. 206, 60 L. ed. 396.

<sup>13</sup> *Hadacheck v. Los Angeles*, 239 U. S. 394, 411-413, 36 Sup. Ct. 143, 60 L. ed. 348, affirming 165 Cal. 416, 132 Pac. 584.

amendment of the United States Constitution as being unduly discriminative.<sup>14</sup>

The right to attack a municipal ordinance as denying equal protection of the law was disregarded where the contention was based on disputable considerations of classification and conditions not judicially determinable.<sup>15</sup>

**Seventh—due process of law—taking private property.**<sup>16</sup>

Unreasonable restrictions on the use of property, not imposed in the legitimate exercise of the police power, clearly deprives one of property without compensation or due process of law.<sup>17</sup>

An ordinance forbidding bathing in a lake in the corporate limits owned by private persons from which the municipality obtains its water supply, was adjudged unconstitutional as depriving the lake owners of property without due process of law.<sup>18</sup>

<sup>14</sup> *Lawrence v. Nissen*, 173 N. C. 359, 91 S. E. 1036.

<sup>15</sup> *Hadacheck v. Los Angeles*, 239 U. S. 394, 411-413, 36 Sup. Ct. 143, 60 L. ed. 348, affirming 165 Cal. 416, 132 Pac. 584.

<sup>16</sup> *Davis v. Savannah* (Ga. 1918), 95 S. E. 6; *Schwarz Bros. Co. v. Jersey City Board of Health*, 84 N. J. L. 735, 87 Atl. 463, affirming 83 N. J. L. 81, 83 Atl. 762; *St. Louis v. Dreisoerner*, 243 Mo. 217, 147 S. W. 998.

Smoke abatement ordinance held constitutional. *Northwestern Laundry v. Des Moines*, 239 U. S. 486, 36 Sup. Ct. 206, 60 L. ed. 396.

Ordinance providing eight hour work day. *Stange v. Cleveland* (Ohio), 114 N. E. 261.

Ordinance forbidding sale of loose or dipped milk is not a deprivation of property without just compensation. *Mannix v. Frost*,

164 N. Y. S. 1050, 100 Misc. Rep. 36.

Ordinance requiring the rat-proofing of all buildings, held constitutional. *New Orleans v. Beck*, 139 La. 595, 71 So. 883; *New Orleans v. Mangiarisina*, 139 La. 605, 76 So. 886.

Proceeding by affidavit against a person charged with having committed an offense in violation of an ordinance is due process of law. *New Orleans v. White* (La. 1918), 78 So. 745.

Ordinance forbidding the keeping of billiard halls does not contravene the 14th amendment. *Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 65 L. ed. 1229, affirming 155 Cal. 322.

<sup>17</sup> *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828, 832.

<sup>18</sup> *Pounds v. Darling* (Fla. 1918), 77 So. 666.

While the regulations of livery stables with respect to their location and the manner in which they are to be conducted in a thickly populated city "are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the law-making power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws within the meaning of the 14th amendment." <sup>19</sup>

**Eighth.** Pursuant to the enforcement of pure food regulations, an ordinance may confer upon officers and employees, power to enter and inspect premises and make it unlawful to interfere with such officers and employees under penalty. Such legislation does not contravene the constitutional provision forbidding unreasonable search and seizure. <sup>20</sup>

An ordinance making it unlawful to sell or distribute newspapers, or other publications in the city without a license from the city council and permitting a license to be revoked at any time by the council without notice, which, in effect, confers power to prevent the circulation of any newspapers within the city, as the council may determine, which allows discrimination between particular newspapers or classes of newspapers, discrimination between individual publishers of newspapers or classes of newspapers, preventing publishers of newspapers and other publishers from writing and presenting their sentiments on all subjects and restraining and

<sup>19</sup> Reinman v. Little Rock, 237 U. S. 171, 177, 35 Sup. Ct. 511, 59 L. ed. 900.

Ordinance of Niagara Falls prohibiting the erection or operation of any factory within a defined area within the city boundaries

without the consent of a specified number of property owners was sustained as valid and constitutional. Re Russell, 158 N. Y. S. 162.

<sup>20</sup> Keiper v. Louisville, 152 Ky. 691, 154 S. W. 18.

abridging their opportunity as such publishers and the opportunity of the press is manifestly unconstitutional and void.<sup>21</sup>

**Ninth.** An ordinance cannot conflict with any provision of the state constitution or the spirit thereof.<sup>22</sup>

Municipal taxation authorized by statute, to raise money to maintain coal and fuel yards, to sell coal and fuel to the inhabitants, was held to be a public use, and therefore, constitutional.<sup>23</sup>

An ordinance limiting the speed of automobiles to ten miles an hour where the limit of the state law is eight is not inconsistent with the laws of the state and therefore unconstitutional, because the ordinance does not undertake to license automobiles to run at a speed in excess of that prescribed by the state law.<sup>24</sup>

#### § 741. Ordinances in derogation of common rights.<sup>25</sup>

Where a specific grant of power to enact an ordinance exists the only test is that it must be constitutional and not contravene a common right. If doubt arises it should be resolved against its constitutionality. An ordinance providing that no one under eighteen years of age should be allowed to drive a vehicle required to be licensed (automobile) within the city limits was held void as an invasion of rights of citizens by including in its territory property over which the city had no control, in that it did not limit the operation of the automobile to streets, alleys and public grounds, over which

<sup>21</sup> *Star Co. v. Brush*, 172 N. Y. S. 320, 326, 327.

<sup>22</sup> Ordinance making tax levy in excess of constitutional limit. *Laredo v. Frishmuth* (Tex. Civ. App.), 196 S. W. 190.

The Alabama constitution provides that the legislature shall have no power to authorize any municipal corporation to pass any law or ordinance inconsistent with the general laws of the state. Ex

parte Birmingham (Ala. 1918), 79 So. 113.

<sup>23</sup> *Jones v. Portland*, 245 U. S. 217, 38 Sup. Ct. 504, 62 L. ed. 252, affirming 113 Me. 123, 93 Atl. 41.

<sup>24</sup> *Adler v. Martin*, 179 Ala. 97, 59 So. 597.

<sup>25</sup> *State v. Bass*, 173 N. C. 780, 87 S. E. 972, holding unreasonable an ordinance restricting location of livery stables.

alone the city had control, but included operation on private grounds.<sup>26</sup>

An ordinance prohibiting treating in saloons was adjudged constitutional against the contention that it was in derogation of common rights.<sup>27</sup>

Terms and conditions for the doing of public work may be prescribed by a city as trustee for the public in harmony, of course, with the law and public policy of the state, e. g., hours and wage to unskilled labor on public work, since the object is to promote the industrial welfare of the community. And this is true whether the work is performed by the state directly or by one of its agencies. The right to work for the public is not a vested right, but rather a privilege, and hence it may be granted on such terms and conditions as a state agency may see fit to impose, consistent, as mentioned, with the law and public policy of the state.<sup>28</sup>

An ordinance forbidding workmen under penalty from quitting their employment in a body is void because such concerted withdrawal is not unlawful *per se*. Every workman has an absolute right in the absence of contract to quit his employment when he pleases. The employer has the reciprocal right to discharge a workman in like manner. The fact that a number of workmen exercised this right in common cannot be a criminal act.<sup>29</sup>

The occupation of soliciting for charities is subject to the police power so far as relates to a reasonable supervision over the persons so engaged and for the application and use of the contributions received to the purposes intended, in order to prevent unscrupulous persons from obtaining money or other things under the pretence that they were to be applied to charity, and to prevent the wrongful diversion of such funds to other uses, or

<sup>26</sup> Royal Indemnity Co. v. Pac. 123; People v. Crane, 214 N. Schwartz (Tex. Civ. App.), 172 S. Y. 154, 108 N. E. 427; Mallette v. W. 581. Spokane, 77 Wash. 205, 137 Pac.

<sup>27</sup> Tacoma v. Keisel, 68 Wash. 496, 51 L. R. A. (N. S.) 686.

685, 124 Pac. 137. <sup>29</sup> Hall v. Johnson, 87 Or. 21,

<sup>28</sup> Norris v. Lawton (Okl.), 148 169 Pac. 515, 518.

to secure them against waste. Measures reasonably tending to these ends are unquestionably valid. Every person has the right to solicit contributions for charity if he acts in good faith and makes an honest application of funds so obtained. "Reasonable regulations may be adopted touching and to a limited extent controlling the operation of charitable institutions, dependent in whole or in part on public beneficence." But there is a wide distinction between such reasonable regulations and "a law which makes the right to solicit at all, and thus the right of a given charity to exist, dependent on the arbitrary will of a charity commission." For example, delegating to such commission, power to endorse or grant permits to such charitable institutions, "as meet the actual needs of the community, attain a reasonable standard of efficiency, and are so conducted as to insure the public in the wise use of funds." In brief, a charity "that will execute every trust for charity with the least possible delay, with the greatest possible efficiency and with the least possible deduction for expense"—a standard of "absolute perfection of human endeavor." Unless such standard should be reached no permit should be granted and the charity would then cease.

"Can the municipal authorities of a city arbitrarily say what person or what institution may or may not engage in charitable work, dependent wholly or in part upon voluntary contributions from the public? Unhesitatingly we answer that this can not be done, that it constitutes an attempt to use the police power in an arbitrary, unreasonable and oppressive manner. It necessarily contains an assertion of the power to prohibit and suppress vocations and occupations, which, entirely aside from their religious character, are from a worldly point of view in and of themselves not only harmless but positively beneficial to humanity. The power to pass reasonable regulations in such a case bears no relationship to the power to prohibit or suppress."<sup>30</sup>

<sup>30</sup> *Ex parte Dart*, 172 Cal. 47,  
155 Pac. 63.

An ordinance forbidding the sale of named produce except in containers of a specified capacity, it has been held, does not impair the right to make contracts.<sup>31</sup>

So an ordinance does not impair the right to contract by fixing the standard of loaves of bread and forbidding the sale of loaves of any other size.<sup>32</sup>

Pursuant to statutory authority an ordinance may limit travel on certain public ways to light vehicles. Such ordinance is not unconstitutional.<sup>33</sup>

#### § 742. Same—use of private property.<sup>34</sup>

Ordinances cannot impose unreasonable restraints upon the right to use and enjoy property. Nor can they be imposed for the benefit of adjacent or neighboring property.<sup>35</sup> Nor can they be imposed to effect symmetry of the city, street or section, otherwise than under the power of eminent domain, allowing compensation, if at all.<sup>36</sup>

An ordinance forbidding the maintenance and conduct of a garage within fifty feet of a school house was held not to be an arbitrary interference with the rights of the individual, but a fair, reasonable and appropriate exercise of the police power, and further, the fact that the property had been used for such purpose for a series of years anterior to the passage of the restriction, in

<sup>31</sup> *Stegmann v. Weeke* (Mo. 1919), 214 S. W. 137, 139.

<sup>32</sup> *Schmidinger v. Chicago*, 226 U. S. 578, 38 Sup. Ct. 182, 57 L. ed. 363, Ann. Cas. 1914B, 284, affirming 243 Ill. 167, 90 N. E. 369, 44 L. R. A. (N. S.) 632, 17 Ann. Cas. 614.

<sup>33</sup> *Strauss v. Enright*, 174 N. Y. S. 113.

<sup>34</sup> *People ex rel. v. Stroebe*, 209 N. Y. 434, 103 N. E. 735, reversing 141 N. Y. S. 1014, 156 App. Div. 457, as to construction and validity

of an ordinance forbidding the maintenance and conduct of a public garage without permission of the superintendent of buildings.

Regulating erection of buildings. *State ex rel. v. Houghton*, 134 Minn. 226, 158 N. W. 1017. See § 948, post.

<sup>35</sup> *Enbank v. Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192.

<sup>36</sup> *State ex rel. v. Stahlman*, 81 W. Va. 335, 94 S. E. 497.



no manner affected its constitutionality or precluded its enforcement.<sup>37</sup>

Ordinances segregating whites and negroes as to resident locations have been sustained in whole or in part by state decisions,<sup>38</sup> but such legislation has met with disfavor in the Supreme Court of the United States. Thus an ordinance forbidding negroes from occupying as a residence any house in any block in which the majority of residence are occupied by white persons was held violative of property rights, in that it prevents white persons from selling property in such block to negroes for residences. Nor can it be sustained as a police regulation in that it will prevent race conflict.<sup>39</sup>

#### § 746. Relating to individual liberty.<sup>40</sup>

An ordinance authorizing an arrest of a citizen without a warrant on the mere verbal request of any other citizen by a statement that such citizen has violated some criminal law of the state or some ordinance of the city, without probable cause on the part of the officer to believe that an offense has been committed is unconstitutional.<sup>41</sup>

<sup>37</sup> *McIntosh v. Johnson*, 211 N. Y. 265, 105 N. E. 414, affirming 145 N. Y. S. 763, 160 App. Div. 563.

<sup>38</sup> *Carey v. Atlanta*, 143 Ga. 192, 84 S. E. 456, L. R. A. 1915D, 684, Ann. Cas. 1916E, 1151; *State v. Gurry* (Md.), 88 Atl. 228, 121 Md. 534, 88 Atl. 546, 47 L. R. A. (N. S.) 1087; *Jackson v. State* (Md. 1918), 103 Atl. 910; *State v. Darnell*, 166 N. C. 300, 81 S. E. 338.

Ordinance segregating whites and negroes as to residence, was held valid in part and void in part. Valid as to persons whose rights as owners or tenants have accrued since the enactment of the regulation, but void in so far as to restricts the rights of persons to

move into and occupy property of which they were the owners at the effective date of the ordinance. *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, citing §§ 724, 730, 732, vol. 2, ante, and §§ 893, 895, vol. 3, ante.

<sup>39</sup> *Buchanan v. Warley*, 245 U. S. 60, 38 Sup. Ct. 16, 62 L. ed. 149, reversing 165 Ky. 559, 177 S. W. 472, Ann. Cas. 1917B, 149.

<sup>40</sup> Ordinance forbidding bathing in lake in city limits. *Pounds v. Darling* (Fla. 1918), 77 So. 666.

<sup>41</sup> *Ex parte Rhodes* (Ala. 1918), 79 So. 462, reviewing numerous cases.

See § 1038, post; § 1038, vol. 3, ante.

So an ordinance forbidding the smoking of tobacco in public ways, parks, public places, public buildings, hotels, stores, etc., was adjudged unconstitutional, as an unreasonable interference with the private rights of the citizen.<sup>42</sup>

So an ordinance declaring an act of public indecency a misdemeanor, and providing that whenever two or more persons of opposite sex are associated together upon the sidewalks and streets of the city, one of them being a person of ill repute, such an association is an act of indecency, was held unreasonable and void as infringing upon the rights of personal liberty.<sup>43</sup>

An ordinance forbidding playing base ball on Sunday is not unconstitutional as violating the guarantee of religious liberty.<sup>44</sup>

### § 750. Personal liberty—drunkenness.

Ordinances forbidding drinking malt, vinous, spirituous or other intoxicating liquors in any business house,

<sup>42</sup> An ordinance declaring it unlawful for any person to smoke tobacco in any form in or upon any street, alley, avenue, boulevard, park, parkway, public passageway, depot, depot platform, depot ground, hospice, hotel, store, post office, or other public building or public place within the city, was held unconstitutional as "an unreasonable interference with the private rights of the citizen." "It will be seen that the ordinance in question cannot be sustained on the ground that it tends to protect the property of the city from damage by fire. If the ordinance were limited to places where quantities of highly combustible materials were collected it would be less objectionable. In the broad language in which the ordinance is enacted it is appar-

ently an attempt on the part of the municipality to regulate and control the habits and practices of the citizen without any reasonable basis for so doing." *Zion v. Behrens*, 262 Ill. 510, 104 N. E. 836, citing §§ 902, 921, vol. 3, ante.

Although smoking cigarettes, especially by the young, is regarded as more offensive and harmful than the use of tobacco in any other form, the Kentucky court held void an ordinance which forbade the smoking of cigarettes within the corporate limits of a city. *Hershberg v. Barbourville*, 142 Ky. 60, 133 S. W. 985, 24 L. R. A. (N. S.) 41, Ann. Cas. 1912D, 189.

<sup>43</sup> *Lancaster v. Reed* (Mo. App. 1919) 868.

<sup>44</sup> "It is hard to conceive how the ordinance can be said to infringe any guaranty of religious

store buildings, restaurant, hotel, livery stable, billiard hall, poolroom, bowling alley, or within a street or alley within the city unless the persons occupying the building shall be duly licensed to sell intoxicating liquors was sustained as constitutional in Colorado.<sup>45</sup>

### § 750a. Same—handling intoxicating liquor.

In Missouri an ordinance emanating from express legislative grant forbidding the ordering for keeping, storing or delivering of intoxicating liquor for or to another person is not repugnant to the constitution and laws of the state.<sup>46</sup>

### § 751. Mode of trial.

An ordinance that “deprives a party of the right of trial by jury” in prosecutions for the violation of municipal ordinances is not unconstitutional.<sup>47</sup>

## II. ORDINANCE IMPAIRING THE OBLIGATION OF CONTRACTS.

### § 753. Ordinances cannot impair the obligation of contracts.<sup>48</sup>

liberty. We have never heard of a religious denomination which declared as an article of faith that it was the duty of its members to play baseball on Sunday.” *Hiller v. State*, 124 Md. 385, 92 Atl. 842.

<sup>45</sup> *Delta v. Charlesworth* (Colo. 1918), 170 Pac. 965.

<sup>46</sup> *East Prairie v. Greer* (Mo. App.), 186 S. W. 952.

<sup>47</sup> *Craddock v. San Antonio* (Tex. Civ. App.), 198 S. W. 634.

<sup>48</sup> *Sears v. Akron*, 246 U. S. 242, 252, 38 Sup. Ct. 245, 62 L. ed. 688, 699; *Los Angeles Gas & Electric Corp. v. Los Angeles*, 163 Cal. 621, 126 Pac. 594; *State ex rel. v. Rendigs* (Ohio 1918), 120 N. E. 836.

Charter amendment as impairing

the obligation of a contract. *Colby v. Medford*, 85 Or. 485, 167 Pac. 487.

If an ordinance is passed in the exercise of the police power it cannot be held that it impairs the obligation of a contract. *Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816.

Charging one with violation of an ordinance forbidding keeping a house of assignation or prostitution does not in any manner impair the obligation of a contract or divest such person of any vested rights in real estate which such person owns and occupies. *New Orleans v. White* (La. 1918), 78 So. 745.

**§ 754. Ordinance as "law."<sup>49</sup>****§ 755. Ordinances as contracts.<sup>50</sup>****§ 756. The "obligation" of a contract.**

In making improvements at the expense of property where the city agrees to permit the owner to pay his assessment in installments, in consideration of his waiving all irregularities and defects, a contract in effect is created between the city and owner; and the city cannot by amendment of its charter change the number and amount of the installments without consent of the owner, since such change impairs the obligation of the contract, within the meaning of the constitution.<sup>51</sup>

**§ 757. Question is for decision by United States Supreme Court.**

United States courts will determine for themselves whether contractual rights exist and, if so, whether they have been impaired, etc.<sup>52</sup>

**§ 759. Ordinances granting franchises as contracts.**

A grant by ordinance of a street railway franchise

<sup>49</sup> Ordinances are not laws within the meaning of the constitutional provision prohibiting local or special legislation. *Taylor v. Philadelphia* (Pa. 1918), 104 Atl. 766.

The prohibition "applies to cities and towns when they amend their own charters, because they are but agencies of the state, exercising legislative powers which the state has delegated to them." *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 499; *Straw v. Harris*, 54 Or. 424, 437, 103 Pac. 777.

<sup>50</sup> Charter amendment: "The term 'contract' is given its ordinary meaning, and as used in the constitution, means a voluntary

agreement of minds upon a sufficient consideration to do or not to do certain things." *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 499; *Ladd v. Portland*, 32 Or. 271, 274, 51 Pac. 564, 67 Am. St. Rep. 526.

<sup>51</sup> *Colby v. Medford*, 85 Or. 485, 167 Pac. 487, 499.

<sup>52</sup> *Birmingham Waterworks Co. v. Birmingham*, 211 Fed. 497, affirmed 213 Fed. 450; *Denver v. Mercantile Trust Co.*, 201 Fed. 790, 798, 120 C. C. A. 100, 161 Fed. 769; *New York Electric Lines Co. v. Empire City Subway Co.*, 235 U. S. 179, 35 Sup. Ct. 72, 59 L. ed. 184.

for a fixed term of years, accepted by the grantee, constitutes a binding contract, the obligations of which cannot be avoided due to economic conditions.<sup>53</sup>

**§ 760. Same—imposing additional burdens.**

The vested right of a railroad company to finish a street crossing plan is impaired by an ordinance directing a crossing at a different point.<sup>54</sup>

A license or occupation tax may be imposed on a company authorized to use the streets and distribute and sell electricity without violating its contract franchise rights.<sup>56</sup>

**§ 763. Reservation of right to alter, amend or repeal franchise contracts.**

An ordinance granting rights to lay tracks in streets and run cars thereon pursuant to state law, which expressly reserves to the municipality, power to make or alter regulations and to forbid the use of a specified motive power (steam locomotives) if accepted by the grantee, precludes the grantee afterwards from claiming that, as the state law authorized the designation of streets only, the municipality was prevented from acting on the reserved power, without impairing the obligation of the contract. In the opinion of the court, the specific conditions and general powers reserved in the ordinance were not inconsistent with the grant from the state, and when, with such reservation, it was accepted by the grantee, it became contractual as well as legislative. The grantee could not rely on it for the purpose of laying the tracks and then deny the validity of such conditions. The ordinance was proposed and accepted as an entire

<sup>53</sup> Columbus Ry. Power & Light Co. v. Columbus, 249 U. S. 399, 39 Sup. Ct. 349.

<sup>54</sup> Chicago v. New York, C. & St. L. R. Co., 216 Fed. 734.

<sup>56</sup> Salt Lake City v. Utah Light

& Ry. Co., 45 Utah 50, 142 Pac. 1067, following St. Louis v. United Rys. Co., 210 U. S. 266, 274, 278, 280, 28 Sup. Ct. 630, 52 L. ed. 1054.

contract and, as such, was binding on the grantee as well as the city. The reserved power therein authorized the city to prohibit the use of steam locomotives on the tracks. In the language of the court, "this did not defeat the grant, inasmuch as it was permissible and practicable to use electricity, gasoline or other motive power free from noise and vibration—increased here above the ordinary when steam was used on a grade said to be one of the steepest, if not the steepest, in the state."<sup>57</sup>

The fact that under a reserved power in an ordinance, the city may not prohibit the hauling of freight cars over a certain street but can regulate the motive power, an ordinance prohibiting transportation of freight and forbidding the use of steam locomotives on the street involved, is not necessarily void in its entirety. "The provisions relating to motive power, prohibiting the hauling of freight cars and declaring a forfeiture for a violation of the ordinance are so far separable that they do not necessarily stand or fall together and, therefore, the regulation against the use of steam can be enforced without regard to the validity of the prohibition against hauling freight cars."<sup>58</sup>

It may be questioned whether a city in granting a franchise, pursuant to state law, to lay and operate tracks in a certain street, including the right to haul both passengers and freight, reserving therein the power to regulate and prohibit the use of steam locomotives thereon, can afterwards prohibit the hauling of freight cars over such street. The court in view of an incomplete record, withheld a decision on this point.<sup>59</sup>

<sup>57</sup> *Southern Pacific Co. v. Portland*, 227 U. S. 559, 572, 33 Sup. Ct. 308, 57 L. ed. 642, affirming 177 Fed. 958, stating: The case is like *Richmond F. & P. R. Co. v. Richmond*, 96 U. S. 521, 24 L. ed. 734, affirming 26 Gratt (Va.) 83, where under a somewhat similar ordinance, it was held that the city might provide that no car or

engine could be drawn or propelled by steam along certain parts of the highway.

<sup>58</sup> *Southern Pacific Co. v. Portland*, 227 U. S. 559, 572, 573, 33 Sup. Ct. 308, 57 L. ed. 642, affirming 177 Fed. 958; *Laclede Gas Light Co. v. Murphy*, 170 U. S. 78, 99.

<sup>59</sup> *Southern Pacific Co. v. Port-*

**§ 765. Rights vested in contractor for public work.**

The lien given by law to the contractor on the real estate abutting the improvement or in the improvement district is a remedy which may be modified at any time before the rights have become vested, or when such change does not impair a contract right, or substantially deprive a party of adequate means of enforcing his right.<sup>60</sup>

**III. ORDINANCES CANNOT INTERFERE WITH OR REGULATE  
INTERSTATE OR FOREIGN COMMERCE.****§ 771. Ordinances cannot interfere with or regulate interstate or foreign commerce.<sup>61</sup>**

The question whether a particular ordinance or a state law, (as the applicable principles for determination are identical) interferes with or attempts to regulate interstate or foreign commerce must be decided by a proper conception of the commerce clause of the United States constitution and the scope and effect of the Congressional legislation, if any, involved. Under the constitution of the United States the Congress possesses exclusive jurisdiction "to regulate commerce with foreign nations and among the several states."<sup>62</sup> Its power in this respect "is supreme and plenary."<sup>63</sup> That which is reserved to the states, in the language of Chief Justice Marshall, is limited to "the completely internal commerce of the states."<sup>64</sup>

These principles, early established by the United States

land, 227 U. S. 559, 573, 574, 33 Sup. Ct. 308, 57 L. ed. 642, affirming 177 Fed. 958.

<sup>60</sup> *Gubbins v. Harrington*, 48 Ind. App. 488, 96 N. E. 31.

<sup>61</sup> Although both the sending and receiving points of a telegram are in one state, if the transmission route is partly through another state, it is interstate commerce. *Davis v. Western Union*

*Tel. Co.*, 198 Mo. App. 692, 697, 202 S. W. 292.

<sup>62</sup> Constitution of the United States—Article 1, Section 8, Paragraph 3.

<sup>63</sup> *Minnesota Rate Cases*, 230 U. S. 352, 398, 33 Sup. Ct. 729, 57 L. ed. 1511.

<sup>64</sup> *Gibbons v. Ogden*, 9 Wheat (22 U. S.) 1, 196.

Supreme Court, were clearly stated by Mr. Justice Hughes: "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the state, as such but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."<sup>65</sup>

The decisions on this subject cluster around certain general governmental and legal principles which have gradually developed and which are susceptible of reasonable classification:

First, state or local police regulations incidentally affecting interstate commerce, which will be sustained if they do not impose a direct burden upon such commerce.

Second, matters admitting of diversity of treatment according to the special requirements of local conditions, in which case the states may act within their respective spheres until Congress acts, provided, however, that such state action does not impose a direct burden upon interstate commerce.

Third, where Congress has not acted, the broad grant in the Constitution constitutes plenary power at all times adequate to secure freedom of interstate commercial intercourse from state control with respect to those subjects embraced within the grant in the Constitution and

<sup>65</sup> The Minnesota Cases, 230 U. S. 352, 399.



which require a general system and uniform regulation, or which are of such a nature as to demand, if regulated at all, their regulation should be prescribed by a single authority. In such cases the power of the Congress is exclusive.

Fourth, when Congress acts in a matter which is within its jurisdiction the exercise of its authority overrides all conflicting state legislation; or, as tersely expressed in the *Minnesota Rate Cases*,<sup>66</sup> whenever the "Congress may be entitled to act by virtue of its power to secure the complete government of interstate commerce, the state power nevertheless continues until Congress does act and by its valid interposition limits the exercise of the local authority."

"The principle which determines this classification underlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."<sup>67</sup>

The proposition has long been recognized that the mere grant to the Congress of the power to regulate interstate commerce does not of its own force and without legislation by the Congress impair the authority of the states to establish reasonable regulation for the protection of the health, the lives or the safety of their people.<sup>68</sup> "Undoubtedly, the exertion of the power essen-

<sup>66</sup> 230 U. S. 352, 411, 412.

<sup>67</sup> The *Minnesota Rate Cases*, 230 U. S. 352, 400.

<sup>68</sup> *Chicago, Rock Island & Pacific Ry. Co. v. Arkansas*, 219 U. S. 453, 465; *New York etc. Railroad v. New York*, 165 U. S. 628, 631, 632, 633; *Western Union Tel. Co. v. Kansas*, 216 U. S. 1, 27; *Missouri, K. & T. Ry. Co. v. Haber*,

169 U. S. 613, 627; *Chicago M. & St. P. Ry. Co. v. Solan*, 169 U. S. 133.

"That the Congress has the exclusive power to regulate interstate commerce is beyond question, and when that authority is exerted by the state, even in the just exercise of the police power, it may not interfere with the supreme au-

tial to assure needed protection to the community may extend incidentally to the operations of a carrier in its interstate business, provided it does not subject that business to unreasonable demands and is not opposed to federal legislation."<sup>69</sup> Such local regulations must not in any sense impose a direct burden upon interstate commerce, that is, they must not subject the operations of interstate carriers in the course of transportation from one state to another to requirements that are unreasonable or that pass beyond the point of suitable local protection.<sup>70</sup> Nor must such regulations in any manner forbid or hamper or fetter by conditions the carriers' right to pursue their interstate commerce operations as theretofore.<sup>71</sup>

Moreover, such regulation must be confined to matters which are appropriately of local concern. They must proceed upon the recognition of the right secured by the federal Constitution. "Local police regulations cannot go so far as to deny the right to engage in interstate

thority of Congress over the subject; while this is true this court from the beginning has recognized that there may be legitimate action by the state in the matter of local regulation which the state may take until Congress exercises its authority on the subject." *Sligh v. Kirkwood*, 237 U. S. 52, 58, 35 Sup. Ct. 501, 59 L. ed. 835.

<sup>69</sup> *Adams Express Co. v. New York*, 232 U. S. 14, 31; *Mobile v. Kimball*, 102 U. S. 691, 697; *Lake Shore & M. S. Ry. Co. v. Ohio*, 173 U. S. 285; *N. Y. N. H. & H. R. R. Co. v. New York*, 165 U. S. 628; *Hennington v. Georgia*, 163 U. S. 299; *Western Union Tel. Co. v. James*, 162 U. S. 650, 656; *Smith v. Alabama*, 124 U. S. 464, 474, 482.

<sup>70</sup> *Yazoo, etc., Railroad v. Greenwood Grocery Co.*, 227 U. S. 1; *Texas, etc., R. R. Co. v. Sabine*

*Tram. Co.*, 227 U. S. 111; *Ohio R. R. Comrs. v. Worthington*, 225 U. S. 101; *Houston, etc., R. R. Co. v. Mays*, 201 U. S. 321.

<sup>71</sup> *Buck Stove Co. v. Vickers*, 226 U. S. 205; *Crutcher v. Kentucky*, 141 U. S. 47; *Bowman v. Chicago, etc., Ry. Co.* 125 U. S. 465; *Leisy v. Hardin*, 135 U. S. 100; *Kansas City v. Jordan*, 99 Kan. 814, 163 Pac. 188, ordinance regulating the transportation of intoxicating liquor, held valid.

Ordinance relating to transportation and delivery of liquors by common carriers engaged in interstate commerce, wherein no distinction was made between intrastate and interstate shipments, held unconstitutional in toto, as an unwarranted interference with interstate commerce. *West Jersey & S. R. Co. v. Millville (N. J. 1918)*, 103 Atl. 245.

commerce, or to treat it as a local privilege and prohibit its exercise in the absence of a local license.”<sup>72</sup> “A state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce no matter how specious the pretext may be for imposing it.”<sup>73</sup>

The decisions of the United States Supreme Court amply illustrates the proposition that the state power to regulate ceases the moment that the national legislation has ordained constitutionally how the instrumentality or agency employed in interstate commerce shall be regulated by the federal authority. By such action the latter assumes exclusive control of the subject committed to it by the constitution and its power in the premises cannot be denied or thwarted by the comingling of interstate and intrastate operations, nor circumscribed or lessened by the employment for economical or other reasons of such instrumentality or agency indiscriminately in both classes of service, notwithstanding by such intermingling the effective national regulation incidentally controls that which otherwise (if Congress has not acted) would be purely internal commerce wholly within the state. “When Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulative power of the state ceases to exist.”<sup>74</sup> In other phrase, when the Congress acts, the state law occupying the identical field must give way.<sup>75</sup>

<sup>72</sup> *Adams Express Co. v. New York*, 232 U. S. 14, 31; *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 496; *Leloup v. Mobile*, 127 U. S. 640, 645; *Stoutenburgh v. Hennick*, 129 U. S. 141, 148; *Rearick v. Pennsylvania*, 203 U. S. 507; *International Text Book Co. v. Pigg*, 217 U. S. 91, 109; *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S. 229, 260; *Buck Stove Co. v. Vickers*, 226 U. S. 205, 215; *Crenshaw v. Arkansas*, 227 U. S.

389; *Minnesota Rate Cases*, 230 U. S. 352, 401.

<sup>73</sup> *Crutcher v. Kentucky*, 141 U. S. 47, 58.

<sup>74</sup> *Erie Railroad Co. v. New York*, 233 U. S. 671, 681 (an action for penalty for alleged violation of New York State Eight Hour Law).

<sup>75</sup> *Adams Express Co. v. Croninger*, 226 U. S. 491; *Chicago, etc., Railway Co. v. Hardwick Elevator Co.*, 226 U. S. 426; *Reid v. Colo-*

### § 771a. Impracticability of application of state law to the instrumentality in intrastate operations.

Where it is impracticable to separate the interstate and intrastate operations or instrumentalities of com-

rado, 187 U. S. 137, 146, 147; Gulf, etc., Railway Co. v. Hefley, 158 U. S. 98; Gibbons v. Ogden, 9 Wheat (22 U. S.) 1; Davis v. Western Union Tel. Co., 198 Mo. App. 692, 697, 698, 202 S. W. 292.

"It is elementary that the right of a state to apply its police power for the purpose of regulating interstate commerce in a case like this (law relating to consecutive hours of service of train crew) exists only from the silence of Congress on the subject and ceases when Congress acts upon the subject or manifests its purpose to call into play its exclusive power." Northern Pacific R. R. Co. v. Washington, 222 U. S. 370, 378.

Toledo, St. Louis and Western R. R. Co. v. Slavin, 236 U. S. 434, 59 L. ed. 671, 35 Sup. Ct. R. 306, holds that the employers' liability act of April 22, 1908, covers an action by an injured employee against an interstate railway carrier to the exclusion of any applicable state statutes, where the evidence on the trial shows that the train on which the plaintiff was riding at the time of injury was engaged in interstate commerce.

Southern Railway Co. v. Railroad Commissioners of Indiana, 236 U. S. 439, 445, held that Congress has so far occupied the field of legislation relating to the equipment with safety appliances of cars moving on interstate railways as to invalidate, as applied to freight cars moving between points

within the state on a railway engaged in interstate commerce. The provision of the Indiana Law required railway companies to place secure grabirons or handholds on the sides or ends of every railway car. The car in question was engaged in transporting freight between points wholly within the state of Indiana and was moving on a railroad engaged in interstate commerce. Mo. K. & T. R. Co. v. Harris, 234 U. S. 412, 420, 34 Sup. Ct. 790, 58 L. ed. 1377, 1382, notes the results of many recent cases beginning with Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. ed. 314, 44 L. R. A. (N. S.) 257, and coming down to Boston and Maine R. R. Co. v. Hooker, 233 U. S. 97, 34 Supreme Court, 526, 58 L. ed. 868, L. R. A. 1915B, 450.

Charleston v. Western Carolina R. W. Co. v. Varnville Furniture Co., 237 U. S. 597, holds that the Congress has so far taken over the subject of a carriers' liability for loss or damage to interstate shipments by appropriate legislation as to invalidate the provisions of the South Carolina law subjecting a terminal carrier to a penalty for failure to pay promptly a claim for damage to an interstate shipment.

In a case involving the federal and state Eight Hour laws the Missouri Supreme Court remarked that, since the act of the Congress covers the same subject or class of legislation that is covered by

merce, as for example, switch engines which move cars used in both state and interstate traffic, a state law made to apply only to such engines employed in intrastate traffic is superseded by an act of Congress relating to the control of the equipment of such engines, because the operation of such instrumentalities in both classes of traffic are interdependent and not separable.<sup>76</sup> There-

the state law "the former nullifies the latter as completely as if it had never been enacted." *State v. Wabash R. R. Co.*, 238 Mo. 21, 32, 33, 141 S. W. 646, approving *State v. Mo. Pac. Railway Co.*, 212 Mo. 658, 111 S. W. 500.

<sup>76</sup> See *State v. Missouri Pacific Ry. Co.*, 212 Mo. 658, 683, 111 S. W. 500.

**Hours of labor.** In passing on a conflict between a Federal and State law restricting hours of labor of telegraph operators, the supreme court of Wisconsin said that the impracticability, if not impossibility, of limiting hours of work devoted to domestic commerce alone, is so obvious as to preclude belief in any such legislative purpose. That impracticability is shown by facts which are a matter of common knowledge. "Many purely domestic trains carry some freight or passengers in transit to extrastate destination. It would seem that any severance of control over state from interstate trains involved so much of confusion and probability of danger, and its impossibility even is so doubtful and experimental, that no legislature would absolutely precipitate it without careful consideration, nor without providing in the act for the event of the failure of such experiments. For this reason as well, we are convinced

that the legislative purpose involved what the legislative words include, the regulation of services of all operators, and would in no wise be satisfied, even in part, by a restriction to those whose acts affect only domestic commerce, if indeed there are any such." *State v. Chicago, M. & St. P. R. Co.*, 136 Wis. 407, 419, 19 L. R. A. (N. S.) 326, 117 N. W. 686.

In considering the Missouri law relating to hours of certain railroad employes, concerning its conflict with the Federal law on the same subject, it was said that "when Congress undertakes to exercise its exclusive jurisdiction over interstate commerce, there can be no parceling out of the field affected between state and Federal jurisdiction. The congressional act indicates to what extent in the judgment of Congress the regulation and restriction on the railroads shall go. It is exclusive, and it admits of no supplementary or additional limitation on the part of any of the states. In view of these controlling decisions we are not at liberty to say that the statute can be apportioned so as to uphold it as to intrastate traffic and disregard it as to interstate traffic, but must treat it as a whole." *Phelps v. St. Louis, I. M. & S. R. Co.*, 2 Mo. P. S. C. 15, 21.

fore, in view of the unity and indivisibility of the service of these switch engines and the paramount character of the authority of the Congress to regulate interstate commerce, any national act on the subject is exclusively controlling.<sup>77</sup>

<sup>77</sup> As stated in substance by Chief Justice White in *Northern P. R. Co. v. Washington*, 222 U. S. 370, 375, 56 L. ed. 237, 238, 32 Sup. Ct. Rep. 160, in view of the unity and indivisibility of the service of these switch engines and the paramount character of the authority of the Congress to regulate interstate commerce, the national act is exclusively controlling. Like expressions are found in *Southern R. Co. v. United States*, 222 U. S. 20, 56 L. ed. 72, 32 Sup. Ct. Rep. 2, 3 N. C. C. A. 822.

The moment a car is moved on a switch or in a terminal, which ultimately, as a result of such initial movement, carries interstate freight, from that moment the car is employed in interstate commerce, and the locomotive used to move such car is therefore from such moment engaged in the like character of commerce, and hence, under the exclusive jurisdiction of the federal government. When more than one car is moved at a time, frequently the movement of local and interstate traffic takes place at the same time on the same switch or switches with the same employees and with the same locomotive. No separation is made and it is impracticable in the exercise of fair economy to make a separation. Whether the local traffic exceeds in volume the interstate traffic, is not material. In

view of the impracticability of segregating the two classes of movements, the conclusion is justified that a switch engine when operated by an interstate carrier is at all times an instrument of interstate commerce. This statement applies to every switch engine at every yard upon the line of such carrier, whether the yard is in the center of the state or whether it is on the state borders. The switch engine is only an assistant to the main road engine, and it performs in the terminal what the road engine performs at the small station. It cannot be designated as operated for state or interstate transportation, but depends entirely on the class of traffic handled by the main line or road engine. A train contemplates an engine and cars which have been assembled and coupled together for a run or trip along the road. The various movements of a locomotive of a carrier engaged in interstate commerce in railroad yards whereby cars are moved and assembled and coupled into trains and whereby incoming trains which have completed their runs are broken up and the cars thereof separated and moved to different points, are all acts pertaining to interstate commerce, unless the cars moved are limited to traffic wholly within the state. The fact that the locomotives may not be engaged in what are termed

Moreover, where the subject-matter of regulation is of such a nature as to require a general system and uniform regulation prescribed and controlled by a single competent authority, the power of the Congress is exclusive.

### § 772. Meaning of term "commerce."

Comprehensively speaking commerce describes intercourse between nations, but as applied to interstate commerce it is confined to the intercourse between persons, co-partnerships or corporations of the several states. As tersely put: "Importation is the indispensable element, the test, of interstate commerce."<sup>78</sup> Ordinarily, therefore, whenever there is a negotiation, contract, trade or dealing between persons of different states in which importation is an essential feature or forms a component part of the transaction it may be termed "interstate commerce."<sup>79</sup>

As observed in a recent judicial judgment, necessarily there are limitations upon this definition due to differences in facts in particular cases. It is never held that the act of Congress regulating interstate commerce is to be so construed as to interfere with the power of a state to regulate adequately its police and taxing powers and its domestic trade, provided, of course, that such state regulation is not inconsistent with the congressional regulation of interstate commerce.<sup>80</sup>

### § 775. License tax for privilege of selling goods, etc.

One as agent of a foreign corporation who goes from house to house and obtains orders from residents for groceries and forwards such orders to his principal in

technical train movements, but are merely engaged in what are called switching operations, is immaterial. *Brotherhood of Locomotive Firemen & Enginemen v. St. Louis & San Francisco R. R. Co.*, 2 Mo. P. S. C. 560, 573-578, P. U. R. 1915F, 489.

<sup>78</sup> *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. (C. C. A.) 1.

<sup>79</sup> *Text Book Co. v. Pigg*, 217 U. S. 91, 54 L. ed. 678.

<sup>80</sup> *Eldorado Springs v. Highfill*, 268 Mo. 501, 508, 188 S. W. 68.

another state which fills them by making up separate packages for each order and sends them to the agent who delivers them in unbroken packages to the persons who had theretofore ordered them and receives money therefor which the agent transmits to his foreign principal, it has been held, is engaged in interstate commerce. Accordingly an ordinance exacting of him a license is not applicable to him and others engaged in like business.<sup>81</sup>

A packing company in Indiana sold its products in Kansas City, Missouri, through a solicitor or agent who obtained orders therefor which were forwarded by the agent to the Indiana company to be filled, and the agent's participation in the matter ended. If the orders were filled the goods were shipped direct to the buyers and the collections were made of them by the company. The agent finding that the business was more than he could personally transact organized a force of men who solicited for the company who reported to him but forwarded all orders to the Indiana company as having been made by the agent, and the goods were shipped and collections made by the company. The force of men thus employed increasing in numbers the agent opened an office in Kansas City where they reported to him and received instructions before entering upon their work. The compensation of the agent and the men employed by him were paid by the Indiana Company. The goods were sold by sample and the orders sent in by the agents to the company were subject to acceptance or rejection as it might determine. Instances occurred in which the agents went to local retail dealers and took orders for goods of the Indiana Company using samples of the goods sought to be sold, to secure the order, and after the order was secured the solicitor would ask the retailer which if wholesaler or jobber he would like to have the order placed and the same would be placed as re-

<sup>81</sup> *Jewel Tea Co. v. Carthage, Inc. v. Mexico*, 262 Mo. 432, 171 257 Mo. 383, 165 S. W. 743; *Flem-* S. W. 321.



quested. Such transactions were held to be interstate in character and hence not subject to local regulations.<sup>82</sup>

**§ 777. Same—where goods sold are in the state.**

In a prosecution charging defendant with violating a municipal ordinance in engaging in the business of a canvasser or agent by taking orders or selling goods to customers without taking out a license authorizing him so to do, the facts were that defendant went from house to house carrying samples of goods, exhibiting them to prospective purchasers who engaged to buy from him goods similar to the samples and to pay for them upon delivery after satisfactory examination. Orders for the goods, made by defendant were directed to a manufacturing corporation in another state, sufficient to meet the requirements of the prospective sales. Defendant did not furnish the corporation with the names of the particular purchasers but before making the orders he furnished the corporation with letters of credit to cover the cash amount of the particular order. The goods were billed and shipped to the defendant in bulk and he paid the freight charges. Upon receipt he delivered them in accordance with the condition of sales theretofore made. Upon acceptance of the goods the purchasers paid defendant therefor. Defendant had an agreement with the corporation that he might return at its expense to a certain amount on any order, goods not taken by persons to whom contracted and who declined to receive them. Here it was held that the interstate character of the shipment was lost upon the delivery of the goods by the foreign corporation to defendant, and the goods thereafter not moving in interstate commerce, the transactions became local in their nature. The goods became defendant's property upon their delivery to him. There is no semblance of agency, in the opinion of the

<sup>82</sup> *Kansas City v. McDonald*  
(Mo.), 175 S. W. 917.

court, but all the characteristics of an independent transaction in which defendant was one of the principals.<sup>83</sup>

**§ 782. License tax under the police power.<sup>84</sup>**

**§ 784. Taxation of property employed in interstate or foreign commerce.**

The decisions of the Supreme Court establish the proposition that the privilege given under the terms of the act of Congress to use the military and post roads of the United States for the poles and wires of a telegraph company is to be regarded as permissive in character and not as creating corporate rights and privileges to carry on the business of telegraphy, which were derived from the laws of the state incorporating the company, and that this permissive grant does not prevent the state from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the state.<sup>85</sup> The reasonableness of such taxing ordinance, unless some federal right set up and claimed is violated, is a matter for the state to determine.<sup>86</sup>

<sup>83</sup> *Eldorado Springs v. Highfill*, 268 Mo. 501, 510, 511, 188 S. W. 68.

<sup>84</sup> "The ordinance imposing a tax upon peddlers who have no regular place of business in Salem but therein orders for the sale and future delivery of tea, coffee, spices, etc., should not be classed as an exercise of the police power, since it would seem that such business could not injuriously disturb the peace, molest the order, impair the health, violate the morality or annoy the society of the city." *Ideal Tea Co. v. Salem*, 77 Or. 182, 150 Pac. 854, citing § 782, vol. 2, ante.

(*McQuillin*, Mun. Ord. § 260.)

<sup>85</sup> *Williams v. Talladega*, 226 U. S. 404, 416, 33 Sup. Ct. 116, 57 L. ed. 275, reversing 164 Ala. 633, 51 So. 330; distinguishing *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1; *Western Union Telegraph Co. v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 156 L. ed. 710; *Western Union Telegraph Co. v. State*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. ed. 1116; *Postal Telegraph Cable Co. v. Charleston*, 153 U. S. 692, 14 Sup. Ct. 1094, 38 L. ed. 871.

<sup>86</sup> *Williams v. Talladega*, 226 U. S. 404, 33 Sup. Ct. 116, 57 L. ed. 275.

**§ 784a. Taxing a governmental agency.**

An agency of the United States government is not subject to a municipal license tax. Hence a state cannot impose a license tax on the doing of business within the state, including the transmission of government messages, by a telegraph company which has accepted the terms of the act of Congress of 1866. Thus an ordinance which taxes, without exemption, the privilege of carrying on a business a part of which is that of a governmental agency constituted under the laws of the United States and engaged in an essential part of the public business—communications between the officers and departments of the federal government—an ordinance making no exception of this class of business, necessarily includes its transaction within the privilege tax levied, is void as an unconstitutional attempt to tax a governmental agency. This part of the license enacted necessarily affects the whole and makes the tax unconstitutional and void.<sup>87</sup>

**§ 786. Cannot regulate or tax operations or objects of interstate or foreign commerce.**

Ordinances requiring expressmen to be licensed and providing that only citizens of the United States or those who have declared their intention to become such can be licensed, as applied to interstate commerce, imposes a direct burden thereon and so applied is unconstitutional.<sup>88</sup>

**§ 789. Scope of local police power.**

The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established by the de-

<sup>87</sup> Williams v. Talladega, 226 U. S. 404, 419, 33 Sup. Ct. 116, 57 L. ed. 275, reversing 164 Ala. 633, 51 So. 330.

<sup>88</sup> Adams Express Co. v. New York, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483, reversing 189 Fed. 268.

cisions of the Supreme Court of the United States. Such articles, it has been declared by that court, are not legitimate subjects of trade or commerce, nor within the protection of the commerce clause of the constitution.<sup>89</sup> Nor does it make any difference that such regulations incidentally affect interstate commerce, when the object of the regulation is not to that end, but is a legitimate attempt to protect the people of the state.<sup>90</sup>

“So it may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the state from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation.”<sup>91</sup>

### § 790. Local police regulations—illustrative cases.<sup>92</sup>

A state law making it unlawful for anyone to sell, offer for sale, ship, or deliver for shipment, any citrus fruits which are immature or otherwise unfit for consumption

<sup>89</sup> *Sligh v. Kirkwood*, 237 U. S. 52, 59, 60.

“They may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life. The self-protecting power of each state, therefore, may be rightfully exerted against their introduction, and such exercise of power cannot be considered regulations of commerce prohibited by the constitution.” *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U. S. 465, 489.

<sup>90</sup> *Sligh v. Kirkwood*, 237 U. S. 52, 60.

<sup>91</sup> *Sligh v. Kirkwood*, 237 U. S. 52, 61.

<sup>92</sup> Ordinance of a town of one thousand inhabitants limiting the speed of interstate trains to six miles an hour, held to impose an unreasonable burden on interstate commerce. *Lusk v. Dora*, 224 Fed. 650.

An ordinance regulating speed of trains carrying United States mail, held admissible as evidence in an action against the railroad for death of United States mail clerk. *Lasater v. St. Louis, Iron Mountain & S. Ry. Co.*, 177 Mo. App. 534, 538, 160 S. W. 818.

was sustained as valid against the contention that it was an unreasonable interference with interstate commerce.<sup>93</sup>

### § 793. Harbor and local police regulations.

An ordinance prescribing the method and rate of speed of vessels when passing bridges and requiring vessels of a certain tonnage while navigating certain portion of a river within municipal limits to have the assistance of a tug or tugs was sustained as a valid local police regulation and not an interference with interstate commerce. A municipality may prescribe and regulate the means and methods of navigation in a harbor or a river as a highway of commerce within its jurisdiction in so far as such regulation conflicts with no rule established by the Congress for such navigation. The decisions of the Supreme Court of the United States are numerous and uniform in sustaining this doctrine.<sup>94</sup>

<sup>93</sup> "We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein such fruits find their most extensive markets. The shipment of fruits so immature as to be unfit for consumption and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in foreign markets with the consequent beneficial effect upon a great home industry, may have been within the legislative intent and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that pur-

pose." *Sligh v. Kirkwood*, 237 U. S. 52, 61, 62.

<sup>94</sup> *Canada Atlantic Transit Co. v. Chicago*, 210 Fed. 7, 126 C. C. A. 587, wherein it is said that "the doctrine thus settled is comprehensively stated and applied in *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. 185, 27 L. ed. 442, in reference to the power of the city of Chicago to regulate navigation of the river, pursuant to an ordinance prescribing hours when bridges shall not be opened for the passage of vessels, and that during other hours named they shall not be opened for a longer period than ten minutes at any one time and shall then 'be closed for fully ten minutes' for the passage of teams and persons 'waiting to pass over'—and may be epitomized as follows: The power of Congress is supreme over all navigable waters, to 'exercise control to the extent necessary to protect, preserve and improve

The ordinance was challenged for unreasonableness, and it was said that this challenge imposed the most difficult burden of proof established for any issue, in law or equity. "Neither preponderance of evidence or proof which convinces the court of want of justifiable cause for the requirements, can serve to authorize judicial interference with legislative action upon a subject within the power of state or municipal legislation. In such case it must be presumed under our form of government that the regulations are enacted in conformity with public opinion in the locality based on familiarity with local conditions, as needful for reasonable speed and safety in navigation through and between bridges."<sup>95</sup>

their free navigation; but this federal power of control is usually exercised only in matters which 'are national in their character and admit and require uniformity of regulation affecting all the states' and water ways. It is well recognized, therefore, that general regulations of navigation adopted by Congress cannot reasonably be made to answer various local requirements in ports and rivers within the states, and that the several states retain and 'have full power to regulate within their limits, matters of internal policy,' which includes regulation of navigation in a water way like the Chicago river, crowded with shipping and spanned by numerous bridges, in the midst of a great commercial metropolis. So under the sanction of the state, the city of Chicago is authorized to regulate use of the bridges and river within the city, in accordance with local conditions, and needs 'until Congress interferes and supercedes' such regulation. 'If the power of the state and that of

the federal government come in contact, the latter must control and the former must yield;' but 'until Congress acts upon the subject' municipal regulation for local purposes is within the authority of the state."

This ruling was reaffirmed and the doctrine applied in *Cummings v. Chicago*, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. ed. 525.

<sup>95</sup> "This presumption is fortified by evidence in the present record of the existence of such public opinion, and neither the character nor the extent of testimony introduced by the appellants, tending to disprove such necessity for use of tugs in every movement of their steamers as required by the ordinance, and tending to show unreasonable delays and expenses thereby imposed, can furnish sanction for the annulment of the ordinance by judicial decree, as we believe, under the established rule of the federal jurisdiction." *Canada Atlantic Transit Co. v. Chicago*, 210 Fed. 7, 11, 126 C. C. A. 587.

## CHAPTER 20.

### CONSIDERATION OF VALIDITY OF MUNICIPAL ORDINANCES, AND HEREIN PROCEDURE TO TEST AND RULES OF CONSTRUCTION.

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| § 794. Courts may determine validity of ordinances.                        | § 806. Injunction to prevent violation of ordinance.  |
| § 795. Method of consideration of validity.                                | § 807. Certiorari.                                    |
| § 796. How the exercise of the police powers may be questioned.            | §§ 810-811. Rules of construction.                    |
| § 797. Estoppel.   | § 812. Title in construction.                         |
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| § 799. Enumeration of proceedings in which validity may be questioned.     | § 814. Construction of penal ordinance.               |
| § 800. Who may question validity.  | § 815. Construction of words and terms.               |
| § 804. Citizens and taxpayers may question validity of ordinance—mandamus. | § 816. Construction where ordinance void in part.     |
| § 805. Injunction to restrain enforcement.                                 | § 817. Construction of ordinances—illustrative cases. |
|  | § 819. Same—who liable—landlord or tenant.            |

#### § 794. Courts may determine validity of ordinances.

If an ordinance relates to a subject-matter within the competency of the municipal corporation and is enacted in the manner prescribed the general rule is that the courts will not interfere unless it appears on the face of the ordinance that it is arbitrary, oppressive, or impairs some vested right or countervenes some constitutional provision. This is in accordance with the general proposition that the necessity, propriety or wisdom of the enactment is in the first instance with the municipal authorities. The legal presumption is that the ordinance is valid and reasonable until the contrary is distinctly shown.<sup>1</sup> Therefore, where the ordinance is within the

<sup>1</sup> Arkansas. North Little Rock v. Rose (Ark. 1918), 206 S. W. 449. Alabama. Briggs v. Birmingham Ry. Light & Power Co., 188 Ala. 262, 66 So. 95; Standard

corporate powers, is fair on its face and no fraud ap-

Chemical Oil Co. v. Troy (Ala.), 77 So. 383.

California. Santa Cruz v. Southern Pacific R. Co., 163 Cal. 538, 126 Pac. 362; Ex parte Sumida (Cal. 1918), 170 Pac. 823.

Florida. State ex rel. v. Dillon (Fla. 1918), 79 So. 29, citing § 791, vol. 1, ante.

Georgia. Cartersville v. McGinnis, 142 Ga. 71, 82 S. E. 487; Moore v. Thomasville, 17 Ga. App. 285, 86 S. E. 641.

Illinois. Chicago v. Moore, 170 Ill. App. 163; Hartman v. Chicago, 198 Ill. App. 372; Springfield v. Postal Telegraph-Cable Co., 253 Ill. 346, 97 N. E. 672, affirming 164 Ill. App. 276; Chicago v. Walden W. Shaw Livery Co., 258 Ill. 409, 101 N. E. 588; Hangan v. Chicago, 259 Ill. 249, 102 N. E. 185; People ex rel. v. Oak Park, 266 Ill. 365, 107 N. E. 636; People v. Chicago, 154 Ill. App. 578, 582.

Iowa. Iowa City v. Glassman, 155 Iowa 671, 136 N. W. 899.

Kansas. State ex rel. v. Atchison, 92 Kan. 431, 140 Pac. 873.

Kentucky. Silva v. Newport, 150 Ky. 781, 150 S. W. 1024; Cumberland Tel. & Tel. Co. v. Calhoun, 151 Ky. 241, 151 S. W. 659.

Louisiana. New Orleans v. Ricker, 137 La. 843, 69 So. 273.

Michigan. Detroit Building Com. v. Kunin, 181 Mich. 604, 148 N. W. 207.

Minnesota. Twin City Separator Co. v. Chicago, M. & St. P. Ry. Co., 118 Minn. 491, 137 N. W. 193.

Missouri. Hislop v. Joplin, 250 Mo. 588, 599, 157 S. W. 625 (ordinance extending city limits); St. Louis v. Kellman, 235 Mo. 687,

139 S. W. 443; Windsor v. Bast (Mo. App.), 199 S. W. 722.

New Jersey. Blake v. Pleasantville, 87 N. J. L. 426, 95 Atl. 113.

New York. Buffalo v. Goodman, 136 N. Y. S. 568, 77 Misc. Rep. 255, affirmed in 137 N. Y. S. 1114, 152 App. Div. 954.

Ohio. State ex rel. v. Rendigs (Ohio 1918), 120 N. E. 836.

Oregon. State ex rel. v. Dalles City, 72 Or. 337, 143 Pac. 1127.

Pennsylvania. Commonwealth v. Walton, 236 Pa. 220, 84 Atl. 766; Vare v. Walton, 236 Pa. 467, 84 Atl. 962.

Virginia. Elsnor Bros. v. Hawkins, 113 Va. 47, 73 S. E. 479, citing § 730, vol. 2, ante. (McQuillin, Mun. Ord. § 186.)

West Virginia. Harrold v. Huntington, 74 W. Va. 538, 82 S. E. 476.

State ex rel. v. Missouri Pacific Ry. Co., 262 Mo. 720, 174 S. W. 73, ordinance directing the construction of a viaduct, to eliminate a grade crossing.

St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S. W. 929, sustaining ordinance fixing fees for permits to erect buildings.

Ashley v. Minneapolis, St. Paul & S. S. M. Ry. Co., 37 N. D. 147, 163 N. W. 727, as to necessity of extending a street, holding ordinance competent proof thereof, following Grafton v. St. Paul & Manitoba Ry. Co., 16 N. D. 313, 112 N. W. 598, 22 L. R. A. (N. S.) 1.

“Cities in enacting ordinances in the exercise of their police powers must necessarily be allowed



pears, the action of the municipal legislative body is conclusive upon the courts, not only in collateral but also in direct proceedings. It is only where the ordinance is so unreasonable, oppressive and subversive of individual and property rights that it carries the inference of an attempted abuse rather than a legitimate exercise of power that the courts will interfere.<sup>2</sup>

The mere fact that officers may act arbitrarily under the ordinance does not necessarily invalidate it or justify the courts in setting it aside.<sup>3</sup> The test of validity is not what has been done under the ordinance but what the law and the ordinance authorizes to be done under its provisions.<sup>4</sup> While the question of what is actually being done

considerable discretion, and courts will not hold such ordinances void unless they are clearly so." *Williams v. Chicago*, 266 Ill. 267, 107 N. E. 599.

"Since the power to require the grade separation exists as an integral part of the police power of the city the appropriate means to its exercise must rest largely in the discretion of the city's governing body. The courts will not interfere with that discretion in the absence of a clear abuse." *Detamore v. Hindley*, 83 Wash. 322, 145 Pac. 462, 465.

Court will not declare an ordinance unconstitutional "merely because it may think it unwise or inexpedient, nor will it strike it down because it will operate harshly upon persons affected by it. It cannot be declared void upon constitutional grounds, unless it plainly contravenes some provision of the constitution." *Hiller v. State*, 124 Md. 385, 92 Atl. 842, declining to hold void an ordinance forbidding playing baseball on Sunday.

"A void ordinance is equivalent

to none at all." "Where a court proceeding cannot go on without an ordinance a valid one is essential to the court's jurisdiction." *St. Louis v. Handlan*, 242 Mo. 88, 97, 145 S. W. 421, 423, 424.

<sup>2</sup> *Schwabe v. Moore*, 187 Mo. App. 74, 81, 82, 172 S. W. 1157.

Mere informalities and irregularities in the procedure in adopting a code of ordinance will not justify the court in declaring the ordinances void, especially after a lapse of twelve years, during which time the ordinances have been observed. *Ninth St. Imp. Co. v. Ocean City*, 91 N. J. L. 703, 100 Atl. 568.

"The charter gives the city full jurisdiction over the subject matter and their ordinances relating thereto will be supported by every reasonable intendment." *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541, 543, sustaining ordinance licensing hackmen.

<sup>3</sup> *Crossman v. Galveston* (Tex. Civ. App. 1918), 204 S. W. 128.

<sup>4</sup> *Star Co. v. Brush*, 172 N. Y. S. 320, 324.

In passing upon the validity of

under a law or ordinance is always material and at times very important, yet what is done is not the only test of validity. When a law or ordinance is assailed upon the ground that it offends against some other paramount law, the question ordinarily is not limited to what is, but goes to the extent of what may, be done under the law.<sup>5</sup>

In the absence of evidence to the contrary the existence of facts necessary to sustain an ordinance will be presumed.<sup>6</sup>

an ordinance the court is to be controlled by what acts may be done under its authority, not what has been done by its authority. *Levering v. Williams* (Md. 1919), 106 Atl. 176, following *Ulman v. Baltimore*, 72 Md. 587, 20 Atl. 141, 11 L. R. A. 224.

5 "If as in the case at bar, an ordinance taxes some of a class while it exempts others of the same class, the ordinance is vulnerable to the objection whether there are others within the class who at a particular time are engaged in the particular business or not. It is sufficient that others within the same class may engage in the business without paying the tax, that others within that class are required to pay, and that it is naturally and reasonably to be expected that others will engage in the business at some time, or that they may do so at any time." *Salt Lake City v. Utah Light & Ry. Co.*, 45 Utah 50, 142 Pac. 1067, holding void an ordinance requiring a license to engage in the business of furnishing electricity for light, heat, fuel or power purposes, because of discrimination, relying on *Southern Ry. Co. v. Greene*, 216 U. S. 417, 30 Sup. Ct. 287, 54 L. ed. 536, 17 Ann. Cas. 1247.

<sup>6</sup>*State ex rel. v. Atchison*, 92 Kan. 431, 140 Pac. 873.

Presumed valid. Burden on one asserting contrary. *Moore v. Thomasville*, 17 Ga. App. 285, 86 S. E. 641; *State ex rel. v. Maplewood* (Mo. App.), 193 S. W. 989 (ordinance extending city limits). *Tipton v. Tipton Light & Heating Co.*, 176 Iowa 224, 157 N. W. 844, 846.

Presumed ordinance properly enacted. *Ruston v. Lewis*, 140 La. 777, 73 So. 862; *State v. Joseph*, 139 La. 734, 72 So. 188.

Presumed valid, although enacted under general express or implied powers. *Stubbe v. Adamson*, 159 N. Y. S. 751, 760, 173 App. Div. 305.

Where an ordinance appears regular on its face the burden is upon the one denying its validity to show the irregularity of its enactment, e. g., it was not passed by the prescribed vote and was not published as the charter provided. *Bates v. Monticello*, 173 Ky. 244, 251, 190 S. W. 1074; *Weatherhead v. Cody*, 27 Ky. L. Rep. 631; *Muir v. Bardstown*, 120 Ky. 739, 87 S. W. 1096, 27 Ky. L. Rep. 1150.

In passing upon the validity of ordinances, courts have nothing to do with mere questions of public

If an ordinance on its face raises the question as to its validity because of the subject matter dealt with, an adjudication upholding its legality is conclusive, and the one attacking it may not raise the same question subsequently by pleading the facts constituting its alleged illegality.<sup>7</sup> Thus where the Supreme Court of the United States in an equity case brought by a street railway company to enjoin the enforcement of an ordinance imposing a tax upon it, having jurisdiction of the case and the whole being within the pleadings, held that "the city had power under its charter to impose the license tax in question," the inquiry whether the ordinance was authorized by the municipal charter is *res adjudicata*.<sup>8</sup>

As a rule the validity of the ordinance will only be considered as presented by the facts in the case before the court. For example, where the right to sell at retail only is presented for determination and the court finds the ordinance is valid in this respect, its validity touching sale at wholesale will not be considered.<sup>9</sup>

The view has been expressed in some cases that the court may not determine whether a proposed ordinance will be valid if passed, since the power of the court only extends to determine its validity after it has been enacted.<sup>10</sup> However, it has also been ruled that in attempt-

policy so long as the law is within the field of legislative power and discretion. "If legislation of the character now before us is mischievous in its tendencies and results in increased tax burdens the remedy rests with the people themselves. The remedy is legislative and political and is not to be found in the judicial field. The field of legislative discretion is broad and as long as legislative bodies stay within its limits their enactments are the law of the land." *Milwaukee v. Raulf*, 164 Wis. 172, 189, 159 S. W. 815.

<sup>7</sup> *Bates v. Monticello*, 173 Ky.

244, 247-249, 190 S. W. 1074, raising question of constitutionality of ordinance prescribing fire limits.

<sup>8</sup> *St. Louis v. United Railways Co.*, 263 Mo. 387, 421-428, 174 S. W. 78.

<sup>9</sup> *State v. Duluth*, 134 Minn. 355, 159 N. W. 792.

<sup>10</sup> *Re Holman*, 197 Mo. App. 70, 97, 191 S. W. 1109.

"During the process of legislation in any mode the work of the lawmakers is not subject to judicial arrest or control, nor open to judicial inquiry. But after the law-making department of the gov-

ing to enact an ordinance by the power of initiative, in seeking by appropriate proceedings to compel its submission to the electors, the courts will look into the question whether, if approved by the voters, it would be valid and constitutional.<sup>11</sup>

Finally, an ordinance cannot be held invalid on any other ground than its illegality. It is not within the province of the court to say that a valid ordinance is unwise or impolitic; these questions are to be addressed solely to the municipal legislative body.<sup>12</sup>

### § 795. Method of consideration of validity.

In passing upon the validity of any given ordinance the questions usually involved are: (1) whether power to enact existed: (2) whether the mandatory legal provisions in the manner of its enactment were observed in substance.<sup>13</sup> (3) Where the ordinance is passed under general or implied power the further question whether the ordinance is reasonable is often presented, as fully considered in a prior chapter.<sup>14</sup>

The general rule is that the motives of the members of the legislative body cannot be considered in order to impeach an ordinance otherwise valid.<sup>15</sup>

ernment in any of its forms or by any of its agencies has finished its work and the act of legislation in which it was engaged has become fait accompli and is clothed with the outward forms of law, the question of the constitutionality of the completed bill or ordinance becomes one for ultimate determination by the judiciary." *Pittman v. Drabelle*, 267 Mo. 78, 98, 183 S. W. 1055.

<sup>11</sup> *State ex rel. v. White*, 36 Nev. 334, 136 Pac. 110.

<sup>12</sup> *Cathright v. Byllesby & Co.*, 154 Ky. 106, 157 S. W. 45.

<sup>13</sup> *Re Covington*, 176 Ky. 140, 195 S. W. 439.

<sup>14</sup> Section 724, et seq., ante.

<sup>15</sup> "The mere allegation of an improper motive of a legislative body in adopting a measure is not, standing alone, sufficient to disclose invalidity. So long as the act is fair upon its face and capable of even-handed and impartial application to all who come within its terms, the mere motive actuating its enactment cannot be inquired into as a ground for avoiding it." *Yee Gee v. San Francisco*, 235 Fed. 757, 760.

Validity of ordinance cannot be questioned by attempting to show that the affirmative votes of councilmen necessary to its passage

In considering the existence of an ordinance, as whether it was published after its passage as required by law, evidence *aliunde* the record is competent.<sup>16</sup>

§ 796. How the exercise of the police powers may be questioned.<sup>17</sup>

§ 797. Estoppel.<sup>18</sup>

§ 798. Collateral attack denied.<sup>19</sup>

It has been declared that a void ordinance is subject to direct or collateral attack whenever its authority is in-

were induced by misrepresentations to them of material facts and their erroneous belief with respect thereto without which they would have voted adversely, resulting in the defeat of the ordinance. "The rule is, we believe, universal and undisputed that an otherwise valid ordinance cannot be thus impeached." *Crampton v. Montgomery*, 171 Ala. 478, 55 So. 122, approving *Albes v. Southern Ry. Co.*, 164 Ala. 356, 51 So. 327.

<sup>16</sup> "A record such as the city council is required to keep, is evidence of no facts except those which the law requires it to contain, and there is nothing in any statute requiring the record to show that an ordinance was published in the manner required by law to make it legal." *Bates v. Monticello*, 173 Ky. 244, 190, S. W. 1074. See §§ 624, 625, vol. 2, ante, and §§ 624, 625, ante.

<sup>17</sup> The question involved was the want of power to pass the particular ordinance which prohibited the operation of a stone quarry without permission of the legislative body. The power conferred on the

city was to regulate, and the court concluded that the power to prohibit was withheld by its exclusion from the enumeration of the things which may be prohibited. *St. Louis v. Atlantic Quarry & Const. Co.*, 244 Mo. 479, 148 S. W. 948.

<sup>18</sup> See §§ 1083, 1084, vol. 3, ante; § 1083, ante.

City is not estopped to assert that an ordinance was not legally enacted, etc. *Sutton v. Mentzer*, 154 Iowa 1, 134 N. W. 108.

When city department is not estopped from enjoining one from proceeding to construct a building, in violation of the building ordinance, although by permission of the department the building had proceeded. *Detroit Building Com. v. Kunin*, 181 Mich. 604, 148 N. W. 207, 210.

Municipality cannot be estopped from abating a nuisance by ordinance, because it allowed its construction, e. g., gasoline filling station. *Oriental Oil Co. v. San Antonio* (Tex. Civ. App. 1918), 208 S. W. 177, 181.

<sup>19</sup> An improvement ordinance is not subject to collateral attack in

voked in a judicial proceeding.<sup>20</sup> The rule thus broadly stated is apparently misleading. Of course, the defense may be set up that the municipal corporation had no power to pass the ordinance or that it was never legally enacted. Neither of such defenses is viewed as a collateral attack.<sup>21</sup>

### § 799. Enumeration of proceedings in which validity may be questioned.

Injunction,<sup>22</sup> prohibition,<sup>23</sup> *ex parte* proceedings by statute,<sup>24</sup> *habeas corpus*,<sup>25</sup> in defenses, in actions and

a proceeding to enforce a tax levy for the improvement. *Decatur v. Barteau*, 260 Ill. 612, 103 N. E. 601, 604.

<sup>20</sup> "Municipal authorities must be able to show a warrant to tax which will justify their action," relating to improvement ordinance, wherein direct attack was made. *Lincoln v. Harts*, 250 Ill. 273, 95 N. E. 200.

Form and seal of an ordinance granting a franchise were those appropriate to a city of a higher class, held a mere irregularity which did not invalidate the ordinance, subjecting it to collateral attack. *State ex rel. v. Superior Court*, 64 Wash. 594, 117 Pac. 487, 491, quoting with approval part of § 798, vol. 2, ante. (*McQuillin*, Mun. Ord. § 279.)

<sup>21</sup> "Of course, in actions to enforce ordinances parol evidence is not admissible to vary or contradict the record of their passage. \* \* \* But here neither the correctness of the record nor the power of the municipality was brought in question. To prove the vacation of a strip of ground ten feet wide on each side of the

street plaintiff introduced in evidence the pretended ordinance. In response, defendants adduced the city clerk's record demonstrating that such pretended ordinance never was enacted for that certain formalities declared essential by statute were not observed. The proof did not assail an ordinance but established that alleged had never become an ordinance and was purely defensive." *Sutton v. Mentzer*, 154 Iowa 1, 5, 6, 134 N. W. 108.

<sup>22</sup> Sections 805, 806, post.

<sup>23</sup> *United Fuel & Gas. Co. v. Commonwealth*, 159 Ky. 34, 166 S. W. 783.

<sup>24</sup> **Kentucky** statute provides in substance that the validity of city ordinances and by-laws may be tried by writ of prohibition from the circuit court, with right of appeal to the court of appeals or upon *ex parte* petition by the city, or any bona fide citizen and resident thereof, to the circuit court with right of appeal. *Re Covington*, 176 Ky. 140, 195 S. W. 439; *Newport v. Glazier*, 175 Ky. 608, 194 S. W. 771; *Shoemaker v. Hodge*, 111 Ky. 436, 63 S. W. 979,

prosecutions to enforce the ordinance,<sup>26</sup> have been recognized as appropriate wherein the validity of the ordinance may be challenged.

### § 800. Who may question validity.

He who is not injured by the operation of a law or ordinance can not be said to be deprived by it of either constitutional right or of property.<sup>27</sup> One attacking an

16 Ky. Law Rep. 736; City of Lexington, 96 Ky. 258, 28 S. W. 665, 16 Ky. Law Rep. 467.

In such *ex parte* proceedings court will not consider validity of proposed bond issue as to whether city's indebtedness has exceeded the constitutional limit. This is a public question and should not be heard in an *ex parte* proceeding. The court can consider, first, whether the city had power to legislate on the subject-matter of the ordinance, and second, whether in passing the ordinance mandatory provisions were observed. *Re Covington*, 176 Ky. 140, 195 S. W. 439.

<sup>25</sup> *Ex parte Barmore*, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688; *Dickey v. Davis*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, P. U. R. 1915E, 93; *Pounds v. Darling* (Fla. 1918), 77 So. 666; *Harper v. Galloway*, 58 Fla. 255, 51 So. 226, 26 L. R. A. (N. S.) 794, 19 Ann. Cas. 235.

*Habeas corpus* where one is restrained of his liberty charged with having violated an ordinance, etc. *Ex parte Bogle* (Tex. Cr. App.), 179 S. W. 1193.

<sup>26</sup> *United Fuel & Gas Co. v. Commonwealth*, 159 Ky. 34, 166 S. W. 783.

<sup>27</sup> "The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such billboards may be

erected in such districts as are described if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street in any block in which such billboard is to be erected. The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property. *Tyler v. Judges of Registration*, 179 U. S. 405; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531. To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations, which are properly the subject of regulation in the exercise of the police power, is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons, *Swift v. People*, 162 Ill. 534, and as to the location of garages, *People v. Eriesson*, 263 Ill. 368, 105 N. E. 315. Such treatment is plainly applicable to offensive structures." *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530, 37 Sup. Ct. 290, 61 L. ed. 191, af-

ordinance, therefore, must affirmatively show that as applied to him the ordinance is void; his personal or property rights must be involved,<sup>28</sup> as one charged with having violated it.<sup>29</sup> Thus where one has not been convicted, he cannot complain of the penalty of an ordinance.<sup>30</sup> So provisions, sections or parts of an ordinance, clearly separable from those invoked, not affecting the party, cannot be questioned by him.<sup>31</sup>

firming 267 Ill. 344, 108 N. E. 340, 8 Ann. Cas. 1916C, 488.

<sup>28</sup> "When the aid of the court is invoked, the person attacking the ordinance enacted under the police power must affirmatively show that as applied to him it is unreasonable or oppressive." *Kaper v. Louisville*, 152 Ky. 691, 154 S. W. 18, 20; *Bradford v. Jones*, 142 Ky. 820, 135 S. W. 290; *Wells v. Mt. Olivet*, 126 Ky. 131, 102 S. W. 1182, 31 Ky. Law Rep. 576, 11 L. R. A. (N. S.) 1080.

An ordinance provided for the rat-proofing of all buildings required the foundations of all buildings to be of brick or stone laid in cement or of concrete. "The accused says that a property holder has the right to use for the foundation of his building any material equally impenetrable to rats as to those here named, and that to restrict him of that right is unconstitutional. Perhaps so; but, until someone has desired to use such other equally impenetrable material and has been prevented from doing so we do not see that there is any occasion for considering that question." *New Orleans v. Mangiari-sina*, 139 La. 605, 71 So. 886.

"As to the provisions asserted to have the effect to vest arbi-

trary power in the supervisors to grant or reject permits to engage in the business, their validity need not be inquired into, since plaintiff does not show himself injured thereby. It is not alleged that he has ever applied for or been denied a permit under this ordinance, and he is not, therefore, in a position to attack it on this ground, assuming it to be subject to the vice alleged." *Yee Gee v. San Francisco*, 235 Fed. 757, 760; *Gundling v. Chicago*, 177 U. S. 183, 186, 20 Sup. Ct. 633, 44 L. ed. 725; *Kissinger v. Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1005.

<sup>29</sup> *Ex parte Bogle* (Tex. Cr. App.), 179 S. W. 1193.

<sup>30</sup> "In absence of a conviction and the imposition of any penalty it is not perceived that the prosecutor is in any position to quarrel with a provision which, if her contention be correct, would not be enforceable in case she violated the ordinance." *Koettegen v. Paterson*, 90 N. J. L. 698, 101 Atl. 253.

<sup>31</sup> One convicted of keeping open his grocery store on Sunday in violation of an ordinance; held he could not question the validity of the ordinance because it permitted drug stores to be open, since the city had power to close all busi-



If an ordinance is valid in part and invalid in part, which parts are separable, he who assails its validity must show himself to be affected by the provisions alleged to be invalid.<sup>32</sup> Thus where one has been found guilty under a valid section of an ordinance he cannot attack the ordinance on the ground that the other sections thereof are void.<sup>33</sup> So a defendant found guilty and fined under an ordinance cannot attack the validity of a penalty therein of imprisonment.<sup>34</sup>

§ 804. Citizens and taxpayers may question validity of ordinance—mandamus.

It has been held that it is not necessary that a relator who is a citizen of the municipality show a special injury to himself or his property to entitle him to proceed by mandamus to compel public officers to enforce a municipal ordinance.<sup>35</sup>

§ 805. Injunction to restrain enforcement.

In the absense of adequate legal remedy, or to prevent a multiplicity of suits, equity has jurisdiction to enjoin

ness on Sunday, and only druggists could raise question, etc. *State v. Medlin*, 170 N. C. 682, 86 S. E. 597.

"The second question is whether the ordinance creates a monopoly of the liquor traffic in Vale, and is thereby void. The petitioner is not in a position to raise that question. There is no controversy here as to his right to a license. He was charged with the violation of the ordinance in selling liquor within the city without a license and he can only question the validity of that provision of the ordinance which prohibits the sale without a license." *Barton v. Records' Court of Vale*, 60 Or. 273, 119 Pac. 349.

<sup>32</sup> *Little v. Attalla*, 4 Ala. App.

287, 58 So. 949, following *ex parte Byrd*, 84 Ala. 17, 4 So. 397, 5 Am. St. Rep. 328.

One granted a permit to erect a building in an established fire zone of the specified material cannot complain that the ordinance discriminates since he has in no way been harmed or unfairly treated; he cannot say any discrimination has been applied to him. *Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555, 559.

<sup>33</sup> *New Orleans v. White* (La. 1918), 78 So. 745.

<sup>34</sup> *Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18.

<sup>35</sup> *Beem v. Davis*, 31 Idaho 730, 175 Pac. 959, 960, citing § 804, vol. 2, ante.

the threatened enforcement of a void or unconstitutional ordinance where it is shown that its enforcement would result in irreparable injury to property rights.<sup>36</sup> Thus

<sup>36</sup> Alabama. *Montgomery v. Orpheum Taxi Co.* (Ala. 1919), 82 So. 117, 123.

Georgia. *Davis v. Savannah* (Ga. 1918), 95 S. E. 6.

Iowa. *Houston v. Des Moines*, 176 Iowa 455, 156 N. W. 883.

Louisiana. *State ex rel. v. New Orleans*, 141 La. 788, 75 So. 683.

Missouri. *Joplin Transfer & S. Co. v. Carterville*, 160 Mo. App. 186, 141 S. W. 705.

Oregon. *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378; *Spaulding v. McNary*, 64 Or. 491, 130 Pac. 391.

Texas. *Houston Electric Co. v. Houston* (Tex. Civ. App. 1919), 212 S. W. 198.

District of Columbia. *Weeks v. Henrich*, 40 App. D. C. 46.

United States. *Overton v. Los Angeles*, 263 Fed. 951, 953; *Hammond v. Calumet Coal & Supply Co.*, 262 Fed. (C. C. A.) 938.

Injunction lies to restrain a city from removing wooden buildings erected within fire limits prescribed by an unconstitutional ordinance. "The excellence of the equitable remedy in a case like this is that it admits of the doing of complete justice by preserving the status without the destruction or loss of property which must precede and sustain the action for damages. Its selection in such cases is commendable." *Hays v. Poplar Bluff*, 263 Mo. 516, 538, 173 S. W. 676.

*Boyd v. Frankfort*, 117 Ky. 199, 77 S. W. 669, sustains injunction

to prevent the destruction of a church without the consent of the council as required by ordinance, saying "There can be no doubt of the right to maintain this action. The law authorizing it has been repeatedly declared by this court."

"We have no doubt that courts of equity have jurisdiction to enjoin the threatened enforcement of a void ordinance when it is shown that its enforcement would result in irreparable injury to plaintiff's business or property." *Churchill v. Albany*, 65 Or. 442, 133 Pac. 632, citing § 805, vol. 2, ante.

Where an ordinance is unconstitutional as applied to interstate commerce, the person or corporation whose business is interfered with by the enforcement of the ordinance is entitled to an injunction to prevent its enforcement relating to interstate business. *Adams Express Co. v. New York*, 232 U. S. 14, 34 Sup. Ct. 203, 58 L. ed. 483, reversing 189 Fed. 268.

Equity does not look with favor on bills to prevent the enforcement of municipal ordinances; street paving ordinance. *Henderson v. Enterprise* (Ala. 1918), 80 So. 115, 117, approving *Cramton v. Montgomery*, 171 Ala. 478, 55 So. 122.

"Equity will restrain a municipal corporation from proceeding under an illegal and invalid order or resolution, to remove an alleged nuisance where private

injunction lies to restrain prosecution under an ordinance interfering with interstate commerce of an agent of another state in the sale of goods without a license at the suit of his principal, where under the facts it is apparent the principal has no adequate remedy at law.<sup>37</sup>

rights are unlawfully encroached upon and irreparable injury will ensue." *Parker v. Fairmont*, 72 W. Va. 688, 79 S. E. 660, to restrain enforcement of void smoke abatement order. *Donahoe v. Fredloek*, 72 W. Va. 712, 79 S. E. 736, illegal order to abate a division fence.

Injunction granted to restrain enforcement of ordinance, held void and unreasonable forbidding use of streets for bringing and taking traction engines and heavy vehicles to and from complainant's shop, as an interference with the traffic to and from his business. *Brown v. Nichols*, 93 Kan. 737, 145 Pac. 561.

Injunction to restrain enforcement of ordinance regulating rates of water company enacted without authority under guise of police power. *York Water Co. v. York*, 250 Pa. 115, 95 Atl. 396.

*Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378, ordinance requiring certain classes of business to close at fixed hours of each day of the week, held void because of unreasonable classification.

*Calvo v. New Orleans*, 136 La. 480, 67 So. 338, sustaining injunction from enforcing an ordinance forbidding any sort of business on a designated avenue of the city.

*Star Co. v. Brush*, 172 N. Y. S. 320, 327, 328, unconstitutional or-

dinance interfering with the freedom of the press.

*A. C. L. R. R. Co. v. Goldsboro*, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. ed. 721, recognizing power of court to enjoin the enforcement of an ordinance relating to railroad tracks in streets.

*Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed. 1389, enjoining the enforcement of an ordinance revoking a grant of a franchise to occupy city streets.

*Keekevoet v. Dubuque*, 158 Iowa 631, 138 N. W. 540, ordinance imposing wharfage charges.

*Home Telephone Co. v. Carthage*, 235 Mo. 644, 139 S. W. 547, ordinance enacted pursuant to statute, fixing telephone rates.

*Kansas City Gunning Advertising Company v. Kansas City*, 240 Mo. 659, 678, 144 S. W. 1099, ordinance regulating advertising bill boards.

*Chicago, M. & St. P. Ry. Co. v. Minneapolis*, 238 Fed. 384, ordinance requiring railroad tracks, etc., depressed.

*Brittingham & Hixon Lumber Co. v. Sparta*, 157 Wis. 345, 147 N. W. 635, ordinance relating to weighing of coal.

<sup>37</sup> "It was entitled to prosecute the lawful business in which it was engaged without the vexation, annoyance and irreparable damage

Ordinarily equity will not interfere to restrain a criminal prosecution against one violating the provisions of a void or an unconstitutional statute or ordinance.<sup>38</sup> In such case the remedy is at law, either by a defense in the criminal courts where the question of the validity of the law may be as effectually availed of as in equity,<sup>39</sup> or by proceeding on *habeas corpus*.<sup>40</sup> But if there is no adequate legal remedy and the enforcement or threatened enforcement of the statute or ordinance involves or will involve direct invasion of property rights, equity will interfere to restrain the perpetration of the wrong, notwithstanding the enforcement is through a criminal proceeding.<sup>41</sup>

of a multiplicity of suits growing out of an arrest and prosecution of its sales agent for each order and delivery of goods taken and made by him; and defendant admits, in the agreed statement, it intended to institute prosecutions in every such instance except for the temporary injunction granted. The jurisdiction of equity to enjoin interference with interstate commerce by such proceedings under a municipal ordinance similar to the present, is well established." *Jewel Tea Co. v. Carthage*, 257 Mo. 383, 391, 165 S. W. 743; *Dobbins v. Los Angeles*, 195 U. S. 223; *Jewel Tea Co. v. Lee's Summit*, 198 Fed. 535; *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323.

<sup>38</sup> *Davis Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 23 Sup. Ct. 498, 47 L. ed. 778.

<sup>39</sup> *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269.

<sup>40</sup> Section 1098, vol. 3, post.

<sup>41</sup> *Yee Gee v. San Francisco*, 235 Fed. 757, restraining enforcement of ordinance regulating laundries.

*Mobile v. Orr*, 181 Ala. 308, 61 So. 920, enforcement restrained during determination of validity of ordinance, where it appeared the prosecution thereunder would destroy property rights.

"The jurisdiction of a court of equity to restrain the enforcement of a municipal ordinance by criminal prosecutions, void because violative of the federal constitution because of its unreasonableness, is undoubted." *Lusk v. Dora*, 224 Fed. 650.

"Courts of equity will not, save in exceptional cases, enjoin the enforcement or execution of the criminal law or of city ordinances imposing fines and penalties for their violation," but "where rights of property are involved and the enforcement of such ordinances violate vested rights, injunctive relief will be awarded especially where such enforcement will work irreparable injury." *Seaboard Air Line Ry. Co. v. Raleigh*, 219 Fed. 573, restraining enforcement of an ordinance requir-

On the other hand, injunction may not be invoked to prevent the municipal authorities from the enforcement of valid and constitutional ordinance by appropriate and legal methods.<sup>42</sup>

ing the removal of railroad tracks from streets, denied.

"We do not doubt that equity may enjoin public officers from taking action which will be injurious to the plaintiff's property rights under an ordinance which is merely void as well as under a statute which is unconstitutional," ordinance relating to hawkers and peddlers. *Greene v. Cook*, 219 Mass. 121, 106 N. E. 573, 576; *Moneyweight Scale Co. v. McBride*, 199 Mass. 503, 506, 85 N. E. 870.

*City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, 131 Pac. 472, 474, injunction to restrain enforcement of regulations of hacks, omnibuses and other vehicles while waiting for the arrival of trains. Answering the contention that injunction is not the proper remedy to test the validity of police regulations and police ordinances, the court said: "It may be that the weight of authority in other jurisdictions sustains this view, but we have heretofore felt constrained to adopt the opposite rule. The legal remedies of submitting to an arrest or bringing an action in damages are generally inadequate, since judgments obtained thereon are incapable of being made operative against future repetitions of the acts giving rise to the action, while the remedy of injunction is operative throughout all future time."

*Seattle Taxicab & Transfer Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134, injunction to restrain enforcement of an ordinance forbidding taxicab drivers from entering at certain times upon passenger station property, or upon wharves, to solicit passengers or baggage.

<sup>42</sup>Injunction to enjoin enforcement of resolution declaring particular building a nuisance, denied. *Sevier v. Barbourville*, 180 Ky. 553, 204 S. W. 294.

*Lemon v. Porter*, 65 Pa. Super. Ct. 94, denying injunction to restrain enforcement of an ordinance requiring the removal of all awnings and awning posts on a particular busy trading street.

*Osborn v. Shreveport*, 143 La. 932, 79 So. 542, denying injunction to restrain the enforcement of an ordinance prohibiting the establishment and maintenance of an undertaking business on a residential street.

*Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182, denying injunction to enforce an ordinance relative to the sale of revolvers and other deadly weapons, etc.

*Northwestern Laundry v. Des Moines*, 239 U. S. 486, 491, 36 Sup. Ct. 206, 60 L. ed. 396, denying injunction to restrain enforcement of a smoke abatement ordinance.

*Shurman v. Atlanta*, 148 Ga. 1, 95 S. E. 698, denying injunction against enforcement of ordinance regulating junk dealers.

*Mannix v. Frost*, 164 N. Y. S.

### § 806. Injunction to prevent violation of ordinance.<sup>43</sup>

A municipality, it has been held, may invoke injunction to enforce its ordinances, e. g., limiting street car fares.<sup>44</sup>

The general rule is that at the suit of the municipality equity will not restrain a threatened violation of an ordinance, e. g., one relating to the erection of buildings.<sup>45</sup> Nor will injunction lie at the instance of an individual instituted solely to enforce an ordinance, and not because of irreparable special damage to him.<sup>46</sup> But where it distinctly appears that the erection of a building in express violation of a valid ordinance will work special and peculiar injury of an irreparable nature to complainant he may maintain a suit to enjoin the erection thereof.<sup>47</sup>

1050, 100 Misc. Rep. 36, denying against enforcement of order of board of health against the sale of loose or dipped milk, although so sold for fifty years.

*Kleinheim v. Wichita*, 98 Kan. 431, 157 Pac. 1190, denying injunction to restrain enforcement of an ordinance passed pursuant to statute regulating the weight and grade of plumbing material; the court expressing the opinion that whether the ordinance had a direct and substantial relation to the public health the subject was open to debate and the legislature having acted, the court could not interfere.

*Huston v. Des Moines*, 176 Ia. 455, 156 N. W. 883, ordinance regulating jitneys.

Injunction to restrain enforcement of an ordinance regulating and licensing jitneys. *Parrish v. Richmond*, 119 Va. 180, 89 S. E. 102; *Auto Transit Co. v. Ft. Worth* (Tex. Civ. App.), 182 S. W. 685.

<sup>43</sup> *Rochester v. Gutberlett*, 211 N. Y. 309, 105 N. E. 548, affirm-

ing 135 N. Y. S. 1104, 151 App. Div. 900; *Ashley v. Ashley Lumber Co.* (N. D. 1918), 169 N. W. 87, 91, citing § 806, vol. 2, ante.

<sup>44</sup> *Lake Charles v. Lake Charles Ry. L. & W. Co.* (La. 1918), 80 So. 260, 262, citing § 806, vol. 2, and § 1767, vol. 4, ante.

<sup>45</sup> *First National Bank v. Sarlis*, 129 Ind. 201, 203, 204, 28 N. E. 432, 13 L. R. A. 481, 28 Am. Rep. 185.

<sup>46</sup> *Caskey v. Edwards*, 128 Mo. App. 237, 107 S. W. 37; *Mason v. Deitering*, 132 Mo. App. 26, 111 S. W. 862.

<sup>47</sup> *Shelton v. Lentz*, 191 Mo. App. 699, 705, 178 S. W. 243.

Laws prescribe action by municipal authorities to enjoin thereunder violations of building ordinances and regulations. *Detroit Building Commission v. Kunin*, 181 Mich. 604, 148 N. W. 207, 210.

Injunction by municipal authorities to restrain the use of a building for the purpose forbidden by ordinance. *Baltimore v. Scott*, 131 Md. 228, 101 Atl. 674.

It is only when the injury is general and public in its effects, and no private right is violated, in contradistinction to the rights of the public, that individuals are precluded from bringing private suits for the violation of their individual rights.<sup>48</sup>

§ 807. *Certiorari*.<sup>49</sup>

§§ 810-811. *Rules of construction*.

Construction is ascertaining the intention of the ordinance in accordance with well settled legal rules. Primarily that intention is to be gathered from the ordinance itself, reading its language in the ordinary and popular sense. When the intention is clearly disclosed by the form of expression employed obviously no application of rules of construction is required. Where the language is clear and explicit there is no call for construction.<sup>50</sup>

If the ordinance is free from ambiguity no exposition is allowed contrary to its express words.<sup>51</sup> But in case

<sup>48</sup> *First Nat. Bank v. Sarlis*, 129 Ind. 201, 204, 28 N. E. 432, 13 L. R. A. 481, 28 Am. St. Rep. 185.

<sup>49</sup> *Lassiter v. Atlantic City*, 86 N. J. L. 87, 90 Atl. 675; *Ninth Street Improvement Co. v. Ocean City* (N. J. L. 1918), 103 Atl. 186.

"*Certiorari* lies not to correct that which is void, but only that which is irregular or erroneous." *Moore v. Thomasville*, 17 Ga. App. 285, 86 S. E. 641; *Sawyer v. Blakely*, 2 Ga. App. 159, 161, 56 S. E. 399, 400.

<sup>50</sup> *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 280, 18 Sup. Ct. 588, 591, 42 L. ed. 1033, applied to contract.

Where "the meaning of an ordinance is clear courts are not obliged to resort to the various rules of construction in order to arrive at the intent of the enact-

ment." *Beem v. Davis* (Idaho 1918), 175 Pac. 959.

"Where the language of a statute or ordinance is clear and its meaning unmistakable, there is no room for construction, but we merely follow the intention, as thus plainly expressed. The argument drawn from inconvenience has no application in such a case. Whether it would be better that the law should be different is a matter solely for the lawmaking body to decide, and not for us. We simply enforce the law as we find it, and according to its plainly expressed meaning." *State v. Norfolk Southern Ry. Co.*, 166 N. C. 528, 82 S. E. 963, 966; *Standard Oil Co. v. Birmingham* (Ala. 1918), 79 So. 489.

<sup>51</sup> "The contract being free from ambiguity no exposition is

of doubt courts will lean toward the presumed intention of the legislative body, and will so construe the ordinance as to effectuate such intention.<sup>52</sup>

The provisions are to be read and construed in the light of the whole ordinance.<sup>53</sup> A reasonable and liberal construction should be invoked,<sup>53a</sup> so as to give the effect

allowed contrary to the express words of the instrument." *United States v. Gleason*, 175 U. S. 588, 606, 20 Sup. Ct. 228, 235, 44 L. ed. 284.

When free from ambiguity the ordinance is construed according to its terms, without resort to other means of interpretation. *Golding v. New York*, 140 N. Y. S. 1020.

"Doubtless the legislative intent is inartistically expressed; but if that intent can be spelled out from the words of the statute effect must be given to it. The language being explicit, the words being free from ambiguity, it is not allowed to resort to other means of interpretation." *People ex rel. v. Gaus*, 199 N. Y. 147, 149, 92 N. E. 230, 231.

<sup>52</sup> *Benton v. Blake*, 263 Ill. 358, 104 N. E. 1040; *Chicago v. Wilshire*, 243 Ill. 123, 90 N. E. 245; *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182, 186.

"All doubts are resolved in favor of the validity of the ordinance." *Guidoni v. Wheeler*, 5 Alaska 229, 232, quoting from § 810, page 1734, vol. 2, ante.

<sup>53</sup> *Sullivan v. Cloe*, 277 Ill. 56, 115 N. E. 135; *Benton v. Blake*, 263 Ill. 358, 104 N. E. 1040; *McChesney v. Chicago*, 173 Ill. 75, 50 N. E. 191; *People ex rel. v. Chicago Rys. Co.*, 270 Ill. 278, 110 N. E. 394; *Highwood v. Chicago & M. El. R. Co.*, 268 Ill. 482, 109 N. E. 270 (all parts of a local improvement ordinance to be considered

together); *Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133; *Warwick County v. Newport News (Va.)*, 90 So. 644.

"Our duty is to presume that each clause and sentence of the ordinance here has a purpose and use and the purpose and use signified by the usual and ordinary meaning of the language." *Crayton v. Larabee (N. Y.)*, 116 N. E. 355.

"An ordinance is to be construed as a whole and according to the ordinary meaning of the language used therein. If it is bad when thus construed, it can not be made good by judicial limitation." *Mills v. Sweeney*, 219 N. Y. 213, 220, 114 N. E. 65.

An ordinance as amended constitutes a single legislative entity and is to be construed as a whole. *Commonwealth v. Slocum (Mass. 1918)*, 119 N. E. 687; *Merrill v. Paige*, 229 Mass. 511, 118 N. E. 862, 863.

<sup>53a</sup> *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182; *Carmi v. Miller*, 173 Ill. App. 283, 286; *People ex rel. v. Miller*, 146 N. Y. S. 403, 161 App. Div. 138; *Guidoni v. Wheeler*, 230 Fed. 93, 144 C. C. A. 391; *State v. Jarvis*, 89 Vt. 239, 95 Atl. 541, 543, sustaining an ordinance licensing hackmen.

"Ordinances ordinarily are not carefully drawn and but few would stand a hard and fast rule of construction. While the rules applic-



to the ordinance intended and that it may be sustained if this can be done in reason.<sup>54</sup> If, therefore, the ordinance is susceptible of two constructions, one of which will support and the other defeat it, the former will be adopted.<sup>55</sup>

able to the construction of statutes may be applied to the construction of ordinances, yet the courts in many instances have held that ordinances are especially entitled to a more reasonable construction, because they are usually less carefully expressed than other laws." *Geiger & Sons v. Schmitt*, 186 Ind. 292, 116 N. E. 50.

Liberally in favor of general public, and not strictly in favor of interests of individuals. *Cream City Bill Posting Co. v. Milwaukee*, 158 Wis. 86, 147 N. W. 25, 30, bill board ordinance.

Ordinances ought to be "benevolently" interpreted to the end that they may be supported if possible. *Krouse v. Johnson*, 2 Q. B. 91, 61 J. P. 469, 67 L. J. Q. B. 782, 78 L. T. 647, 46 W. R. 630, 14 T. L. R. 416, per Lord Russell, C. J.

<sup>54</sup>*Sloss-Sheffield Steel & Iron Co. v. Smith*, 175 Ala. 260, 57 So. 29; *Dreyfus v. Montgomery*, 4 Ala. App. 270, 58 So. 730; *Detroit Building Com. v. Kunin*, 181 Mich. 604, 148 N. W. 207; *Madison v. Southern Wisconsin Ry. Co.*, 156 Wis. 352, 146 N. W. 492.

Court should hold an ordinance within the legitimate exercise of the police power lawful "if it can be done on any rational theory." *Ex parte Sumida*, 177 Cal. 388, 170 Pac. 823.

If there should be doubt as to the validity of the ordinance, the doubt should be in favor of its validity. *Cream City Bill Posting*

*Co. v. Milwaukee*, 158 Wis. 86, 147 N. W. 25.

"It is a matter well known that ordinances, and statutes as well, are not always drawn with that precision that is desirable, but of course, the legislative intent must be declared and enforced, when it is possible in consonance with well established principles of interpretation, and without doing violence to the fundamental rights of the individual." *O'Malley v. Sebastopol*, 24 Cal. App. 32, 139 Pac. 1082.

Ordinance is presumed valid, "but this presumption, however strong, is not conclusive as one might be led to suppose from the enunciation of it found in many decisions. The contrary is attested by a large number of other decisions whose correctness is now questioned by no one. It, in its last analysis, amounts simply to this, that the legislative action will be sustained if the doing so is possible under any reasonably supposable state of facts." *New Orleans v. Toca*, 141 La. 551, 75 So. 238.

"If any doubt exists as to the extent of a power attempted to be exercised by a municipality out of the usual range, or which may affect the common law right of a citizen it is to be resolved against the municipality." *Pounds v. Darling* (Fla. 1918), 77 So. 666; *Anderson v. Shackelford* (Fla.), 76 So. 343.

<sup>55</sup>*Birmingham Ry. L. & P. Co.*

And it has been declared in a New York case that the argument *ab inconvenienti* may properly be considered as bearing upon the question which of two conflicting interpretations should be sanctioned as expressive of the law-making body.<sup>56</sup>

Ordinances are construed by the same rules that govern the construction of statutes.<sup>57</sup>

v. Kyser (Ala. 1919), 82 So. 151, 156; Swift v. Topeka, 43 Kan. 671, 23 Pac. 1075, 8 L. R. A. 773; Weyman v. Newport, 153 Ky. 487, 156 S. W. 109, 111; Standard Tailoring Co. v. Louisville, 152 Ky. 504, 153 S. W. 764; Bradford v. Jones, 142 Ky. 820, 135 S. W. 290; Lowry v. Lexington, 113 Ky. 763, 68 S. W. 1109, 24 Ky. Law Rep. 516; Burlington Light & Power Co. v. Burlington (Vt. 1919), 106 Atl. 513, 516; Commercial Club v. Chicago St. P. M. & O. Ry. Co. (Minn. 1919), 171 N. W. 312; Chicago v. Washingtonian Home (Ill. 1919), 124 N. E. 416; Chicago v. Chicago & O. P. E. R. Co., 261 Ill. 478, 104 N. E. 240; Berry v. Chicago, 192 Ill. 154, 61 N. E. 498; Harmon v. Chicago, 140 Ill. 374, 29 N. E. 732; Northwestern University v. Wilmette, 230 Ill. 80, 82 N. E. 615; Benton v. Blake, 263 Ill. 358, 104 N. E. 1040; Highwood v. Chicago & M. El. R. Co., 268 Ill. 482, 109 N. E. 270; Biffer v. Chicago, 278 Ill. 562, 116 N. E. 182, 186.

Courts will adopt that construction which will render the ordinance valid "although it is not the most obvious or natural construction." Carroll Blake Constr. Co. v. Boyle (Tex. 1918), 203 S. W. 945, 948.

"An interpretation that renders an ordinance null and void cannot be admitted. It is an absurdity to

suppose that after it is reduced to terms it means nothing. It ought to be interpreted in such a manner as that it may have effect and not be found vague and nugatory." People ex rel. v. Chicago Rys. Co., 270 Ill. 278, 110 N. E. 394, 399, 400.

But, of course, the construction to sustain must be in harmony with the general purpose of the legislation. Commonwealth v. O'Neil (Mass. 1919), 124 N. E. 482, 485.

"Every rational presumption in favor of its validity must be indulged, and it will not be denounced as contrary to the constitution unless the language is so clear and explicit as to render impossible any other reasonable construction." Commonwealth v. O'Neil (Mass. 1919), 124 N. E. 482, 485 (per Rugg, C. J.); Perkins v. Westwood, 226 Mass. 268, 271, 115 N. E. 411, which contains a collection of cases.

<sup>56</sup> New York v. Fredericks, 206 N. Y. 618, 622, 100 N. E. 419, affirming 134 N. Y. S. 795, 150 App. Div. 83.

<sup>57</sup> Alabama. Sloss-Sheffield Steel & Iron Co. v. Smith, 175 Ala. 260, 57 So. 29.

Illinois. Chicago v. Chicago & O. P. E. R. Co., 261 Ill. 478, 104 N. E. 240; Illinois Central R. Co. v. Chicago, 169 Ill. 329, 48 N. E. 492; Stanton v. Chicago, 154 Ill.

The purpose of construction, of course, is to learn the intention of the ordinance, and give effect thereto,<sup>58</sup> that is, the legislative intent, as expressed and not the intent unexpressed in the ordinance. Where the terms are plain, the intention of the enacting body, and not the conduct of the parties upon whom it operates, will control.<sup>59</sup>

23, 39 N. E. 987; *People ex rel. v. Chicago Rys. Co.*, 270 Ill. 87, 110 N. E. 386, 393; *People v. Mohr*, 252 Ill. 160, 96 N. E. 803; *People v. Hummel*, 215 Ill. 43, 74 N. E. 68.

Maryland. *Baltimore v. First M. E. Church* (Md. 1919), 107 Atl. 351, 355.

Missouri. *Holman v. Macon*, 155 Mo. App. 398, 137 S. W. 16; *Ex parte Lerner* (Mo. 1920), 218 S. W. 331, 333.

N. Mexico. *Continental Oil Co. v. Santa Fe* (N. Mex. 1918), 177 Pac. 742, 745.

New York. *Kennahan v. New York*, 147 N. Y. S. 835, 162 App. Div. 364.

Oregon. *Duncan v. Dryer*, 71 Or. 548, 143 Pac. 644, 647, citing § 810, vol. 2, ante (*McQuillin*, Mun. Ord., § 289).

Tennessee. *Carroll Blake Const. Co. v. Boyle* (Tenn. 1918), 203 S. W. 945, 948, citing § 810, vol. 2, ante (*McQuillin*, Mun. Ord., § 289).

Utah. *Salina City v. Lewis* (Utah), 172 Pac. 286, citing § 810, vol. 2, ante.

Speed ordinance is construed as statute, since it is essentially a statute. *People v. Harrison*, 170 N. Y. S. 876.

If passed pursuant to statute, to be construed with statute. *Van Arsdale v. Justice*, 133 N. Y. S. 661, 75 Misc. Rep. 495.

<sup>58</sup> *Merchants Loan & Trust Co.*

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*v. Chicago*, 264 Ill. 76, 105 N. E. 726, 728, affirming 182 Ill. App. 298; *People ex rel. v. Chicago Rys. Co.*, 270 Ill. 87, 110 N. E. 386; *People v. Price*, 257 Ill. 587, 101 N. E. 196, Ann. Cas. 1914A, 1154; *Fairbanks Co. v. Chicago*, 153 Ill. App. 140; *Tipton v. Tipton Light & Heating Co.*, 176 Iowa 224, 157 N. W. 844; *Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133; *State ex rel. v. Cunningham* (Ohio 1918), 119 N. E. 361.

Intention as expressed by the language employed read in the light of the surrounding circumstances. *Burlington Light & Power Co. v. Burlington* (Vt. 1919), 106 Atl. 513, 516.

"In the construction of ordinances the intention of the law making department should be carried out, if this can be done consistently with the fair reading of the ordinance." *Weyman v. Newport*, 153 Ky. 487, 156 S. W. 109, 111.

In construction "it cannot be presumed that the city was ignorant of its charter powers or that it deliberately intended to violate the organic law of the state or city." An ordinance duly enacted is presumed to be valid. *St. Louis v. Murta* (Mo. 1920), 222 S. W. 430.

<sup>59</sup> *Peavler v. Mt. Vernon*, 158 Ill. App. 610.

In construction the court may consider the effect of the ordinance when given practical application of its provisions.<sup>60</sup>

A reasonable and practical construction should be given to franchise ordinances;<sup>61</sup> but usually such ordinances are construed most strongly against the grantee.<sup>62</sup>

Limitations in a charter on grants by the city or town are as much a part of an ordinance subsequently passed as though written into it.<sup>63</sup>

An ordinance should be construed in the light of the grant of power to the municipality to enact contained in its charter or a statute applicable. Thus an ordinance enacted pursuant to a statute, of course, should be construed by reading it with the statute, and if the language of both are in substance alike the presumption should be indulged that the ordinance designed to follow the statute.<sup>64</sup>

The power to regulate is often construed as not including the power to prohibit.<sup>65</sup>

In construing amending and substituting ordinances

<sup>60</sup> *North Little Rock v. Rose* (Ark. 1918), 206 S. W. 449, 452.

<sup>61</sup> *Houston v. City Gas & Electric Co.*, 158 Ill. App. 307.

<sup>62</sup> Ordinance granting right to construct and operate a street railway system is to be construed most strongly against the grantee. *Chicago v. Chicago & O. P. E. R. Co.*, 261 Ill. 478, 104 N. E. 240, 245; *Black v. People*, 220 Ill. 444, 77 N. E. 172.

Right granted by ordinance "subject to the provisions herein contained" is to be construed so as to apply the provisions following to the specific grant made, unless the intention from the language used is contrary. *Chicago v. Chicago & Oak Park El. R. R. Co.*, 177 Ill. App. 444.

<sup>63</sup> *Denver v. New York Trust Co.*, 229 U. S. 123, 33 Sup. Ct. 657, 57 L. ed. 1101.

<sup>64</sup> "In determining the proper construction of the ordinance the court should read it in connection with the statute under which it was enacted; for the language of the ordinance is largely borrowed from the statute and it is to be presumed that the city authorities were endeavoring simply to follow the statute." *Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133.

<sup>65</sup> *St. Louis v. Atlantic Quarry & Const. Co.*, 244 Mo. 479, 148 S. W. 948.

See § 356, ante, vol. 1, and § 356, ante.

these things are to be considered: (1) the old law, (2) the new law, (3) the mischief, and (4) the remedy.<sup>66</sup>

Omitted word may be supplied in construction to complete the sense when this is manifest from the context, but clearly an incomplete and uncertain ordinance cannot be perfected by judicial construction.<sup>67</sup>

Invoking the rule *ejusdem generis*, the enumeration of powers or things is held to exclude those not named.<sup>68</sup> As a rule, general words following specific words are limited to thing *ejusdem generis* with those before enumerated, although this as a rule of construction, must be controlled by another equally general rule, that statutes or ordinances ought, like wills or other documents,

<sup>66</sup> Peavler v. Mt. Vernon, 158 Ill. App. 610.

<sup>67</sup> Continental Oil Co. v. Santa Fe (N. Mex. 1918), 177 Pac. 742, 745.

The California statute: "In the construction of a statute or instrument the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." In view of the statute "or" cannot be read into an ordinance for "and" for that "would be judicial legislation pure and simple." Corona v. Merriam, 20 Cal. App. 231, 128 Pac. 769.

<sup>68</sup> St. Louis v. Atlantic Quarry & Const. Co., 244 Mo. 479, 148 S. W. 948.

Rule considered in People ex rel. v. Kaye, 212 N. Y. 407, 411, et seq., 106 N. E. 122.

"An ordinance to regulate and restrain porters, runners, agents and solicitors for boats, vessels, stages, cars, public houses or other establishments," held not applicable to owner of clothing store so-

liciting for business on the sidewalk in front of his business, invoking the rule *ejusdem generis*. State v. Kern, 130 Minn. 191, 153 N. W. 311; State v. Chamberlain, 112 Minn. 52, 127 N. W. 444, 30 L. R. A. (N. S.) 335, 21 Ann. Cas. 679.

"General words associated with specific words are restricted to a sense analogous to the less general." Thus an ordinance prohibiting keeping open on Sunday any billiard room, hall or pin alley, base ball grounds or "other places of amusement," was held not to include amusements in theaters, as moving picture exhibitions, because the amusements enumerated were of the character of games. Clinton v. Wilson, 257 Ill. 580, 101 N. E. 192, following State v. Chamberlain, 112 Minn. 52, 127 N. W. 444, 30 L. R. A. (N. S.) 335, 21 Ann. 679, wherein it was held that the word "show" in a statute prohibiting certain sports on Sunday, under the rule, *ejusdem generis* referred only to outdoor sports, and did not include a moving picture exhibition.

to be construed so as to carry out the objects sought to be accomplished by them.<sup>69</sup>

Concerning general and particular provisions employed in ordinances, the ordinary rule applied is that where there are two provisions, one of which is general and another particular and relating to only one subject the particular provision must prevail and be treated as an exception to the general provision.<sup>70</sup>

A rule occasionally invoked in the construction of statutes and ordinances where its use is indicated in the application of the words to the thing sought to be controlled is that sometimes executive practice under it should be considered in arriving at the legislative intention. This rule is frequently applied to those ordinances which are developed from actual experience in the management of complicated details of municipal administration.<sup>71</sup>

Legislative acts operate in the future only and are never to be given a retrospective effect if susceptible of any other construction. An intention that a statute or ordinance shall have a retrospective operation is not to be presumed but must be manifested by clear and unequivocal language, and in case of doubt the statute or

<sup>69</sup> 27 Halsbury's Laws of England P., 145.

<sup>70</sup> *Springfield v. Interstate Independent Telephone & Telegraph Co.*, 279 Ill. 324, 116 N. E. 631, affirming 201 Ill. App. 227; *Dahnke v. People*, 168 Ill. 102, 48 N. E. 137, 39 L. R. A. 197.

<sup>71</sup> "There is nothing more reasonable than this rule in its application to those ordinances which are developed from actual experience in the management of the complicated details of municipal administration, and which result in many cases from reports of administrative officers showing their necessity. The court, even when enlightened by evidence, cannot

judge of the cheapest plan to provide supervision in desultory work of this kind, as can the officer in charge of and in touch with it continually, with every opportunity to gain some approach to an equal distribution of the service. We are not even in position to state the problems which confront him and we should not be slow to avail ourselves of his experience and practice in the interpretation of rules in operation under his constant observation and which in many instances result from advice founded upon his daily practice." *Orthwein v. St. Louis*, 265 Mo. 556, 570, 178 S. W. 87.

ordinance must be construed to have a prospective effect only.<sup>72</sup>

The public policy of the state, if any, respecting the subject matter of the ordinance must be considered, since an ordinance inconsistent with the state's policy as written in its statutes is void.<sup>73</sup>

### § 812. Title in construction.

Notwithstanding the English rule that the title cannot be resorted to in construing the enactment, from an early date in this country, it has been recognized that the title of an ordinance or statute may be considered in its interpretation.<sup>74</sup> The presumption is that the true intent and meaning is to be found in the title unless it is plainly contradicted by the express terms of the body of the act.<sup>75</sup> The title and preamble are parts of the ordinance, as they are of a statute, and may be referred to, to learn the purpose.<sup>76</sup>

### § 813. Contemporaneous construction.

A construction placed upon a law by the officers whose duty it is to execute it is entitled to consideration, but

<sup>72</sup> Barrett Mfg. Co. v. Chicago, 259 Ill. 578, 102 N. E. 1012; Cleary v. Hoobler, 207 Ill. 97, 69 N. E. 967.

Presumption is that an ordinance is not intended to be retrospective in operation. But if the plain intention is to the contrary, that must control, unless the ordinance is unconstitutional. *De Wolf v. Marshall Field & Co.*, 201 Ill. App. 542, 546.

<sup>73</sup> *Anderson v. Faut*, 96 S. C. 5, 79 S. E. 641.

"Ordinances are to be construed in harmony with the laws and general policy of the state." *Guidoni v. Wheeler*, 5 Alaska 229, 232, quoting from § 810, p. 1734, vol. 2, ante.

<sup>74</sup> *Commonwealth v. O'Neil*

(Mass. 1919), 124 N. E. 482, 485, following *Proprietors of Mills v. Randolph*, 157 Mass. 345, 356, 32 N. E. 153.

Title may be resorted to in construing a statute, not however to enlarge its scope so as to include a subject not fairly embraced in the act itself. *State ex rel. v. Lincoln*, 101 Neb. 57, 162 N. W. 138.

<sup>75</sup> *Frolichstein v. Cupples L. H. & P. Co.*, 201 Mo. App. 162, 181, 182, 210 S. W. 90, 95.

<sup>76</sup> *Duquesne Light Co. v. Pittsburgh*, 251 Pa. 557, 97 Atl. 85.

May refer to the preamble. *Continental Oil Co. v. Santa Fe* (N. Mex. 1918), 177 Pac. 742.

courts are not bound to accept such construction when the law is clear and unambiguous. The rule should be confined to those cases in which the meaning is really doubtful.<sup>77</sup> Courts have often said the practical construction of municipal ordinances by the local authorities who are charged with the duty of applying their provisions and enforcing them prior to the controversy "is very persuasive."<sup>78</sup> Especially is this true where a contrary construction would render the ordinance void or unconstitutional.<sup>79</sup>

"There is no question that the practical construction of a statute by those for whom the law was enacted, or by public officers whose duty it is to enforce it, acquiesced in by all for a long period of time is of great importance in its interpretation in a case of serious ambiguity."<sup>80</sup> "The courts are rather loath to admit proof of extraneous facts and circumstances to aid in the interpretation

<sup>77</sup> *Brown v. Amarillo* (Tex. Civ. App.), 180 S. W. 654, 658; *State ex rel. v. Cupples Station Light, Heat & Power Co.* (Mo. 1920), 223 S. W. 75, approving *Frolichstein v. Cupples Station Light, H. & P. Co.*, 201 Mo. App. 162, 183, 210 S. W. 90, 96, citing § 813, vol. 2, ante.

Court need not adopt erroneous construction given by municipal officers. *Laughlin v. Joplin*, 161 Mo. App. 161, 142 S. W. 786.

<sup>78</sup> *New York v. New York City Ry. Co.*, 193 N. Y. S. 543, 549; *United States v. Hermanos*, 209 U. S. 337, 339.

Concerning an ordinance relating to salaries, it was held that the practical construction given to it by the officers charged with the duty relating to the matter and by employees affected removed all doubt. *Blair v. New York*, 151 N. Y. S. 819, 166 App. Div. 573.

"When construction is needed the relation between the parties,

to a contract, the circumstances attending its execution, and the acts done under it before a difference has arisen, are admissible to disclose the identity of the subject-matter and its extent, and to explain ambiguities and uncertainties in its terms, not however, for the purpose of substituting another contract or other terms for those clearly and definitely expressed." *St. Louis v. Chicago House Wrecking Co.*, 200 Fed. 239, 241, 242, 18 C. C. A. 425.

The above rule was applied in the construction of a contract. *Brawley v. United States*, 96 U. S. 168, 24 L. ed. 622.

<sup>79</sup> *Adams Express Co. v. New York*, 232 U. S. 14, 30, 31, 34 Sup. Ct. 203, 58 L. ed. 483, reversing 189 Fed. 268.

<sup>80</sup> *Grimmer v. New York Tenement House Department*, 205 N. Y. 549, 550, 97 N. E. 884.



of a written instrument, but there is no doubt that it is the proper course to pursue when a real ambiguity is found."<sup>81</sup>

It is well settled that the doctrine of contemporaneous construction has no application when the intention of the ordinance is plain, unambiguous and not susceptible to different or contrary reasonable construction.<sup>82</sup> "The meaning of municipal ordinances, like other legislative acts, must be ascertained from their language. The record of debates in Congress is official and contemporaneous with the acts to which they relate, and yet they are not appropriate sources of information from

<sup>81</sup> Wintersteen v. New York, 220 N. Y. 57, 62, 115 N. E. 17, affirming 147 N. Y. S. 1153, 163 App. Div. 896.

"From Edwards v. Darby, 12 Wheat. 206, 6 L. ed. 603, to Jacobs v. Prichard, Trustee, 223 U. S. 200, 32 Sup. Ct. 289, 56 L. ed. 405, it has been the settled law that, when uncertainty or ambiguity, such as we have here, is found in a statute, great weight will be given to the contemporaneous construction by department officials, who were called upon to act under the law and to carry its provisions into effect, especially where such construction has been long continued, as it was in this case for almost 40 years before the petition was filed. United States v. Hill, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. ed. 627." National Lead Co. v. U. S., (U. S. 1920), 40 Sup. Ct. Rep. 237, 239.

"Conceding then that the statute is ambiguous, we must turn as a help to its meaning, indeed in such case, as determining its meaning, to the practice of the officers whose duty it was to construe and administer it. They may have

been consulted as to its provisions, may have suggested them, indeed have written them. At any rate their practice, almost coincident with its enactment, and the rights which have been acquired under the practice, make it determinately persuasive." U. S. v. Hammers, 221 U. S. 220, 228.

"This rule is practically universally recognized and is supported both by reason and authority. Of course, if the administrative construction were clearly wrong, we would not hesitate to disregard it. It is in no sense binding upon the courts." State ex rel. v. Cupples Station Light, H. & P. Co. (Mo. 1920), 223 S. W. 75.

<sup>82</sup> Applying contemporaneous construction. Montgomery Light & Traction Co. v. Avant (Ala. 1918), 80 So. 497.

Contemporaneous construction rejected. Laughlin v. Joplin, 161 Mo. App. 161, 166, 167, 142 S. W. 786.

Contemporaneous construction by a water department as to refund, etc., rejected. Fairbank v. Chicago, 153 Ill. App. 141.

which to discover the meaning of the language of a statute passed by that body.”<sup>83</sup> “Much less can the private and undisclosed views of members of a city council be received years after an ordinance is passed and after litigation has arisen to explain its scope or qualify its meaning.”<sup>84</sup>

### § 814. Construction of penal ordinance.

Late cases uniformly support the old and well settled rule that penal ordinances, like penal statutes, are to be construed strictly,<sup>85</sup> but yet not so strict as to defeat the obvious intent of the lawmakers.<sup>86</sup> Nor should the construction be an unreasonable or forced one.<sup>87</sup> Strict con-

<sup>83</sup> *United States v. Trans-Missouri Freight Ass’n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007.

<sup>84</sup> *Vermillion v. Northwestern Telephone Exchange Co.*, 189 Fed. 289, 293, 294.

In construction, courts cannot consider statements made by authors of a bill or by those interested in its passage, or by members of the council adopting the bill, showing the meaning or effect of language used in the bill as understood by persons making such statements. The intention is to be determined from a consideration of the enactment itself. *People ex rel. v. Chicago Rys. Co.*, 270 Ill. 87, 110 N. E. 386, 393.

Legislative debates and opinions of members of the legislative body that enacted the law are inadmissible to show the intent of the law. *Ex parte Goodrich*, 160 Cal. 410, 117 Pac. 451, 454.

<sup>85</sup> *Alabama. Sloss-Sheffield Steel & Iron Co. v. Smith*, 175 Ala. 260, 57 So. 29.

*Alaska. Guidoni v. Wheeler*, 5 Alaska 229, 232, quoting with ap-

proval part of § 814, vol. 2, ante. *Georgia. Pennington v. Sparta*, 15 Ga. App. 287, 82 S. E. 826.

*Illinois. Chicago v. South Side El. R. Co.*, 183 Ill. App. 181, 185.

*Maine. Saco v. Jordan*, 115 Me. 278, 98 Atl. 808.

*Ohio. State v. Dauben* (Ohio 1919), 124 N. E. 232.

*Washington. Clark v. Pacific Power & Light Co.*, 91 Wash. 130, 157 Pac. 462.

“Penal ordinances, like penal statutes, are to be strictly construed. \* \* \* This rule is to be applied when the purpose of the construction is to relieve one charged with a violation of such an ordinance, a liberal construction being permissible otherwise to maintain its validity.” *Ex parte Lerner* (Mo. 1920), 218 S. W. 331, 333.

<sup>86</sup> *New York v. Fredericks*, 206 N. Y. 618, 623, 100 N. E. 419.

<sup>87</sup> Penal ordinance must be strictly construed, “but this rule is open to the limitation that the construction must not be an unreasonable or forced one.” *State*

struction means that the language is not to be extended by implication so as to embrace cases or acts not clearly within its prohibition,<sup>88</sup> for in no event can the court resort to implication to read into a penal ordinance a prohibition which is not expressed therein.<sup>89</sup>

It is sometimes said that the one charged may be within the strict letter of the law is not enough,<sup>90</sup> but he must be within its spirit also.<sup>91</sup>

Finally it should be observed that strict construction is not a precise but rather a relative expression. "The rule of strict construction has lost much of its force and importance in recent times, since it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object."<sup>92</sup>

### § 815. Construction of words and terms.<sup>93</sup>

An ordinance should be construed according to its rea-

v. Gurry, 121 Md. 534, 88 Atl. 546, 47 L. R. A. (N. S.) 1087.

A reasonable construction should be given where two or more constructions can be given, that one should be adopted which will strengthen the law and make it effective rather than one which will "draw its teeth," and render it unable to "bite." *Moore v. Thomasville*, 17 Ga. App. 285, 86 S. E. 641.

<sup>88</sup> *Wichita v. Lewis*, 97 Kan. 589, 155 Pac. 948.

Penal ordinance cannot be extended by construction. Things embraced must be within the clear intent and spirit of the act. *State v. Norfolk Southern R. Co.*, 166 N. C. 528, 82 S. E. 963.

<sup>89</sup> *New York v. Fredericks*, 206 N. Y. 618, 623, 100 N. E. 419,

affirming 134 N. Y. S. 796, 150 App. Div. 83.

<sup>90</sup> *State v. Rookard*, 87 S. C. 444, 69 S. E. 1076.

<sup>91</sup> *Anderson v. Fant*, 96 S. C. 5, 79 S. E. 641.

<sup>92</sup> *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182, 186, per.

<sup>93</sup> "Attorney," referring to "city attorney," held a person licensed to practice law. *Baxter v. Venice*, 171 Ill. 233, 111 N. E. 111.

"Inmate" as applied to house of ill fame. *People v. Rice*, 277 Ill. 521, 115 N. E. 631.

"Or" cannot be substituted for "and." *Corona v. Merriam*, 20 Cal. App. 231, 128 Pac. 769.

"Or elsewhere," as to use of obscene language, after enumerating streets, depots, public places, etc., "or elsewhere," held not to

son and spirit.<sup>94</sup> Words employed therein should be read and understood agreeable to their natural and obvious meaning.<sup>95</sup> An ordinance should "receive that meaning which the ordinary reading of its language warrants, words not technical being taken in their ordinary familiar acceptation with regard to their general and popular use."<sup>96</sup>

"Common or popular words are to be construed in their popular sense; common law words according to their common law meaning, and technical words according to their technical meaning. As a general rule, words are to be taken in their ordinary or popular sense unless it plainly appears that they were used in a different sense."<sup>97</sup>

Ordinances, like statutes are primarily to be interpreted according to the ordinary meaning of their words

include private yard abutting on a public street. *Peer v. Dixon*, 82 N. J. L. 366, 83 Atl. 180.

An ordinance relating to carrying weight of floors using the term "dead load" when "live load" was meant, held not misleading. *O'Rourke v. Fulton Bag & Cotton Mills*, 133 La. 955, 63 So. 480, 482.

"A building line," as used in a charter, requiring its establishment by ordinance, held to mean at least two lines on either side of the boulevard. *St. Louis v. Handlan*, 242 Mo. 88, 94, 95, 145 S. W. 421.

<sup>94</sup> *Guidoni v. Wheeler*, 5 Alaska 229, 237, quoting with approval part of § 815, vol. 2, ante.

<sup>95</sup> *State v. Norfolk Southern R. Co.*, 166 N. C. 528, 82 S. E. 963, 965.

<sup>96</sup> *Chicago v. South Side El. R. Co.*, 183 Ill. App. 181, 185, holding that the term "street railway" in general and popular use does not include elevated railroads, and that "street railway cars," means

those employed on the surface of city streets.

<sup>97</sup> *Standard Oil Co. v. Birmingham* (Ala. 1918), 79 So. 489.

"The courts approach the interpretation of a statute or ordinance with the presumption that the words and phrases therein are used in their natural, plain, obvious, familiar and popular sense, and without any forced, subtle or technical construction to limit or extend their meaning. All laws must be executed according to the sense and meaning which they imparted at the time of their passage. The meaning to be given to words is not confined by the strict definition given by lexicographers if it clearly appears that another meaning was intended by the lawmakers. The definition found in the dictionaries is entitled to great weight though by no means conclusive." *Reading City v. Yeager*, 62 Pa. Super. Ct. 268, 272, in construing "porch" as used in an ordinance.

and the proper grammatical effect of their arrangement. It will be presumed that the municipal legislators are conversant with the simple rules of grammar and have expressed their will in apt terms unless it is apparent in the ordinance itself that the application of such presumption would be absurd, extravagant or repugnant to other provision of law which must stand with it.<sup>98</sup>

Every word must be given effect according to the common or approved usage of the language, and a word is to be rejected or ignored as meaningless only when no other conclusion can fairly be reached.<sup>99</sup>

In construction, qualifying words and phrases and clauses are to be applied to those preceding and not to those remote, unless the intent as appears from the context so requires.<sup>1</sup> In an ordinance relating to excavations, the distinctive use of the adjective "adjoining" in conjunction with the adjective "contiguous" was held to indicate that the obligation to preserve any "adjoining or contiguous wall," etc., from injury extends not only to a wall or structure which touches the excavation but also to a wall or structure which is "contiguous," i. e., "near to," or "in close proximity to," definitions etymologically recognized and which have received judicial sanction.<sup>2</sup>

In constructions courts ordinarily follow the definition of words and terms given in the ordinance.<sup>3</sup>

### § 816. Construction where ordinance void in part.

The fact that a law may be void in part does not necessarily render the whole law invalid. If the valid parts are not essentially dependent upon the void provisions,

<sup>98</sup> *Orthwein v. St. Louis*, 265 Mo. 556, 178 S. W. 87.

"Ordinances are to be construed according to common sense and so as to give effect to the purpose of their adoption." *Karpeles v. City Ice Delivery Co.* (Ala. 1916), 73 So. 642, 645.

<sup>99</sup> *Long v. Ottumwa Ry. & Light*

*Co.*, 162 Iowa 11, 142 N. W. 1008, 1015.

<sup>1</sup> *Montgomery Light & Traction Co. v. Avant* (Ala. 1918), 80 So. 497.

<sup>2</sup> *Gordon v. Automobile Club*, 167 N. Y. S. 585, 587.

<sup>3</sup> *St. Louis v. Nash*, 266 Mo. 523, 181 S. W. 1145.

e. g., where the former are independent of and not necessarily connected with the latter, and it is practicable to separate them, those parts that are valid will be enforced. Briefly, the valid and void parts must be entire and distinct from each other and the former must be capable of distinct enforcement.<sup>4</sup> But if the law is entire, each part

<sup>4</sup> Alabama. *Little v. Attalla*, 4 Ala. App. 287, 58 So. 949.

Alaska. *Guidoni v. Wheeler*, 5 Alaska 229, 233, citing § 816, vol. 2, ante.

California. *Ex parte Anixter*, 22 Cal. App. 117, 134 Pac. 193.

Colorado. *Pueblo v. Kurtz* (Colo. 1919), 182 Pac. 884; *Provident Loan Soc. v. Denver* (Colo. 1918), 172 Pac. 10.

Georgia. *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487.

Illinois. *People ex rel. v. Rock Island*, 271 Ill. 412, 111 N. E. 291, 298; *People v. Mohr*, 252 Ill. 160, 96 N. E. 893.

Idaho. *State v. Bird*, 29 Idaho 47, 156 Pac. 1140.

Indiana. *Smith v. George*, 181 Ind. 119, 103 N. E. 949, affirming (Ind.), 102 N. E. 828.

Kentucky. *Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18.

Louisiana. *Shreveport v. Maroun*, 134 La. 490, 64 So. 388; *New Orleans v. White*, 143 La. 487, 78 So. 745; *Vivian v. Edwards*, 140 La. 782, 73 So. 863.

Massachusetts. *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *Goldstein v. Conner*, 212 Mass. 57, 98 N. E. 701.

Maryland. *Creaghan v. Baltimore*, 132 Md. 442, 104 Atl. 180.

Maine. *Skowhegan v. Heselton*, 117 Me. 17, 102 Atl. 772.

Missouri. *Kansas City Gunning Adv. Co. v. Kansas City*, 240 Mo.

659, 679, 144 S. W. 1099, 1104; *Nixa v. Wilson* (Mo. App. 1918), 200 S. W. 703; *St. Louis v. St. Louis Transfer Co.*, 256 Mo. 476, 165 S. W. 1077; *Phelps v. St. Louis I. M. & S. Ry. Co.*, 2 Mo. P. S. C. 15, 19; *Brotherhood of Locomotive Firemen & Enginemen v. St. Louis & San Francisco R. R. Co.*, 2 Mo. P. S. C. 560, 573, P. U. R. 1915F, 489, 504; *Gratz v. Kirkwood*, 182 Mo. App. 581, 597, 166 S. W. 319.

New York. *Fongera & Co. v. New York*, 224 N. Y. 269, 120 N. E. 642, 1 A. L. R. 1467; *Geyer v. Buck*, 175 N. Y. S. 613; *Yellow Taxicab Co. v. Gaynor*, 144 N. Y. S. 299, 159 App. Div. 893, affirming 143 N. Y. S. 279, 82 Misc. Rep. 94; *Hotel Astor v. New York*, 144 N. Y. S. 494, 159 App. Div. 888, affirming 143 N. Y. S. 279, 82 Misc. Rep. 94; *Chapman v. Selover*, 159 N. Y. S. 632, 172 App. Div. 858; *Re Willard Parker Hospital*, 217 N. Y. 1, 111 N. E. 256, affirming 151 N. Y. S. 641, 166 App. Div. 106.

New Jersey. *Blake v. Pleasantville*, 87 N. J. L. 426, 95 Atl. 113; *Koettegen v. Paterson*, 90 N. J. L. 698, 101 Atl. 253; *Schwarz Bros. Co. v. Jersey City Board of Health*, 84 N. J. L. 735, 87 Atl. 463, affirming 83 N. J. L. 81, 83 Atl. 762; *Ninth Street Improvement Co. v. Ocean City* (N. J. 1918), 103 Atl. 186; *Eveler v. Atlantic City*, 88

being essentially connected with the rest, the invalidity

N. J. L. 710, 96 Atl. 1101; *Marcus v. Atlantic City*, 88 N. J. L. 727, 96 Atl. 1102; *Seidel v. Atlantic City*, 88 N. J. L. 720, 732, 733, 737, 96 Atl. 1102; *Shill Rolling Chair Co. v. Atlantic City*, 87 N. J. L. 399, 94 Atl. 314.

Oregon. *Barton v. Recorder's Court*, 60 Or. 273, 119 Pac. 349.

Texas. *Modern Order of Praetorians* (Tex. Civ. App.), 162 S. W. 17.

Utah. *Logan City v. Steadman*, 47 Utah 611, 155 Pac. 445; *Tooele City v. Hoffman*, 42 Utah 596, 134 Pac. 558.

Virginia. *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139.

Washington. *Seattle v. Hewetson*, 95 Wash. 612, 164 Pac. 234.

United States. *LaFollette v. LaFollette Water L. & T. Co.*, 252 Fed. 762; *Barrett v. New York*, 232 U. S. 14, 34 S. Ct. 203, 58 L. ed. 483, reversing 189 Fed. 268; *Western Union Tel. Co. v. Richmond*, 224 U. S. 160, 32 Sup. Ct. 449, 56 L. ed. 710, affirming 178 Fed. 310; *The Employers' Liability Cases*, 207 U. S. 463; *Southern Pacific Co. v. Portland*, 227 U. S. 559, 33 Sup. Ct. 308, 57 L. ed. 643, affirming 177 Fed. 958.

The elision of a void section of an ordinance, one upon which no other section or provision of the ordinance is dependent, will not affect the remainder if the ordinance is otherwise constitutional and valid. *Kansas City Gunning Advertising Company v. Kansas City*, 240 Mo. 659, 669, 670, 144 S. W. 1099.

"An ordinance may be good and bad in part, when the good pro-

visions are separable from the bad." *Little v. Attalla*, 4 Ala. App. 287, 58 So. 949.

The fact that an ordinance may cover matters which the city has no power to control is no reason why it should not be enforced as to those which it may control, when those matters are separable. *Little v. Attalla*, 4 Ala. App. 287, 58 So. 949, following *Kreulhans v. Birmingham*, 164 Ala. 623, 627, 51 So. 297, 298, 26 L. R. A. (N. S.) 492.

Although an ordinance operates unreasonably in some instances and reasonably in others it is not wholly void. Section 662, ante.

Ordinance providing for the exercise of the initiative and referendum, void in part because it restricts the signing of initiative petitions to registered voters, does not invalidate the other part prescribing the manner of exercising the right. *State ex rel. v. Dalles City*, 72 Or. 337, 143 Pac. 1127.

Where in case of alternative penalties one of which is legal and the other illegal. *Shill Rolling Chair Co. v. Atlantic City*, 87 N. J. L. 399, 94 Atl. 314.

Ordinance providing penalty of fine and imprisonment, valid as to fine, but void as to imprisonment, held parts separable. *Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18.

If a section of an ordinance is of doubtful validity because of its omission of a penalty, and such section is clearly separable from the other sections such omission will not invalidate the entire ordinance. *Blake v. Pleasantville*,

of one part renders the whole invalid.<sup>5</sup> For example, an ordinance relating to transportation and delivery of liquors by common carriers which is invalid as to interstate shipments and valid as to intrastate shipments, the whole ordinance fails,<sup>6</sup> or where an ordinance in levying a license tax on a telegraph company makes no exemption, but includes messages of the government, the license exacted necessarily affects the whole and renders the entire tax unconstitutional and void.<sup>7</sup>

87 N. J. L. 427, 430, 98 Atl. 1084.

A provision of an ordinance declaring all buildings which from age, neglect or other cause become dilapidated shall be and are declared nuisances, although void does not invalidate a further provision of the same ordinance prescribing the manner of procedure for a determination whether such building is in fact a nuisance. *Crossman v. Galveston* (Tex. Civ. App.), 204 S. W. 128, 131.

Part licensing pawnbrokers being complete in itself may be held valid, and other distinct void. *Provident Loan Soc. v. Denver* (Colo.), 172 Pac. 10; *Vinsonhaler v. People*, 48 Colo. 79, 81, 108 Pac. 993.

Building ordinance prescribing the character of buildings, held separable from provision requiring consent of three-fourths of resident property owners of doubtful validity. *Spann v. Dallas* (Tex. Civ. App.), 189 S. W. 999.

A proviso in an ordinance relating to the width of tires of vehicles was held void, but such proviso being separable from the balance of the ordinance and when so separated a complete ordinance licensing vehicles was left, the court ruled that as the ordinance

was not dependent upon the invalid proviso, it could stand and be enforced. *St. Louis v. St. Louis Transfer Co.*, 256 Mo. 476, 165 S. W. 1077, considering *State ex rel. v. Clifford*, 228 Mo. 194, 128 S. W. 755.

<sup>5</sup> Illinois. *Chicago v. Pettibone Co.*, 267 Ill. 573, 108 N. E. 698; *Sullivan v. Cloe*, 277 Ill. 56, 115 N. E. 135.

Indiana. *Indianapolis v. College Park Land Co.* (Ind. 1918), 118 N. E. 356.

Kentucky. *Hickman v. Kimbley*, 161 Ky. 652, 171 S. W. 176.

Massachusetts. *Greene v. Cook*, 219 Mass. 121, 106 N. E. 573, 576.

New Jersey. *Lassiter v. Atlantic City*, 86 N. J. L. 87, 90 Atl. 675.

N. Carolina. *State v. Prevo* (N. C. 1919), 101 S. E. 370.

Oklahoma. *Ex parte Gordon* (Okl.), 164 Pac. 1146.

Texas. *Laredo v. Frishmuth* (Tex. Civ. App.), 196 S. W. 190; *Ex parte Goldburg* (Tex. Cr. App. 1918), 200 S. W. 386; *Royal Indemnity Co. v. Schwartz* (Tex. Civ. App.), 172 S. W. 581, 583.

<sup>6</sup> West Jersey & S. R. Co. v. Millville (N. J. 1918) 103 Atl. 245.

<sup>7</sup> *Williams v. Talladega*, 226 U. S. 404, 419, 33 Sup. Ct. 116, 57 L.



Judicial decisions have stated the doctrine in varying phrase: "A part of a statute or ordinance may be invalid and a part valid, unless all of the provisions are so connected in subject-matter and so dependent upon each other as to warrant the belief that the legislative body would not have passed the valid part independently of the invalid part."<sup>8</sup> "Unless the court can say that the void parts cannot be separated from the valid ones, and that the whole must fail because such void parts were a compensation for the valid ones, and that the valid parts would not have been enacted except in conjunction with the void ones, the ordinance should not be held void in its entirety. \* \* \* It is essential, however, that the parts upheld form, independently of the invalid portion, a complete law in some reasonable aspect, so that it may be fairly concluded that the council would have enacted it without the invalid parts."<sup>9</sup> "The test is, Has the legislative body manifested an intention to deal with a part of the subject-matter covered, irrespective of the rest of the subject-matter? If such intention is manifest the subject-matter is separable, otherwise not."<sup>10</sup>

### § 817. Construction of ordinances—illustrative cases.<sup>11</sup>

ed. 275, reversing 164 Ala. 633, 51 So. 330.

<sup>8</sup> *Kucharski v. Harrison*, 264 Ill. 563, 106 N. E. 488, 490; *People v. Strassheim*, 240 Ill. 279, 88 N. E. 821, 22 L. R. A. (N. S.) 1135; *Chicago v. Pettibone Co.*, 267 Ill. 573, 108 N. E. 698.

<sup>9</sup> *Brittingham & Hixon Lumber Co. v. Sparta*, 157 Wis. 345, 147 N. W. 635, 638; *Water Power Cases*, 148 Wis. 124, 152, 134 N. W. 330, 38 L. R. A. (N. S.) 526.

<sup>10</sup> *Chicago M. & St. P. Ry. Co. v. Minneapolis*, 238 Fed. 384, citing as supporting *Illinois Central R. R. Co. v. McKendree*, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. ed. 298; *Em-*

*ployers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. ed. 297; *Butts v. Merchant's Transportation Co.*, 230 U. S. 126, 33 Sup. Ct. 964, 57 L. ed. 1422; *Poindexter v. Greenhow*, 114 U. S. 270, 304, 5 Sup. Ct. 902, 922, 29 L. ed. 185; *El Paso, etc., Ry. Co. v. Gutierrez*, 215 U. S. 87, 97, 30 Sup. Ct. 21, 25, 54 L. ed. 106.

<sup>11</sup> Ordinance construed as dealing with overhead and underground wires. *Frolichstein v. Cupples Station Light, Heat & Power Co.*, 201 Mo. App. 162, 210 S. W. 90.

Ordinance regulating salary, misinterpretation by municipal author-

### § 819. Same—who liable—landlord or tenant.<sup>12</sup>

Under an ordinance forbidding specified water closets to be installed in any building and providing that when such closets shall be found to be a nuisance they shall be removed, the owner of the premises was adjudged liable for a water closet which became a nuisance.<sup>13</sup>

ities, held not binding. *Laughlin v. Joplin*, 161 Mo. App. 161, 142 S. W. 786.

Ordinance discriminating in license tax. *Salt Lake City v. Utah Light & Ry. Co.*, 45 Utah 50, 142 Pac. 1067.

Building ordinance. *Detroit Building Com. v. Kunin*, 181 Mich. 604, 148 N. W. 210.

Ordinance as to character of water closets to be installed in buildings. *Chicago v. Atwood*, 269 Ill. 624, 110 N. E. 127.

Franchise for an electric inter-urban passenger railroad—commercial railroad. *Spring Valley v. Chicago O. & P. Ry. Co.*, 277 Ill. 313, 115 N. E. 168, affirming 200 Ill. App. 352.

Ordinance relating to erection and maintenance of telegraph and telephone poles. *Springfield v. Interstate Independent Telephone & Teleg. Co.*, 279 Ill. 324, 116 N. E. 631, affirming 201 Ill. App. 227.

Ordinance relating to the construction of buildings, held to require that whatever part of the sidewalk should be left open for travel it should be covered by a roof. In an injury to an employee of a subcontractor who was fire-proofing a building, due to failure to observe the ordinance, it was held that both the owner who caused the erection of the building and the building contractor

were liable. *Ward v. Ely-Walker D. G. Bldg. Co.*, 248 Mo. 348, 154 S. W. 478.

The fact that an ordinance forbidding the placing or repairing of poles and wires in streets and public ways cannot be enforced against a company acting under a grant of authority during the life of the grant would not make the ordinance invalid as against any one who had no authority to obstruct or use the streets. *Sullivan v. Best*, 286 Ill. 315, 121 N. E. 565.

**Fees—compensation of public officers.** Strict construction, and only such fees as law clearly gives are allowed, and if such ordinance is ambiguous, in construction municipality to be favored. *Bridges v. Sierra Madre*, 27 Cal. App. 93, 148 Pac. 965; *Corona v. Merriam*, 20 Cal. App. 231, 128 Pac. 769; *State v. Wofford*, 116 Mo. 220, 22 S. W. 486.

<sup>12</sup> *Birmingham Ry. Light & Power Co. v. Milbrat (Ala.)*, 78 So. 224.

<sup>13</sup> While the occupant and not the owner is ordinarily responsible for injuries arising from failure to keep premises in repair, yet if premises are let with a nuisance on them, the landlord is liable for injuries caused by that nuisance. Where the owner rents his building with a water closet which an ordinance required should be re-

The author of the wrong is sought to be charged with liability.

moved if it should become a nuisance, and such water closet did become a nuisance; and it being a fixture and part of the building itself, and removal and substitution of one of a different kind could not be considered ordinary repairs to the premises,—it being a part of the building itself which the owner alone could change—when it became a nuisance the or-

dinance required its removal and the owner alone could cause it to be removed. "It may be the tenant was liable for the nuisance but his liability could not relieve the landlord." The penalty was not for the creation of the nuisance, but for his failure to remove the hopper-closet after it became a nuisance. *Chicago v. Atwood*, 269 Ill. 624, 110 N. E. 127.

## CHAPTER 21.

### AMENDMENT AND REPEAL OF ORDINANCES, AND HEREIN OF MUNICIPAL CHARTERS.

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|---|---|
| § 821. Amendment — method of making.  | § 835. Same—penal ordinances.   |
| § 823. Amendment of franchise and contract ordinances.                                | § 837. Effect of repeal and re-enactment.   |
| § 824. Amendment of improvement ordinances.   | § 838. Effect of revision of ordinances as to repeal.                                 |
| § 825. Power to repeal ordinances.  | § 839. Repeal of ordinance by ordinance only.   |
| § 828. Repeal of improvement ordinances.  | § 840. When ordinance and charter provisions are superseded by charter amendment.     |
| § 829. Rules relating to repeals of charter and ordinance provisions by general laws. | § 841. When charter provisions supersede general laws.                                |
| § 830. Question of intent—illustrative cases.   | § 843. When ordinances supersede general laws.  |
| § 831. Implied or constructive repeals are not favored.                               | § 844. Effect on ordinances by surrender of special charter—change in class or grade. |
| § 832. Implied or constructive repeals are sustained.                                 | § 845. Effect on ordinances on dissolution and reorganization.                        |
| § 833. Implied repeals of general and special ordinance.                              |   |
| § 834. Effect of repeal—revival.  |   |

#### § 821. Amendment—method of making.

An amendment is a change or alteration of a law or of some of its provisions and merely continues a law or ordinance in a changed form.<sup>1</sup> An amendatory act or ordinance never purports to repeal an act or section as it previously existed but only changes or amends it to read as therein stated.<sup>2</sup>

Power to legislate on a given subject-matter implies power to change or alter legislation promulgated at any

<sup>1</sup> People v. Zito, 237 Ill. 434, 86 N. E. 1040.      Gravel Roofing Co., 282 Ill. 537, 118 N. E. 730.

<sup>2</sup> Chicago v. American Tile &

time thereafter within the limitation, if any, and in the mode prescribed.<sup>3</sup>

The usual constitutional provision that no law shall be revised or amended by reference to its title, but laws revised or amended shall be re-enacted and published at length, is not applicable to changes in ordinances in the absence of legal provision so requiring.<sup>4</sup> But charters and applicable statutes sometimes provide that no ordinance or section thereof shall be revised or amended unless the new ordinance or section contain the entire section in its amended form. Such requirement intends that the amending ordinance or section shall be complete in itself, and that the former ordinance or section shall be repealed. The purpose is to avoid the confusion and the frequent contradiction which results from amendments which purport to add to or take from an existing ordinance mere words or phrases.<sup>5</sup>

To render the power of initiative and referendum effective, the legislative power of the council is commonly restricted by the provision that, no ordinance or amendment to an ordinance adopted by the electors shall be repealed or amended by the council. In such case, an ordinance or an amendment thereto adopted by a vote of the

<sup>3</sup> Express power to enact, partially modify, amend or repeal ordinances includes power to increase the statutory penalty. *Feunan v. Atlantic City*, 88 N. J. L. 435, 97 Atl. 150, affirmed in 90 N. J. L. 674, 101 Atl. 1054.

Method prescribed to amend charter must be observed. *California Oregon Power Co. v. Medford*, 226 Fed. 957.

Amendment sustained against contention that it sought to amend by reference to title. *Craddock v. San Antonio* (Tex. Civ. App.), 198 S. W. 634.

Many ordinances may be amended by a single ordinance, and the effect of a single ordinance

may be to amend a large number of ordinances. *State ex rel. v. McDonald*, 121 Minn. 207, 141 N. W. 110.

<sup>4</sup> *Ex parte Parr* (Tex. Civ. App. 1918), 200 S. W. 404.

<sup>5</sup> "No ordinance or section thereof shall be revised or amended unless the new ordinance contain the entire ordinance or section revised or amended and the former ordinance or section shall be repealed." Under such law seeking to amend an ordinance by reciting "that section 20 of ordinance No. 167, be amended by adding thereto the following:" is void. *Rochow v. Boone Electric Co.*, 160 Iowa 94, 140 N. W. 193.

electorate can be repealed or amended only in the same manner.<sup>6</sup> When these matters are submitted to a vote of the people they must fairly apprise the electors of the purpose and effect of the proposed amendment. Usually amendments are printed in full in newspapers and pamphlet form and distributed among the city electors.<sup>7</sup>

The amended ordinance as to municipal power to legislate concerning the subject-matter, and the method and reasonableness of the exercise thereof, of course, is to be tested by the same limitations as are applied to original legislation.<sup>8</sup>

### § 823. Amendment of franchise and contract ordinances.<sup>9</sup>

### § 824. Amendment of improvement ordinances.<sup>10</sup>

### § 825. Power to repeal ordinances.

The term repeal as applied to municipal ordinances is the abrogation or annulment of a previously existing ordi-

<sup>6</sup> *Dallas v. Dallas Consolidated Electric St. Ry. Co.* (Tex. Civ. App.), 159 S. W. 76; *Holland v. Cranfill* (Tex. Civ. App.), 167 S. W. 308.

"No ordinance or amendment to an ordinance adopted by the voters \* \* \* shall be repealed or amended by the city council." Method under particular charter. *State ex rel. v. MacQueen*, 82 W. Va. 44, 95 S. E. 666.

<sup>7</sup> Charter—submitting proposed amendment to electors—form. *Burton v. Detroit*, 190 Mich. 195, 156 N. W. 453.

<sup>8</sup> *Weeks v. Henrich*, 40 App. D. C. 46, holding a regulation applying generally to the residence and business sections could not be so modified as to convert it into an agency for the granting of special privileges.

Amendment of ordinance relating to the keeping of cows in the city, held valid and constitutional. *Davis v. Savannah* (Ga. 1918), 95 S. E. 6.

<sup>9</sup> *California-Oregon Power Co. v. Medford*, 226 Fed. 957.

<sup>10</sup> *Dement v. Caldwell*, 22 Idaho 62, 125 Pac. 200; *People v. Waldorf*, 153 N. Y. S. 1072, 168 App. Div. 473, quoting with approval part of § 824, vol. 2, ante (*McQuillin*, Mun. Ord., § 198); *Genesee v. Schultz*, 257 Ill. 273, 100 N. E. 926; *Decatur v. Barteau*, 260 Ill. 612, 103 N. E. 601; *Warner v. Ashland*, 154 Wis. 54, 142 N. W. 513, partial repeal.

Amendment by adding section. *Re Leary Avenue*, *Seattle*, 76 Wash. 617, 131 Pac. 225, 229.

nance by the enactment of a subsequent ordinance which either declares that the former ordinance shall be revoked or abrogated or which contains provisions so contrary to or irreconcilable with those of the earlier ordinance that only one of the two can stand in force; the latter is the implied or constructive repeal; the former the express repeal.<sup>11</sup>

Specific grant of power to amend or repeal ordinances is not necessary in view of the general rule that power to enact them unless restricted, implies power to repeal them.<sup>12</sup> In the absence, therefore, of a valid provision to the contrary the council of a municipal corporation having the authority to legislate on any given subject may exercise that authority at will by enacting or repealing an ordinance in relation to such subject-matter.<sup>13</sup> Such in varying form is the statement of the rule when the ordinance is not a contract, or one that is, from its nature, exhausted from a single exercise.<sup>14</sup> The efficacy of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it.<sup>15</sup>

The rule usually applies to all ordinances passed pursuant to a general grant of discretionary or regulatory authority over the subject-matter of the grant. But it has been held that it does not apply where the ordinance has been enacted under a narrow, limited grant of authority to do a single designated thing in the manner and at

<sup>11</sup> "The repeal of an ordinance, is accomplished when it is destroyed, abolished, abrogated, cancelled, annulled, recalled or rescinded by a later one." *St. Louis v. Kellman*, 235 Mo. 687, 695, 696, 139 S. W. 443.

<sup>12</sup> *Simpson v. State ex rel.*, 179 Ind. 196, 99 N. E. 980, citing § 825, vol. 2, ante (*McQuillin*, *Mun. Ord.*, § 199).

Absent legal restriction, city may repeal ordinance unless vested

rights are interfered with. *Belton v. Head* (Tex. Civ. App.), 137 S. W. 417.

<sup>13</sup> *State ex rel. v. Rich* (Ohio), 117 N. E. 893.

Cannot repeal ordinance disconnecting territory from city. *People ex rel. v. Ellis*, 253 Ill. 369, 377, 97 N. E. 697.

<sup>14</sup> *Stemmler v. Madison Borough*, 82 N. J. L. 596, 83 Atl. 85.

<sup>15</sup> *State ex rel. v. Colson*, 7 Ohio App. 438.

the time prescribed by the legislature, and which excludes the implication that the legislative body of the city was given any further jurisdiction over the subject than to do the one act. In such case the inquiry is to ascertain the intention of the legislature. A legislative act conferred power upon certain cities to fix license fees within a specified minimum and maximum limit, without further control in the matter, and an ordinance enacted pursuant to such restricted power fixing license fees, it was held, could not be repealed.<sup>16</sup>

Where the initiative and referendum prevail the usual restriction is that ordinances or amendments thereto, when adopted by the electors cannot be repealed by the municipal legislative body.<sup>17</sup>

The right of electors of a town in legal meeting assembled to repeal or amend any order, rule or regulation made by the selectmen, it was held did not extend to purely administrative details, e. g., removal of an employee, and hence, electors had no power to reinstate a removed employee.<sup>18</sup>

16 "When made the amount of the fee stands established and out of reach of the authority of the city, as though the law itself has specifically required the particular sum which the city has fixed to be exacted by cities of that class. It is subject to no change except at the hands of the legislature itself." *Simpson v. State ex rel.*, 179 Ind. 196, 99 N. E. 980, 983, citing as supporting the principle *Jackson v. Shlomberg*, 70 Miss. 47, 11 So. 721, a case of the acceptance of a code by a city, where it was held the city could not rescind it thereafter.

17 "No ordinance or amendment to an ordinance adopted by the voters at such an election shall be repealed or amended by the city council." Such provision denies

to the council the usual right to amend and repeal *ex mero motu*. But there is no limitation on the power of the voters to require action by the council to submit an amendment or repeal of an ordinance adopted by them. *State ex rel. v. MacQueen*, 82 W. Va. 44, 95 S. E. 666.

18 Voters of town had power to repeal or amend any order, rule or regulation made by the selectmen, but whether the right to review was confined to orders, rules and regulations of a general nature, perhaps to those of a legislative character, adopted after notice and opportunity for a hearing, the case does not decide, however it was held not to include all administrative acts. The right to "review" does not extend to purely adminis-



### § 828. Repeal of improvement ordinances.<sup>19</sup>

### § 829. Rules relating to repeals of charter and ordinance provisions by general laws.<sup>20</sup>

Repeals are not favored by the law. Both statutes and ordinances are clothed, in the first instance, with presumptive validity. It is familiar that there are two methods of repealing an ordinance or statute, express and implied; the first occurring where the repeal is by express terms, and the latter arising by necessary implication where total repugnancy exists between a later and an earlier ordinance or law; or a repeal *pro tanto* when such partial repugnancy exists; or, again, total or partial, where the whole or part of the subject-matter of the former is covered by the latter and revising regulation.<sup>21</sup>

If there is no express repeal of an ordinance by statute, repeal by implication arises only where there is a conflict.<sup>22</sup> Thus the fact that an ordinance covers a phase of a statutory offense, e. g., adulterating milk, omitted from

trative details such as employment in or dismissal from the public service, or appointments to or removal from positions in that service." In such relation they act "as agents of the law, and not of the town," and the town meeting is without power to dictate their action save as legislation may have conferred that power. *State ex rel. v. Wilkinson*, 88 Conn. 300, 90 Atl. 929.

<sup>19</sup> *Stemmler v. Madison Borough*, 82 N. J. L. 596, 83 Atl. 85.

Partial repeal. *Warner v. Ashland*, 154 Wis. 54, 142 N. W. 513.

<sup>20</sup> *White v. North Yakima*, 87 Wash. 191, 151 Pac. 645, 647, citing § 829, vol. 2, ante.

A constitutional amendment providing that the legislature shall not enact, amend or repeal municipal charters, and conferring

such power on the local electors held did not repeal an ordinance passed pursuant to prior charter granted by the legislature. *Portland v. Parker*, 69 Or. 271, 138 Pac. 852.

<sup>21</sup> *St. Louis v. Kellman*, 235 Mo. 687, 693, 694, 139 S. W. 443, per Lamm, J.

<sup>22</sup> *St. Louis v. Scheer*, 235 Mo. 731, 734, 139 S. W. 434.

Conflict. *State ex rel. v. Mo. Pac. Ry. Co.*, 262 Mo. 720, 174 S. W. 73.

Conflict between an ordinance and a statute, former gives way. *Carlton v. Boudar*, 118 Va. 521, 88 S. E. 174, 178; *Seattle Electric Co. v. Seattle*, 78 Wash. 203, 138 Pac. 892; *State ex rel. v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78.

If a statute and an ordinance are

the statute, the laws are not in conflict, and hence, the ordinance is not repealed by implication. In such case, the ordinance deals with a phase of the matter not dealt with by the statute. In particulars where the statute is silent the ordinance may speak.<sup>23</sup> So long as the ordinance, within the grant of municipal power, is within the statute on the same subject, that is, does not exceed it, or is not inconsistent with it, there is no conflict in the sense of making the ordinance void. To illustrate, where the statute sets up a standard for milk of 8.75% of solids not fat, and the ordinance requires milk to contain not less than 8.5% of non fatty solids, the two are not in conflict. A lower municipal standard for milk is not in the nature of an authorization to sell in violation of the state law; it is merely prohibitory in character. It does not invite a violation of the statute.<sup>24</sup>

But a statute having special application to particular matters and things within the field of its operation supercedes charter and ordinance provisions relating to the same subject matter, e. g., a statute creating a board of education and giving it plenary powers, as to the care of public school buildings, including "ventilation and sanitary condition thereof," thereby withdrawing the latter from the police powers of the municipality.<sup>25</sup> A later statute clearly repugnant to a prior one necessarily repeals the former, without express words to that effect, if the latter is plainly intended as a substitute, and to

not repugnant, but may stand together, the ordinance will not be held void. *Edwards v. Kirkwood*, 162 Mo. App. 576, 142 S. W. 1109.

Statute and ordinance as to vagrancy, held not in conflict, although the former imposed a heavier penalty than the latter. *Portland v. Parker*, 69 Or. 271, 138 Pac. 852.

State law as to selection of members of library board inconsistent with charter provision pre-

vails. *State ex rel. v. Grable* (Fla.), 72 So. 460.

<sup>23</sup> *St. Louis v. Kreumpeler*, 235 Mo. 710, 721, 139 S. W. 446; *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516.

<sup>24</sup> *St. Louis v. Scheer*, 235 Mo. 721, 729, 139 S. W. 434; *St. Louis v. Klausmeier*, 213 Mo. 119, 112 S. W. 516.

<sup>25</sup> *Board of Education v. St. Louis*, 267 Mo. 356, 184 S. W. 975, distinguishing *Pasadena School District v. Pasadena*, 166 Cal. 7.

create the only rule to govern the subject treated.<sup>26</sup> So where an ordinance is completely revised by a new ordinance, the latter operates as a substitute of the new for the old and annuls the latter.<sup>27</sup> That is, a subsequent ordinance covering the entire subject of a former one, operates to repeal the earlier one by implication.<sup>28</sup> A like rule applies in changes in a municipal charter.<sup>29</sup>

And where the jurisdiction to legislate is concurrent with the state and the municipality, in event of conflict between a statute and an ordinance, the latter must give way. The rule is otherwise where there is no conflict between the ordinance and the statute, that is, where they are neither inconsistent or irreconcilable with each other.<sup>30</sup>

If a revising law expressly repeals all acts and parts of acts inconsistent, etc., it may be the intention was to retain all prior laws and parts thereof which are not repugnant.<sup>31</sup>

### § 830. Question of intent—illustrative cases.

An ordinance relating to the adulteration of milk prohibited one from having in his possession, with intent to sell, milk adulterated by mixing with it any substance so as to lower or depreciate its strength. A later ordinance provided a standard for saleable milk with reference to milk solids—fatty and non-fatty—but made no provision as to adulteration by water or otherwise. Here it was held that the two ordinances were not in conflict, that one supplemented the other. And an ordinance requiring

<sup>26</sup> *Birmingham v. Baranco*, 4 Ala. App. 279, 58 So. 944; *Madison v. Southern Wisconsin Ry. Co.*, 156 Wis. 352, 146 N. W. 492.

<sup>27</sup> *St. Joseph v. Sperry & Hutchinson*, 189 Mo. App. 481, 483, 176 S. W. 1073.

<sup>28</sup> *Mullins v. Nordlow*, 170 Ky. 169, 185 S. W. 825, 831, relating to equipping buildings with fire escapes.

<sup>29</sup> *Phipps v. Medford*, 81 Or. 119, 158 Pac. 666.

Adopting new charter. *Standard Salt & Cement Co. v. National Surety Co.*, 134 Minn. 121, 158 N. W. 802.

<sup>30</sup> *St. Louis v. Ameln*, 235 Mo. 669, 684, 687, 139 S. W. 429.

<sup>31</sup> *Madison v. Southern Wisconsin Ry. Co.*, 156 Wis. 352, 142 N. W. 492.

milk offered for sale to have a certain percentage of fatty and non-fatty solids, does not conflict with another ordinance forbidding the mixture of water with milk. One charged with adding water to milk in violation of one of the ordinances cannot escape conviction by showing that the milk, after the water was added, still contained a larger percentage of milk solids than fixed by the other ordinance. So an ordinance forbidding the adulteration with water or other substance of milk sold or offered for sale, or selling or offering for sale any milk product from diseased cows, does not conflict with another ordinance which forbids the possession of adulterated milk, with intent to sell. So an ordinance forbidding the sale or offering for sale of milk containing a substance "which is poisonous or injurious to health," does not conflict with another ordinance forbidding any person from having in his possession with intent to sell milk with which has been mixed a substance "so as to lower or depreciate the strength, quality or purity" of the milk. This is true because water is not a substance poisonous or injurious to health and hence, adding water to milk is not putting therein a substance poisonous or injurious to health.<sup>32</sup>

Under a statute which prohibited sales of "goods, wares and merchandise" on Sunday, except "drugs or medicine, provisions or other articles of immediate necessity," it was held an ordinance regulating the hours of business of grocery stores on Sunday did not conflict, since the statute neither authorized nor forbade sales of groceries on Sunday, and the ordinance simply takes up the proposition of selling on Sunday where the statute left off.<sup>33</sup>

<sup>32</sup> St. Louis v. Meyer, 235 Mo. 699, 139 S. W. 438.

An ordinance forbidding the addition of any substance to milk so as to lower or depreciate its strength, quality or purity, was held not to be in conflict with another ordinance which requires milk to be "free from foreign ad-

ditions of any kind." "At the worst possible view they seem cumulative and indicative of redundancy rather than repugnancy." St. Louis v. Niehaus, 236 Mo. 8, 14, 139 S. W. 450.

<sup>33</sup> St. Louis v. Bernard, 249 Mo. 51, 55-58, 155 S. W. 394.

Where the question arises whether two ordinances conflict and it cannot be determined which is the later ordinance, except from the sole circumstance that one of the ordinance bears a later serial number, it has been held that the court will not assume that it is a latter ordinance, and this because an ordinance is a matter of proof in a state court.<sup>34</sup>

### § 831. Implied or constructive repeals are not favored.<sup>35</sup>

“The usual legislative phrase is that all acts and parts of acts inconsistent with the act passed are repealed. This is only *ex majore cantela*, for that would be the effect without such a clause. But that phrase leaves open the question which acts are inconsistent.”<sup>36</sup>

Courts do not favor repeals by implication and will not adjudge a former law repealed by implication unless the new law is so repugnant to the old that the two cannot be reconciled, or unless it clearly appears that the latter law would not have been enacted without a plain intent to repeal the former.<sup>37</sup> “Repeals of ordinances

<sup>34</sup> St. Louis v. Meyer, 235 Mo. 699, 705, 706, 139 S. W. 438.

<sup>35</sup> California. Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953; Rigdon v. San Diego, 30 Cal. App. 107, 157 Pac. 513, 515 (ordinance relating to granting liquor licenses held not impliedly repealing prior one).

Georgia. Walker v. Rome, 16 Ga. App. 817, 86 S. E. 658.

Illinois. Chicago v. Chicago & O. P. R. Co., 261 Ill. 478, 104 N. E. 240, affirming 177 Ill. App. 444.

Kentucky. Henderson v. Kentucky Peerless Distilling Co., 161 Ky. 1, 170 S. W. 210.

Missouri. Edwards v. Kirkwood, 162 Mo. App. 576, 581, 142 S. W. 1109; State ex rel. v. Brodie, 161 Mo. App. 538, 545, 143 S. W. 69;

Menefee v. Taubman, 159 Mo. App. 318, 322, 140 S. W. 604.

Wisconsin. Madison v. Southern Wisconsin Ry. Co., 156 Wis. 352, 146 N. W. 492.

Ordinance, held not repealed by an unconstitutional ordinance. Laredo v. Frishmuth (Tex. Civ. App.), 196 S. W. 190.

Ordinance relating to salary while absent from duty due to illness not contracted while serving the city, held not repealed by implication. Walsh v. Bridgeport, 88 Conn. 528, 91 Atl. 969.

<sup>36</sup> Haspel v. O'Brien, 218 Pa. 146, approved in Commonwealth v. Pottsville, 246 Pa. 468, 471, 92 Atl. 639.

<sup>37</sup> State ex rel. v. Wells, 210 Mo. 601, 620, 109 S. W. 758.

There is no repeal if the two

by implication and the abrogation of valid subsisting contracts by implication are to be found only when there is such utter repugnancy between the earlier ordinance or contract and the latter ordinance or contract that the two cannot be reconciled and stand together."<sup>38</sup>

A seeming repugnancy should be harmonized, if possible, so that the latter law will not operate to repeal the earlier one.<sup>39</sup> Thus where the violation of one of two ordinances on the same subject would not necessarily be a violation of the other, the ordinance of earlier date is not repealed, unless the repeal be expressed in the ordinance of later date.<sup>40</sup>

### § 832. Implied or constructive repeals are sustained.<sup>41</sup>

A subsequent law necessarily repeals an earlier one where there is between them a conflict so clear that the two cannot stand together.<sup>42</sup> It is a rule often asserted and applied that a mere general affirmative statute does not repeal a former special one unless negative words are used, or unless the two are irreconcilably inconsistent. But to accomplish a repeal it is not necessary that the subsequent general law use express words of repeal. Any form of expression showing a clear intention to repeal former special laws will be sufficient.<sup>43</sup>

laws "are easily susceptible of being made harmonious." *State v. Hodges*, 214 Mo. 376, 382, 113 S. W. 1072.

"Two seemingly repugnant statutes should, if possible, have such construction that the latter may not be a repeal of the former by implication." *State ex rel. v. Bishop*, 41 Mo. 16, 24.

<sup>38</sup> *Chicago v. Insull*, 241 Fed. 370, 154 C. C. A. 250.

<sup>39</sup> *Chicago v. Chicago & Oak Park El. R. R. Co.*, 177 Ill. App. 444, affirmed in 261 Ill. 478, 104 N. E. 240, 245.

<sup>40</sup> *Hammond v. Badeau*, 137 La. 828, 69 So. 202.

<sup>41</sup> *Pryzbylowski v. Detroit Board of Poor Comrs.*, 188 Mich. 279, 154 N. W. 117; *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806; *Columbia v. Phillips*, 101 S. C. 391, 85 S. E. 963; *Birmingham v. Baranco*, 4 Ala. App. 279, 58 So. 944.

<sup>42</sup> *State ex rel. v. Shields*, 230 Mo. 91, 100, 130 S. W. 298.

If two ordinances are inconsistent, the later repeals earlier one. *People v. Helm*, 154 Ill. App. 449.

<sup>43</sup> *St. Joseph & Iowa Ry. Co. v. Shambaugh*, 106 Mo. 557, 570.

A law is impliedly repealed by a later one revising the entire subject-matter of the first.<sup>44</sup> Thus a new charter provision revising the whole subject-matter of a general ordinance relating to the classification and tenure of municipal employees repeals by implication the general ordinance.<sup>45</sup> So a subsequent act codifying and amending the law relating to the power of incorporated towns, with amendments, repeals the former law on the same subject.<sup>46</sup>

Where a municipality has been given jurisdiction of a matter and subsequently the state takes control, all ordinances on the subject must give way, e. g., control of service and rates of street railways, within the city limits, and thereafter the state enacts a public service commission law and confers on the state commission full power, of the entire subject.<sup>47</sup>

### § 833. Implied repeals of general and special ordinance.

Some municipal charters abolish the plan of repealing an earlier ordinance by implication because in conflict with a later ordinance by requiring the prior ordinance to be repealed by the later "in express terms." Under

<sup>44</sup> District of Columbia v. Hutton, 143 U. S. 18; State v. Roller, 77 Mo. 120, 129; Smith v. State, 14 Mo. 152.

"A subsequent statute revising the whole subject of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, operates to repeal the former." State ex rel. v. Shields, 230 Mo. 91, 102, 130 S. W. 298; Gumm v. Jones, 115 Mo. App. 597, 599, 92 S. W. 169.

"In case of a statute revising the common law the implication is equally as strong." State v. Crane, 202 Mo. 54, 81, 100 S. W. 422.

"A statute may be in whole or in part repealed or superseded or abrogated by implication of law as a result of the due enactment of a subsequent statute covering the same subject, or by the operation of a later statute upon the occurrence of a definitely specified contingent event." Jacksonville v. Bowden, 67 Fla. 181, 64 So. 769, 773.

<sup>45</sup> Gregory v. Kansas City, 244 Mo. 523, 547, 149 S. W. 466.

<sup>46</sup> Valdez v. Fish, 4 Alaska 427.

<sup>47</sup> Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892; State ex rel. v. Superior Court, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78.

such charter, courts have made a later special ordinance not a repeal by implication but an exception to the prior general ordinance.<sup>48</sup>

If there is no conflict, of course, both ordinances stand and the charter provision has no application. Under such charter provision in determining whether a latter ordinance repeals a prior one "in express terms," the thing done, and not the words used is controlling. Other words which effectually destroy the prior law are just as effective as the words "hereby repealed." Thus where the title of the ordinance is to amend a prior ordinance specifically referring to it by chapter, article and section number of the book of ordinances, clearly designated, by striking out the ordinance involved and inserting in lieu thereof a new section, to be known by the same number, and employing words showing that it related to the same subject matter as the prior ordinance, which is followed by language which is repugnant and irreconcilable with the language of the prior ordinance, it was held that the prior ordinance was repealed in express terms.<sup>49</sup>

### § 834. Effect of repeal—revival.<sup>50</sup>

Where a statute or a section thereof has been amended by a subsequent act, such subsequent act supersedes and impliedly repeals the original act or section thus amended, and if the amendatory act be thereafter repealed such repeal does not revive the original act. In one case an ordinance proposing a bond issue was passed.

<sup>48</sup> *Ruschenberg v. Southern Electric Railroad Co.*, 161 Mo. 70, 61 S. W. 626; *Campbell v. St. Louis & Suburban Railway Co.*, 175 Mo. 161, 176, 177, 75 S. W. 86.

<sup>49</sup> *St. Louis v. Kellman*, 235 Mo. 687, 693, et seq., 139 S. W. 443.

License tax on poles, fixed by general ordinance, held repealed by subsequent special ordinance granting right to named persons to operate a telephone system in the city

and use the streets for poles, etc. *Springfield v. Interstate Independent Telephone & Teleg. Co.*, 279 Ill. 324, 116 N. E. 631, affirming 201 Ill. App. 227.

<sup>50</sup> The repeal of an ordinance is ineffective as to any act done or any right accrued or any claim arising under the former law. *Elgin City Banking Co. v. Chicago, M. & St. P. Ry. Co.*, 160 Ill. App. 364, 377.



The first section of a subsequent ordinance re-enacted with amendments one section of such ordinance and made provision for a special fund to pay the bonds, and the second section thereof repealed a prior amendatory ordinance of the same section. Here it was held, the repeal of the amendatory ordinance was not a repeal of the section of the original ordinance, because the subsequent ordinance expressly re-enacted in amended form the section of the original ordinance which had been amended, and repealed in express terms the earlier amendatory ordinance.<sup>51</sup>

### § 835. Same—penal ordinances.

The common law rule is that the repeal of an existing statute under which a proceeding is pending puts an end to the proceeding unless it is saved by a proper saving clause in the repealing statute; and that the penalty or punishment provided for under the repealing statute cannot then be recovered or enforced.<sup>52</sup>

This rule has been changed by constitution in Oklahoma and by statute in Alabama to the effect that all prosecutions for violation of state laws are saved from being affected by a repeal of the statute under which the offenses were committed. These laws, however, do not apply to *quasi* criminal cases for the violation of municipal ordinances.<sup>53</sup> But a general ordinance saving prosecution commenced under an ordinance from being af-

<sup>51</sup> *Schooley v. Chehalis*, 84 Wash. 667, 675, 676, 147 Pac. 410.

<sup>52</sup> "There is no vested right in the commonwealth, existing after the repeal of a criminal statute, to prosecute an offense in existence prior to the repeal of such statute. It is well settled that all proceedings that have not been determined by final judgment are wiped out by a repeal of the act under which the prosecution for the offense took place." *Scranton City v. Rose*, 60 Pa. Super. Ct. 458, 462.

<sup>53</sup> *Barton v. Gadsden*, 79 Ala. 495.

In Oklahoma, the constitution and statutes reserve this right to the state, but not to municipalities. After a prosecution was begun under an ordinance an amendment, in effect, a substitute was made and retained no saving clause, held prosecution abated. *Baldwin v. Arnett*, 10 Okl. Cr. App. 486, 138 Pac. 822.

fectured by its appeal, it has been held in Alabama, does save the prosecution although the ordinance upon which it was based was repealed during its pendency without a saving clause.<sup>54</sup> Where an amended ordinance is bad because of an exception the original ordinance, it has been held, is in full force, and where a conviction is secured under the amended ordinance, it is covered by the original ordinance.<sup>55</sup>

### § 837. Effect of repeal and re-enactment.

A provision of an ordinance is not repealed by a subsequent ordinance containing the same provision.<sup>56</sup>

Where pursuant to statute an ordinance is passed and subsequently the statute was repealed but re-enacted, the ordinance remains unimpaired. "The statutory change did not have the effect to annul the ordinance passed under the former identical grant of authority."<sup>57</sup>

### § 838. Effect of revision of ordinances as to repeal.<sup>58</sup>

### § 839. Repeal of ordinance by ordinance only.

An ordinance can be repealed only by pursuance of the same method necessary for its enactment.<sup>59</sup>

<sup>54</sup> *Birmingham v. Baranco*, 4 Ala. App. 279, 58 So. 944.

<sup>55</sup> *Fennan v. Atlantic City*, 88 N. J. L. 435, 97 Atl. 150, affirmed 90 N. J. L. 674, 101 Atl. 1054.

<sup>56</sup> *Elgin City Banking Co. v. Chicago, M. & St. P. Ry. Co.*, 160 Ill. App. 364, 376, 377.

<sup>57</sup> *Northwestern Laundry v. Des Moines*, 239 U. S. 486, 494, 36 Sup. Ct. 206, 60 L. ed.; *Allen v. Davenport*, 107 Iowa 90, 77 N. W. 532; *State v. Prouty*, 115 Iowa 657, 84 N. W. 670.

<sup>58</sup> *St. Joseph v. Sperry & Hutchison*, 189 Mo. App. 481, 483, S. W. 1073; *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 173 S. W. 176; *Mott Store Co. v. St. Louis & S.*

*F. R. Co.*, 175 Mo. App. 729, 731, 158 S. W. 106.

<sup>59</sup> *Beem v. Davis* (Idaho 1918), 175 Pac. 959, 962, holding officers of city cannot suspend the operation of an ordinance to allow a particular thing to be done, e. g.; the erection of a building.

Ordinance cannot be repealed or amended by mere order or motion. *Ludwigs v. Walla Walla*, 83 Wash. 205, 145 Pac. 193, 195, citing § 839, vol. 2, ante (*McQuillin, Mun. Ord.* § 210).

An ordinance cannot be repealed by a resolution, but only by an act of equal dignity. *Brown v. Amarillo* (Tex. Civ. App.), 180 S. W. 654, 657; *San Antonio v.*

**§ 840. When ordinance and charter provisions are superseded by charter amendment.<sup>60</sup>**

**§ 841. When charter provisions supersede general laws.**

A constitutional charter in Oklahoma supersedes all laws of the state inconsistent which relate to municipal matters, but not the general laws of the state of general concern, e. g., traffic in intoxicating liquor, against gambling and prostitution.<sup>61</sup>

Mickle-John, 89 Tex. 79, 33 S. W. 735; American Malleables Co. v. Bloomfield, 82 N. J. L. 79, 81 Atl. 500.

Salary ordinance cannot be amended or repealed by resolution. Garretson v. Fox Lake, 154 Ill. App. 58.

Charter: "No ordinance or section thereof shall be amended or repealed except by ordinance adopted by manner provided in the charter." Earlier ordinance required an ordinance to be referred to city plan commission and it had not. The earlier ordinance is general in its scope, while the ordinance involved is specific and later. "It must be held, therefore, that where its provisions are in conflict with the earlier and general ordinance, such provisions must be given effect. The rule is the same whether there is a repealing clause or not." Denver & R. G. R. Co. v. Colorado Springs (Colo. 1919), 184 Pac. 373.

<sup>60</sup> State ex rel. v. Brodie, 161 Mo. App. 538, 544, 143 S. W. 69.

Ordinance may be superseded by charter amendment. State ex rel. v. Lucas, 236 Mo. 18, 139 S. W. 348.

A provision of a new charter revising the whole subject-matter of

a general ordinance repeals the latter by implication. Gregory v. Kansas City, 244 Mo. 523, 546, 149 S. W. 466.

<sup>61</sup> Charter as to levying and collecting taxes prevails over general laws of state, so far as such laws conflict. Rogers v. Bass & Harbour Co. (Okl.), 168 Pac. 212.

Charter is to be in harmony with constitution and general law of state. No provision of any city charter shall conflict with or contravene provisions of any general law of the state. Crary v. Marquette Circuit Judge, 197 Mich. 455, 163 N. W. 905.

Legislature cannot enact, amend or repeal any municipal charter. Charter is subject to constitution and criminal laws of the state. Kalich v. Knapp, 73 Or. 558, 145 Pac. 22, reversing 142 Pac. 594. Compare Portland v. Nottingham, 58 Or. 1, 113 Pac. 28.

General laws supersede charter and ordinance provisions in conflict, e. g., public service commission law as to rates and service of public utilities. State ex rel. v. Superior Court King County, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913D, 78.

Charter provisions relating to recall of officers. State ex rel. v.

### § 843. When ordinances supersede general laws.<sup>62</sup>

In matters of state concern, aside from special provision, state laws supersede all conflicting ordinances.<sup>63</sup>

If the municipality has exclusive power to regulate the subject its ordinances will supersede general state laws, relating to the subject.<sup>64</sup> "It is well settled that an ordi-

Fairley, 76 Wash. 332, 136 Pac. 374.

Charter provisions as to purely municipal affairs prevail over general state laws. *Watts v. State* (Okla. 1920), 187 Pac. 797.

Special charter whose provisions are in harmony with state constitution adopted pursuant to the Missouri Constitution, held superseded statutes relating to government of cities of the class to which the city adopting the charter belonged. *McGhee v. Walsh*, 249 Mo. 266, 155 S. W. 445.

General law designated persons subject to road duty between the ages of twenty-one and fifty years; held charter provision fixing the ages between sixteen and fifty years controlled. *Whitehead v. Vienna*, 10 Ga. App. 337, 73 S. E. 533.

State law, held to repeal ordinance fixing salary of mayor. *Uvalde v. Burney* (Tex. Civ. App.), 145 S. W. 311.

"Where there are valid local or special laws relating to the powers and government of particular municipalities that are in conflict with the general statutory law such local or special laws prevail." *Ferguson v. McDonald*, 66 Fla. 494, 499, 63 So. 915.

<sup>62</sup> *Jacksonville v. Bowden*, 67 Fla. 181, 64 So. 769, 775, citing § 843, vol. 2, ante.

Statute as to sale of liquor, held to repeal municipal ordinance on the same subject. *Nephi City v. Forrest*, 41 Utah 433, 126 Pac. 332.

Eight hour law for workmen provided by ordinance, held not to conflict with general laws. The Ohio Constitution limits day's work to eight hours, except in cases of extraordinary emergencies. *Stange v. Cleveland (Ohio)*, 114 N. E. 261.

<sup>63</sup> City cannot make regulations in conflict with state laws. Statute supersedes ordinance, e. g., speed ordinance. *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82.

When state law regulating motor vehicles does not supersede ordinance regulating street traffic. *Bruce v. Ryan*, 138 Minn. 264, 164 N. W. 982.

See *Kalich v. Knapp*, 73 Or. 558, 142 Pac. 594, 145 Pac. 2.

Ordinance regulating street driving, traffic, etc., held not in conflict with statute on the subject. *Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.

Motor vehicle law of state which does not apply to certain cities does not supersede the ordinances of such cities on the same subject. *People v. Dwyer*, 140 N. Y. S. 475, 27 N. Y. Cr. R. 215, affirming 136 N. Y. S. 148, 26 N. Y. Cr. R. 315.

<sup>64</sup> When they conflict and city has power to regulate the subject

nance passed in pursuance of express legislative authority is a law and has the same effect as a local law, and it may prevail over a general law on the same subject.”<sup>65</sup> In California, in event of conflict between a state law and an ordinance of a municipality with a freeholder’s charter as to a purely municipal affair the latter will control.<sup>66</sup>

**§ 844. Effect on ordinances by surrender of special charter—change in class or grade.<sup>67</sup>**

**§ 845. Effect on ordinances on dissolution and reorganization.<sup>68</sup>**

exclusively, as here by constitution, city had exclusive right to adopt police regulations, speed laws. *Freemont v. Keating*, 96 Ohio St. 468, 118 N. E. 114.

<sup>65</sup> *Gould v. Baltimore*, 120 Md. 534, 87 Atl. 818, citing § 643, vol. 2, ante.

<sup>66</sup> *Muther v. Capps* (Cal. App. 1918), 177 Pac. 882.

State statute licensing the busi-

ness of private detective, yields to ordinance since it is municipal affair. *Ex parte Hitchcock* (Cal. App.), 166 Pac. 849.

<sup>67</sup> *Menefee v. Taubman*, 159 Mo. App. 318, 322, 323, 140 S. W. 604.

<sup>68</sup> Adopting new city charter changing form of government, held not to repeal ordinances. *Spokane v. Lemon*, 73 Wash. 248, 131 Pac. 853.

## CHAPTER 22.

### PLEADING ORDINANCES IN CIVIL PROCEEDINGS.

§ 847. Pleading ordinance when cause of action founded thereon.

§ 849. Judicial notice of ordinances.

§ 850. Pleading substance of ordinance.

§ 851. Pleading ordinance by title and date of passage.

§ 852. Pleading negligence in violation of ordinances.

**§ 847. Pleading ordinance when cause of action founded thereon.<sup>1</sup>**

**§ 849. Judicial notice of ordinances.**

Apart from statute so requiring,<sup>2</sup> state courts do not take judicial notice of municipal ordinances,<sup>3</sup> and, there-

<sup>1</sup> Ordinance must be pleaded. *Rowe v. United Commercial Travelers* (Iowa 1919), 172 N. W. 454, 4 A. L. R. 1235.

An ordinance relied upon as a defense must be pleaded. *Rowe v. United Commercial Travelers* (Ia. 1920), 172 N. W. 454, 4 A. L. R. 1235.

Ordinance must be pleaded as required by law. *Dailey v. Cremen*, 80 Or. 183, 156 Pac. 797.

Charter; sufficient to plead the title and date of approval and court will then take judicial notice, held not exclusive. *Shan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378.

Ordinances relied on, e. g., if ordinances relied on to show rights arising to plaintiff in regard to land, they should be set out in the pleadings in order that it may

be determined what rights are conferred by them. *Funk v. Browne*, 145 Ga. 828, 90 S. E. 64.

Ordinance claimed to have been violated, in an action for its violation, must be pleaded. *Opitz v. Schenck*, 178 Cal. 636, 174 Pac. 40.

<sup>2</sup> *Miles v. Montgomery* (Ala. App. 1919), 81 So. 351.

<sup>3</sup> Alabama. *Benjamin v. Montgomery* (Ala. App. 1919), 81 So. 145.

Arkansas. *Malvern v. Cooper*, 108 Ark. 24, 156 S. W. 845.

California. *Muther v. Caffe* (Cal. App. 1918), 177 Pac. 882, 884.

Georgia. *Funk v. Browne*, 145 Ga. 828, 90 S. E. 64.

Illinois. *Willoughby v. Brown*, 190 Ill. App. 51; *Egeland v. Scheffler*, 189 Ill. App. 426.

Indiana. *Indianapolis Traction*

fore, when a cause of action or defense rests upon an ordinance the ordinance must be pleaded and proved.<sup>4</sup>

Judicial notice of ordinances is taken by municipal courts, since the ordinances are the peculiar law of that forum.<sup>5</sup>

& T. Co. v. Hensley, 186 Ind. 479, 115 N. E. 934, 937.

Missouri. State ex rel. v. Missouri Pacific Ry. Co., 262 Mo. 720, 174 S. W. 73.

New York. People v. Traina, 155 N. Y. S. 1015, 92 Misc. Rep. 82; People v. Cronin, 154 N. Y. S. 446, 91 Misc. Rep. 342.

Ordinances of foreign states, of course, are not noticed judicially. New York C. & St. L. Ry. Co. v. Lind, 180 Ind. 38, 102 N. E. 449.

"It is a general rule, supported by unbroken authority in this state, that courts of record do not take judicial notice of municipal ordinances." Church v. Grady (Cal. App. 1919); Metteer v. Smith, 156 Cal. 572, 105 Pac. 735.

<sup>4</sup>To be considered, they must be offered in evidence as other evidential matters. St. Louis v. Ameln, 235 Mo. 669, 139 S. W. 429.

If not pleaded, ordinance may be excluded. Rowe v. United Commercial Travelers Assn. (Iowa 1919), 172 N. W. 454, 458.

An ordinance must be treated as a fact and when it is the foundation on which the plaintiff would build the case it must be pleaded and proven as a fact. Whether the information is viewed as a civil suit and tested by the rules applicable to a petition or complaint in such case, or a criminal proceeding and tested by the

stricter rules applicable to an information or indictment for a crime, in either case it is essential that the information state facts going to constitute a violation of an ordinance, and one of those essential facts is the existence of such an ordinance. St. Louis v. Ringold, 235 Mo. 472, 476, 477, 139 S. W. 186.

Such ordinances must be specially pleaded. People v. Coffin, 279 Ill. 401, 117 N. E. 85, affirming 202 Ill. 100.

"Generally speaking, courts other than those of the particular municipality do not take judicial notice of its ordinances, and in such other courts such ordinances must be pleaded in order to be admissible in evidence." Central Indiana Ry. Co. v. Wishard (Ind. App.), 104 N. E. 593, 598.

<sup>5</sup>Buffalo v. Stevenson, 129 N. Y. S. 125, 127, 145 App. Div. 117, following Ex parte Davis, 115 Cal. 445, 447, 47 Pac. 258, and Downing v. Miltonvale, 36 Kan. 740, 14 Pac. 281.

City officers may take notice of all ordinances of the city. McDonald v. Ludowici, 17 Ga. App. 523, 87 S. E. 807.

The recorder or judge of a municipal court may take. Berry v. Milledgeville, 17 Ga. App. 326, 86 S. E. 744.

Statutes require certain trial courts to take judicial notice of

**§ 850. Pleading substance of ordinance.<sup>6</sup>****§ 851. Pleading ordinance by title and date of passage.<sup>7</sup>**

ordinances. *Chicago v. Moran*, 192 Ill. App. 57.

Judge of superior court, in reviewing the judgment of a municipal court cannot take judicial notice, etc. *Berry v. Milledgeville*, 17 Ga. App. 326, 86 S. E. 744.

<sup>6</sup>*Dillon v. Beacom*, 67 Or. 118, 134 Pac. 778, 780, stating substance and effect of ordinance, held good on a general demurrer.

Pleading substance is sufficient if accurately identified. *District of Columbia v. Petty*, 37 App. D. C. 156.

Allegation that the ordinance of the city of ——— forbidding the operation of a meat market within designated territory, including the premises in question "was and is a valid ordinance of said city, legally passed and adopted," held sufficient. *Altgelt v. Gerbic* (Tex. Civ. App.), 149 S. W. 233, distinguishing *Austin v. Walton*, 68 Tex. 507, 5 S. W. 70, and *Brush Co. v. Lefevre*, 93 Tex. 604, 57 S. W. 640, 49 L. R. A. 771, 77 Am. St. Rep. 898, which ruled that the contents of the ordinance relied on should be stated, and not every step taken in its passage.

"Even in civil actions based upon the violation of a municipal ordinance, it is regarded as the better practice to set out a full statement as to the ordinance so that all questions as to its sufficiency may be raised by a demurrer. By all rules of pleading enough must be shown to establish the liability of the person charged, and this must distinctly

appear from the pleading. This rule results from the private character of such ordinances, of which no court other than those of the municipality can take judicial notice." *People v. Tait*, 261 Ill. 197, 103 N. E. 750, 753, 754.

<sup>7</sup>*Standard Oil Co. v. Birmingham* (Ala. 1918), 79 So. 489; *Barber Asphalt Paving Co. v. Jurgens*, 170 Cal. 273, 149 Pac. 560; *Church v. Grady* (Cal. App. 1919), 180 Pac. 548; *De Scheppers v. Chicago R. & P. Ry. Co.*, 179 Ill. App. 298.

Reference by number and date of passage, with an averment as to nature, will answer without pleading the ordinance in full. *State ex rel. v. Young*, 259 Mo. 52, 167 S. W. 995.

Attaching ordinance to petition as an exhibit, making the necessary allegation, held sufficient. *Panhandle Telephone & T. Co. v. Amarillo* (Tex. Civ. App.), 142 S. W. 638.

Under the California Statute, in pleading an ordinance it must be set out in *haec verba* or by reference to its title and the day of its passage. *Aalwyn's Law Institute v. San Francisco* (Cal. App. 1919), 179 Pac. 220.

In an action for injury due to collision of automobile and motorcycle, charging unlawful rate of speed, pleading an ordinance by title forbidding certain rate of speed, held good against motion to strike out or to make definite and certain, since an applicable statute required the court to take judicial notice of an ordinance pleaded



**§ 852. Pleading negligence in violation of ordinances.<sup>8</sup>**

Whether when the cause of action or defense is based upon a violation of an ordinance, the ordinance should

by title. *Peterson v. Pallis*, 103 Wash. 180, 173 Pac. 1021.

Under a law providing that in pleading an ordinance it shall be sufficient, or a right derived therefrom it shall be sufficient to refer to such ordinance by its title and the date of its approval, and the court thereupon shall take judicial notice thereof, it was held, this does not provide an exclusive rule of pleading, nor deprive the pleader of the right to state the provisions of either a charter or an ordinance about which the question is raised. *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378.

In an equitable action to compel specific performance of an agreement to sell a certain lot of land and to have an additional lot conveyed by a municipality to the plaintiff instead of to the defendant because of certain ordinances which it was alleged gave that right to the owner of the main lot in controversy upon the payment of a certain sum, a mere general reference to certain ordinances by named dates was held insufficient. *Funk v. Browne*, 145 Ga. 828, 90 S. E. 64.

<sup>8</sup> Under a general allegation of negligence, violation of an ordinance may be proved without pleading it. The ordinance "is simply evidentiary matter, and under our system of pleading it would be improper to plead it." *Opitz v. Schenck* (Cal.), 174 Pac. 40; *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663, 98 Pac. 1063, 16 Ann. Cas. 1061.

In actions for damages for negligence in the violation of municipal ordinances the complaint or petition must set out the ordinance or its substance. *Central Indiana Ry. Co. v. Wishard* (Ind. App.), 104 N. E. 593, 598.

Before a court can determine whether the violation of an ordinance was contributory negligence in an action for personal injuries due to a collision, the ordinance must be pleaded. *Central Indiana Ry. Co. v. Wishard* (Ind. App.), 104 N. E. 593, 598.

An ordinance relied on as a defense in an action for injuries due to alleged negligence is admissible under the general issue, without having been specially pleaded. "It is undoubtedly true that where a cause of action is predicated upon a statute or ordinance the statute or ordinance must be pleaded, but where, as here, the action is not predicated upon the ordinance but the ordinance is invoked as a defense, we think such ordinance may be properly admitted under the general issue. The admissibility of an ordinance under the general issue does not differ, in principle, from the admission of a foreign statute as a matter of defense." *Flynn v. Chicago City Ry. Co.*, 250 Ill. 460, 95 N. E. 449, reversing 159 Ill. App. 405.

"The general rule is well settled that courts do not take judicial notice of ordinances of incorporated towns, and where suit is predicated on such an ordinance,

be pleaded, and the method thereof, a lack of harmony in judicial judgments appears.

so much of the same as relates to the action must be made a part of the complaint. Similarly, matters of defense which touch the scope of such ordinance or its sufficiency as a foundation for the action must first be specially presented in the trial court by motion, demurrer or answer." *Indianapolis Traction & T. Co. v. Hensley* (Ind.), 115 N. E. 934, 937.

Petition charging negligence "in violating the city ordinances of

the City of C in running at a much greater rate of speed than is permitted and allowed by said ordinance duly enacted and in force at the time of the accident," held sufficient to notify the railroad company that the ordinance would be offered in evidence, "and was good, at least in the absence of special exception." *San Antonio & A. P. Ry. Co. v. Boyed* (Tex. Civ. App. 1918), 201 S. W. 219.

## CHAPTER 23.

### EVIDENCE OF ORDINANCES.

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|---|--|
| § 858. Proof of authority to enact.                       | § 867. Same—ordinances published by authority.                         |
| § 859. Proof of existence of ordinance when required.     | § 868. Same—when original record required.                             |
| § 860. Burden of proof.                                   | § 869. Same—proof by copy.   |
| § 861. Judicial notice—appeal from municipal courts.      | § 870. Same—sufficiency of authentication.                             |
| § 862. Proof of formal steps in enactment, when required. | § 872. Admissibility of parol testimony to prove.                      |
| § 863. Proof of record of ordinance.                      | § 873. Proof of violation of ordinance as evidence of negligence.      |
| § 864. Proof of publication of ordinance, when required.  | § 874. Proof of violation by plaintiff in actions for civil liability. |
| § 865. How proof of publication made.                     |  |
| § 866. How ordinances proved.                             |  |

#### § 858. Proof of authority to enact.<sup>1</sup>

#### § 859. Proof of existence of ordinance when required.<sup>2</sup>

<sup>1</sup>In a prosecution for failure to comply with a sanitary ordinance in Louisiana where the defense was want of power to enact the ordinance involved, it was held, that the municipality must first show that it had power to pass the ordinance. "In such case the town must be given every reasonable opportunity of proving that it is proceeding within the law." *Hammond v. Baddeau*, 134 La. 871, 64 So. 803.

<sup>2</sup>When the authorized record or ordinance book containing the ordinance involved is duly identified it is prima facie evidence of the validity of the ordinance and that

all preliminary steps to its due enactment and enforcement have been regularly taken. *Pittsburgh, C. C. & St. L. Ry. Co. v. Macy*, 59 Ind. App. 125, 107 N. E. 486, 492, citing § 859, vol. 2, ante.

An ordinance must be promulgated in the manner prescribed to have any effect. Where the enactment of the ordinance involved is denied, it must be shown that it was duly enacted and promulgated as required. *Slidell v. Levy*, 128 La. 809, 55 So. 413.

If an ordinance is introduced without proof of its existence and without objection, proof thereof will be held waived. *Boylard v.*

## § 860. Burden of proof.

One who challenges the validity of an ordinance has the burden of proof.<sup>3</sup>

Parkerburg, 78 W. Va. 749, 90 S. E. 347.

One claiming salary by virtue of an ordinance, under particular circumstances, held must show the existence of the ordinance. *El Dorado v. Faulkner*, 107 Ark. 455, 155 Pac. 516.

<sup>3</sup> Alabama. *Standard Chemical & Oil Co. v. Troy (Ala.)*, 77 So. 383.

Arkansas. *Pierce Oil Corp. v. Hope*, 127 Ark. 38, 191 S. W. 405; *North Little Rock v. Rose*, 136 Ark. 298, 206 S. W. 449.

California. *Pacific Gas & El. Co. v. Sacramento Police Court*, 28 Cal. App. 412, 152 Pac. 928.

Colorado. *Delta v. Charlesworth (Colo.)*, 170 Pac. 965; *Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816.

Georgia. *Jefferson v. Perry*, 18 Ga. 689, 90 S. E. 365; *Atlantic Postal Telegraph-Cable Co. v. Savannah*, 136 Ga. 657, 71 S. E. 1115; *Killebrew v. Wrightsville*, 17 Ga. App. 809, 88 S. E. 590; *Sampson v. Thomasville*, 17 Ga. App. 541, 87 S. E. 835; *Moore v. Thomasville*, 17 Ga. App. 285, 86 S. E. 641; *McDonald v. Ludowici*, 17 Ga. App. 523, 87 S. E. 807.

Illinois. *Chicago v. Walden W. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588; *Hangan v. Chicago*, 259 Ill. 249, 102 N. E. 185; *People ex rel. v. Oak Park*, 266 Ill. 365, 107 N. E. 636; *Depue v. Banschbach*, 273 Ill. 574, 113 N. E. 156.

Missouri. *Hislop v. Joplin*, 250 Mo. 588, 157 S. W. 625; *State ex rel. v. Missouri Pacific Ry. Co.*, 262 Mo. 720, 174 S. W. 73; *St. Louis v. United Rys. Co.*, 263 Mo. 387, 174 S. W. 78; *Windsor v. Bast (Mo. App.)*, 199 S. W. 722.

New Jersey. *Neumann v. Hoboken*, 82 N. J. L. 275, 82 Atl. 511.

New York. *Stubbe v. Adamson*, 159 N. Y. S. 751, 173 App. Div. 305; *People ex rel. v. Warden of Jail*, 216 N. Y. 154, 110 N. E. 451.

Ohio. *State ex rel. v. Rendigs*, 98 Ohio 251, 120 N. E. 836.

Texas. *Brenham v. Holle & Seelhorst (Tex. Civ. App.)*, 153 S. W. 345.

Utah. *American Fork City v. Charlier*, 43 Utah 231, 134 Pac. 739, 746, quoting with approval from § 860, vol. 2, ante (*McQuillin, Mun. Ord. § 384*).

Proceedings for the assessment of property for street improvements being in invitum, it follows that after the defendant has proved, in the usual manner, the existence of an ordinance preserved in the city's official records as the true and genuine act of its common council, purporting to cast upon the city the burden of paying for the work, facts tending to invalidate such ordinance must be proved by the city or the person seeking to deny the city's liability. *Barber Asphalt Paving Co. v. Jurgens*, 170 Cal. 273, 149 Pac. 560, 563.

“An ordinance when duly proved is presumed to continue in force until the contrary is shown.”<sup>4</sup>

**§ 861. Judicial notice—appeal from municipal courts.<sup>5</sup>**

**§ 862. Proof of formal steps in enactment, when required.**

Whether an ordinance was adopted is a question of fact, and if the ordinance was in fact passed, the fact can be shown that a mistake in the minutes had been made by reciting that the ordinance was adopted as a chapter instead of as a title.<sup>6</sup>

**§ 863. Proof of record of ordinance.<sup>7</sup>**

Production of the ordinance, proof that it was duly passed and proof of publication thereof, as required by law, is sufficient proof.<sup>8</sup>

Where the record as a whole contains a sufficient authentication of the passage of the ordinance it is admissible in evidence, although the council records were kept in a crude and careless manner.<sup>9</sup>

**§ 864. Proof of publication of ordinance, when required.**

Some decisions hold that where a book containing the ordinances of the city published presumably in obedience

<sup>4</sup> *Pittsburgh, C. C. & St. L. Ry. Co. v. Macy*, 59 Ind. App. 125, 107 N. E. 486, 492, citing § 860, vol. 2, ante; *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208.

<sup>5</sup> On appeal from municipal court where judicial notice of ordinance are taken, appellate courts also take judicial notice, etc. *Buffalo v. Stevenson*, 129 N. Y. S. 125, 127, 145 App. Div. 117, following *Solomon v. Hughes*, 24 Kan. 211.

State appellate court will not take judicial notice of municipal ordinances. *Peterson v. United*

*Rys. Co.*, 183 Mo. App. 715, 720, 168 S. W. 254.

<sup>6</sup> *Houston E. & W. T. Ry. Co. v. Cavanaugh* (Tex. Civ. App.), 173 S. W. 619, 623.

<sup>7</sup> *Wabash R. Co. v. Gretzinger*, 182 Ind. 155, 104 N. E. 69.

Proof of passage by record. *Corinth v. Sharp*, 107 Miss. 696, 708, 65 So. 888, 64 So. 379.

<sup>8</sup> *American Fork City v. Charlier*, 43 Utah 231, 134 Pac. 739, citing § 863, vol. 2, ante (*McQuillin, Mun. Ord.* § 387).

<sup>9</sup> *Looney v. Commonwealth*, 115 Va. 921, 78 S. E. 625, 628.

to the law, imposing the duty of publishing the ordinance, is offered in proof of an ordinance included therein, the same is admissible without further authentication; but where the law exacts publication as a condition precedent to the ordinance becoming a law, necessarily such prerequisite must be proved, otherwise, if not shown, no law is exhibited; therefore it was held that a penal ordinance was inadmissible where its publication was not shown.<sup>10</sup>

After lapse of many years the presumption will be indulged that the ordinance was duly published.<sup>11</sup>

The burden of proof of publication is on the one denying the validity of the ordinance.<sup>12</sup>

### § 865. How proof of publication made.<sup>13</sup>

### § 866. How ordinances proved.

Laws authorize proof of ordinances to be made (1) by the certificate of the city clerk, (2) by the production of a book or pamphlet purporting to be published by authority of the municipality, (3) by showing every step necessary to the enactment from the original records, but such methods are not exclusive.<sup>14</sup> The passage of an ordinance may be proved by common law methods.<sup>15</sup>

### § 867. Same—ordinances published by authority.<sup>16</sup>

<sup>10</sup> Woodruff v. Deshazo (Tex. Civ. App.), 181 S. W. 250, following Austin v. Walton, 68 Tex. 507, 5 S. W. 71.

<sup>11</sup> Eleven years. Depue v. Banschbach, 273 Ill. 574, 113 N. E. 156.

<sup>12</sup> Barber Asphalt Paving Co. v. Jurgens, 170 Cal. 273, 149 Pac. 560, 563, citing § 864, vol. 2, ante.

<sup>13</sup> Lampasas v. Hurling (Tex. Civ. App. 1919), 209 S. W. 213.

Cannot be proved by parol. Malvern v. Cooper, 108 Ark. 261, 156 S. W. 845, 847.

Mode prescribed by statute, held not exclusive. Strickland v. Samson (Ala. App. 1918), 80 So. 166.

<sup>14</sup> Van Valkenberg v. Rutherford, 92 Neb. 803, 139 N. W. 652.

<sup>15</sup> Re Alexander, 94 Neb. 774, 144 N. W. 907; Van Valkenberg v. Rutherford, 92 Neb. 803, 139 N. W. 652.

<sup>16</sup> Denver City Tramway Co. v. Carson, 21 Colo. App. 604, 123 Pac. 680; Strickland v. Samson (Ala. App. 1918), 80 So. 166; Pittsburgh, C. C. & St. L. Ry. Co. v. Macy, 59 Ind. App. 125, 107 N.

§ 868. Same—when original record required.<sup>17</sup>

§ 869. Same—proof by copy.<sup>18</sup>

§ 870. Same—sufficiency of authentication.<sup>19</sup>

§ 872. Admissibility of parol testimony to prove.<sup>20</sup>

E. 486; *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 457-461, 173 S. W. 11; *Moberly v. Deskin*, 169 Mo. App. 672, 675, 155 S. W. 842, citing § 867, vol. 2, ante.

Proof of ordinance by production of book or pamphlet purporting to be published by authority of the city. *Van Valkenberg v. Rutherford*, 92 Neb. 803, 139 N. W. 652; *Bugg v. Houlka* (Miss. 1920), 84 So. 387.

Printed code of ordinances purporting to have been published by authority of the council, containing the ordinance in question is admissible by statute. *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208; *Plummer v. Indianapolis Union Ry. Co.*, 56 Ind. App. 615, 104 N. E. 601.

The introduction of the book containing the ordinances of the municipality, the one involved, the presumption of the validity of the ordinance attaches. "If the ordinance was invalid by reason of any irregularity in its passage this was matter of defense to be set up by defendant." *Birmingham Ry. Light & Power Co. v. Fuqua*, 174 Ala. 631, 56 So. 578, 580.

<sup>17</sup> Proof by original record showing that the ordinance was duly passed. *Van Valkenberg v. Rutherford*, 92 Neb. 803, 139 N. W. 652.

Sufficiency of record to show passage of ordinance. *Bell v. Jonesboro*, 3 Ala. App. 652, 57 So. 138.

<sup>18</sup> By statute, ordinance may be read in evidence from a certified copy, or from an authorized printed volume. *People v. Traina*, 155 N. Y. S. 1015, 92 Misc. Rep. 82.

<sup>19</sup> *Little v. Attalla*, 4 Ala. App. 287, 58 So. 949.

Statute authorized proof of ordinance by certificate of clerk. *Van Valkenberg v. Rutherford*, 92 Neb. 803, 139 N. W. 652.

Certification to by the clerk under the corporate seal. *Meldrum v. State*, 23 Wyo. 12, 146 Pac. 596, 600.

Ordinance certified by the city clerk, and authenticated by the corporate seal is admissible in evidence by virtue of statute providing that all ordinances and the date of publication thereof may be proven by the certificate of the clerk under the seal of the corporation. *Decatur v. Barteau*, 260 Ill. 612, 103 N. E. 601, 603, distinguishing *Schott v. People*, 89 Ill. 195, relating to proof of an ordinance under a special charter, and following *Terre Haute & Indianapolis R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20.

<sup>20</sup> "Parol testimony is not admissible to prove an ordinance or

### § 873. Proof of violation of ordinance as evidence of negligence.<sup>21</sup>

The rule in many states is that violation of a statute or ordinance is negligence *per se*,<sup>22</sup> where such violation is

resolution of a town or city council." *El Dorado v. Faulkner*, 107 Ark. 455, 155 Pac. 516; *Balvern v. Cooper*, 108 Ark. 24, 156 S. W. 845.

An ordinance showing on its face that it was passed on a date named cannot be shown by the oral testimony of the city clerk to have been in force prior to that time. *Young v. Dunlap*, 195 Mo. App. 119, 123, 190 S. W. 1041.

Mayor may testify that a particular ordinance was in force and effect at a given date. *Galveston H. & S. A. Ry. Co. v. Harling* (Tex. Civ. App.), 208 S. W. 207, 212.

<sup>21</sup> *Peterson v. Chicago & Alton Ry. Co.*, 265 Mo. 462, 178 S. W. 182.

Violation of ordinance as to running automobile as evidence of negligence. *Kolankiewiz v. Burke*, 91 N. J. L. 567, 103 Atl. 249.

Failure to comply with ordinance requiring drivers of teams on public streets to have sufficient reins, or be walking so near as to have control of same—is evidence of negligence but not negligence *per se*. *Briggs v. Ice Company*, 112 Me. 344, 92 Atl. 185.

Where compliance with traffic ordinance is impossible, failure to comply therewith is not negligence *per se*, as where one travels on lefthand side of street owing to fact that righthand side is in untraveled condition. *Fisher v.*

*Railway Co.*, 177 Iowa 406, 157 N. W. 860.

**Violation does not create cause of action.** Violation of a penal ordinance in failure of abutters to remove snow and ice from the sidewalk where law made such abutting owners liable civilly to pedestrians receiving injury due to defective sidewalks, held not to give by implication cause of action in favor of a pedestrian so injured. *Smith v. Meier & Frank Inv. Co.*, 87 Or. 683, 171 Pac. 555.

<sup>22</sup> *Hill v. Condon*, 14 Ala. App. 332, 70 So. 208; *Wack v. St. Louis, I. M. & S. Ry. Co.*, 175 Mo. App. 111, 123, 157 S. W. 1070; *Weimer v. Rosen* (Ohio 1919), 126 N. E. 307; *Helber v. Harkness* (Mich. 1920), 178 N. W. 46.

Violation of an ordinance regulating the operation of street cars is negligence. *Denver City Tramway Co. v. Carson*, 21 Colo. App. 604, 123 Pac. 680.

Violation is ordinarily negligence but such violation does not relieve the duty imposed by law on the traveler, etc. *Hamm v. United Rys. Co.*, 184 Mo. App. 5, 12, 167 S. W. 1070.

Violation of vigilant watch ordinance as applied to street railways is negligence. *Criss v. United Rys. Co.*, 183 Mo. App. 392, 166 S. W. 834.

"Negligent violation of statutes or municipal ordinances defining reasonable care in the operation of agencies that may inflict in-



the proximate cause of injury.<sup>23</sup> But the rule thus broadly stated is not accepted in all states.

**§ 874. Proof of violation by plaintiff in actions for civil liability.<sup>24</sup>**

jury if not properly used is negligence per se." *Miles v. The Central Coal & Coke Co.*, 172 Mo. App. 229, 239, 157 S. W. 867.

"The violation of an ordinance in and of itself constitutes and establishes negligence." Instruction to jury sustained, where ordinance prohibited washing sidewalks between 8 A. M. and 6 P. M. *Mora v. Favilla* (Cal. App. 1918), 173 Pac. 770.

The rule in Washington is that "a thing which is done in violation of positive law is in itself negligence" in the absence of pleading and proof of such peculiar facts as would tend to justify the violation; e. g., failure to observe the law of the road in violation of an ordinance. *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331.

<sup>23</sup> *Battles v. United Rys. Co.*, 178 Mo. App. 596, 614, 161 S. W. 614; *Chappell v. United Rys. Co.*, 174 Mo. App. 126, 156 S. W. 819.

Violation of speed ordinance by automobile is negligence per se, but of course, to recover such violation must be the proximate cause of the injury. *Cabanne v. St. Louis Car Co.*, 178 Mo. App. 718, 732, 161 S. W. 597.

<sup>24</sup> See § 1395, post.

One violating an ordinance precluded from recovery, when. *Carroll Blake Const. Co. v. Boyle*, 140 Tenn. 166, 203 S. W. 945, 948.

Ordinance forbidding horses from running at large is not available as a defense in an action for killing a horse. *Windle v. Southwest Mo. R. R. Co.*, 168 Mo. App. 596, 605, 153 S. W. 282.

## CHAPTER 24.

### MUNICIPAL CONTROL OF OFFENSES AGAINST STATE.

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|---|---|
| § 876. Municipal and state offenses.  | § 881. Same—Illinois.   |
| § 877. Sources of municipal power to legislate on offenses against the state.               | § 882. Same—Kentucky.   |
| § 878. The same act may be made an offense against the state and the municipal corporation. | § 883. Same—Missouri.   |
| § 880. Same—Georgia.  | § 886. Same—Texas.  |
|   | § 887. Offenses that may be made both state and municipal enumerated. |
|   | § 888. Can there be two punishments?                                  |

#### § 876. Municipal and state offenses.<sup>1</sup>

<sup>1</sup> City may license and regulate the use of jitney busses on the city streets, although a state law regulates automobiles and motor vehicles on public highways and streets. Held, no conflict. *Ex parte Counts*, 39 Nev. 61, 73, 153 Pac. 93, 96, citing § 876, vol. 2, ante.

Municipal functions distinguished from state, § 173, ante; § 173, vol. 1, ante.

Municipality cannot under general powers prohibit possession of intoxicating liquors by ordinance. "Indictable misdemeanors" cannot be dealt with by ordinance under general power since they are not municipal affairs. *State v. Frederic*, 28 Idaho 709, 155 Pac. 977.

Statute declared that all offenses under the penal laws of the state constituting misdemeanors when so prescribed by municipal ordinance shall be local offenses also.

An ordinance including above and offenses against the criminal laws of state also, was held void, because the statute excluded felonies. The statute expressly limited the power of municipalities to offenses constituting misdemeanors. *Bacot v. Laurel* (Miss.), 68 So. 248, following *Oakland v. Miller*, 90 Miss. 275, 43 So. 467, which was approved in *Dismukes v. Louisville*, 101 Miss. 104, 57 So. 547.

"The legislature having delegated to the municipality the power to prohibit gaming 'it was altogether immaterial, in bestowing this power on the city, whether the state had created this offense against its own laws or not.' *Taladega v. Fitzpatrick*, 133 Ala. 613, 616, 32 So. 252. Even if no statute had been enacted by the state to punish persons for gaming the municipality in passing a by-law for the enforcement of peace and good order of the city had au-

§ 877. Sources of municipal power to legislate on offenses against the state.<sup>2</sup>

§ 878. The same act may be made an offense against the state and the municipal corporation.<sup>3</sup>

As to the proposition whether this is true only where express authority has been given the municipal corpora-

thority under the delegated power to enact such an ordinance, as an offense against the state and the corporation are distinguishable." *Little v. Attalla*, 4 Ala. App. 287, 58 So. 949.

<sup>2</sup> *Amerien Fork City v. Charlier*, 43 Utah 231, 134 Pac. 739, citing § 877, vol. 2, ante; *Peterson v. Chicago & Alton Ry. Co.*, 265 Mo. 462, 178 S. W. 182.

Legislature may resume power given to municipalities. *Chicago v. Burke*, 226 Ill. 191, 80 N. E. 720.

Grants often give city police powers of the state as to acts which might be made minor offenses. Sexual intercourse between white persons and negroes may be forbidden by ordinance, not inconsistent with statutes. State may grant power to cities to make acts offenses in city limits although state has never made such acts state offenses. *Strauss v. State* (Tex. Cr. App.), 173 S. W. 663.

State law regulating motor vehicles, licensing, etc. Ordinances dealing with the same subject, of course, must be consistent with state law, and observe classification, if any, of state law. "Ordinances and statutes that provide different provisions for people residing in municipalities from those residing outside are almost universally held valid if the classi-

fication is based upon a reasonable distinction. Such a law is not unconstitutional because it results in some practical inequalities." Residents use streets more than non-residents, and this is reasonable basis, etc. *Heartt v. Downers Grove*, 278 Ill. 92, 115 N. E. 869.

Gambling; municipal police power over is dependent upon its charter and general laws. City possessed no power to penalize gambling games, and charter power "to close gambling houses," held not to embrace power to penalize betting of money on games, including poker, which have never been prohibited by state laws. *Baton Rouge v. Weis*, 141 La. 99, 74 So. 709, following *Marksville v. Worthy*, 123 La. 432, 49 So. 11, 131 Am. St. Rep. 353, and *Shreveport v. Maloney*, 107 La. 194, 195, 31 So. 702, and distinguishing *Ruston v. Perkins*, 114 La. 851, 38 So. 583, where the applicable legislative act conferred power to forbid and suppress gambling games such as "draw poker."

<sup>3</sup> See note 17 L. R. A. (N. S.) 49.

Alabama. *Little v. Attalla*, 4 Ala. App. 287, 58 So. 949.

Colorado. *Provident Loan Soc. v. Denver* (Colo.), 172 Pac. 10.

Georgia. *Shurman v. Atlanta*, 148 Ga. 1, 95 S. E. 698.

Nevada. *Ex parte Counts*, 39

tion to legislate on the subject, and that under general grant of power no implied authority to penalize acts punishable by statute exists there is lack of harmony in the judicial decisions. The exigencies of municipal life require more rigid regulations than is required in rural sections of the state.<sup>4</sup>

Clearly many acts are far more injurious, and the temptation to commit them much greater in congested centers than in the state at large, and when done are not only injurious to the public at large but added injury to the inhabitants of the local community.<sup>5</sup> The better doctrine, therefore, is that the municipality may ex-

Nev. 61, 153 Pac. 93, citing § 876, vol. 2, ante.

N. Carolina. *State v. Medlin*, 170 N. C. 682, 86 S. E. 597.

Oregon. *Portland v. Parker*, 69 Or. 271, 138 Pac. 852.

S. Carolina. *Columbia v. Phillips*, 101 S. C. 391, 85 S. E. 963.

Utah. *American Fork City v. Charlier*, 43 Utah 231, 134 Pac. 739, citing § 878, vol. 2, ante; *Salt Lake City v. Doran*, 42 Utah 401, 131 Pac. 636, 640 citing § 878, vol. 2, ante. (*McQuillin*, Mun. Ord., § 500.)

Virginia. *Elsner Bros. v. Hawkins*, 113 Va. 47, 73 S. E. 479.

Washington. *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18.

"It is well settled that an act may be made a penal offense under the statute of a state, and also made punishable under an ordinance of a municipal corporation." *Guidoni v. Wheeler*, 230 Fed. 93, 96, 144 C. C. A. 391.

"An act may constitute a double offense; it may violate a statute making it a misdemeanor and it may violate a municipal ordinance making it a quasi criminal

offense." *Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42.

To fix rates for public utility service, as gas given by constitution and statute, preventing discriminations, rebate, drawback or other device. *Economic Gas Co. v. Los Angeles*, 168 Cal. 448, 143 Pac. 717.

<sup>4</sup> *Guidoni v. Wheeler*, 230 Fed. 93, 96, 144 C. C. A. 391.

<sup>5</sup> *Kansas City v. Henre*, 96 Kan. 794, 153 Pac. 548; *Neola v. Reichart*, 131 Iowa 492, 497, 109 N. W. 5, 7; *Re Hoffman*, 155 Cal. 114, 118, 99 Pac. 517, 519, 132 Am. St. Rep. 75; *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872.

"Common experience shows that city corporations find it necessary for the peace and good order of the city to forbid the doing of many acts, under penalty, as to which the legislature have not found it necessary to legislate." *Greenville v. Kemmis*, 58 S. C. 433, 36 S. E. 729, 50 L. R. A. 725, sustaining an ordinance prohibiting gambling.

ercise necessary implied authority in police control,<sup>6</sup> in imposing penal regulations, consistent with the constitution and laws of the state,<sup>7</sup> although the act has been made a penal offense by statute. Thus in Kansas the rule is settled that where power is conferred upon cities to enact ordinances for the preservation of peace and good order within the city or for the preservation of the health of its inhabitants it may be exercised although the state by statute had provided regulations on the same subject. An ordinance must not conflict with or operate to nullify the state law. Nor can an ordinance authorize that which a statute prohibits, nor the punishment of an act which the statute expressly permits. The rule is that it is competent for a city, possessing ample power, to prescribe that an act shall be an offense against the authority of a city, although the same act is made an offense against the state.<sup>8</sup>

The ordinance may supplement the statute.<sup>9</sup>

In many jurisdictions it is held that an ordinance enacted in the exercise of the police power is not necessarily inconsistent with a state law on the same subject

<sup>6</sup> *Guidoni v. Wheeler*, 230 Fed. 93, 96, 144 C. C. A. 391.

<sup>7</sup> Section 647, ante.

Ordinances enacted pursuant to statute authorizing municipal corporations to punish misdemeanors cannot be broader than the statute. *Greenwood v. Smothers*, 103 Ark. 158, 146 S. W. 109.

Where enforcement of ordinance would be incompatible with the enforcement of the statute, or where the ordinance undertakes to supersede a state law within the municipal area it is void. *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

Ordinance forbidding certain kinds of business on Sunday, held not to conflict with statute for-

bidding on Sunday, manual, visible and noisy labor. *State v. Medlin*, 170 N. C. 682, 86 S. E. 597.

State laws as to inspection of establishments where food is manufactured, prepared, etc., not in conflict with ordinance passed under sufficient power, regulating bakers, inspection, etc. *Chicago v. Drogasawacz*, 256 Ill. 34, 99 N. E. 869.

<sup>8</sup> *Kansas City v. Henre*, 96 Kan. 794, 153 Pac. 548.

<sup>9</sup> Weighing coal. *Brittingham & Hixon Lumber Co. v. Sparta*, 157 Wis. 345, 147 N. W. 635.

Additional regulations may be made by city consistent, of course, with state laws. *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389.

because it provides for greater restrictions or prescribes higher standards than is ordained by the statute.<sup>10</sup>

Lack of uniformity appears in the decisions as to the regulation of street traffic, and motor vehicles,<sup>11</sup> and where there is conflict in the penalties of the state law and ordinance.<sup>12</sup>

<sup>10</sup> In Kansas it has been held that an ordinance is valid which provides a higher standard of food value in milk sold or kept for sale within the city than is prescribed by statute, and that such ordinance may fix a greater penalty for violation thereof than provided by the statute for its violation. *Kansas City v. Henre*, 96 Kan. 794, 153 Pac. 548.

<sup>11</sup> Statute regulating motor vehicles, and ordinance regulating jitney busses, held no conflict. *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840.

Motor vehicle statute intended to prescribe uniform regulations, etc., and hence supersede ordinance regulations. *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82.

Purpose of motor vehicle act was to make uniform method free from conflicting municipal legislation—but object was not to forbid cities from regulating by license, etc. *Morristown-Madison Auto Bus Co. v. Madison*, 85 N. J. L. 59, 88 Atl. 829.

State law regulating auto driver held not to conflict with ordinance directing manner in turning in crossing streets. Cities may make reasonable police regulations respecting the use of its streets not in contravention of the letter or spirit of statute on the same subject. This is well settled and not open to question. *Oshkosh v.*

*Campbell*, 151 Wis. 567, 139 N. W. 316.

Jitney regulations by statute and ordinance, held valid where there is no inconsistency. *Allen v. Bellingham*, 95 Wash. 12, 163 Pac. 18.

“A city may, as we have many times held, enact ordinances on subjects covered by the state statutes, operative within the jurisdiction of the city, when the statute does not expressly prohibit it.” If there is an express prohibition in the statute, an ordinance on the same subject is therefore void. *Seattle v. Rothweiler*, 101 Wash. 680, 172 Pac. 825.

Motor vehicle law, as to speed, etc., speed fixed by ordinance must not be greater than that prescribed by state law. Here ordinance was passed and then state law. The legislature intended to establish uniformity in matter of speed of motor cars throughout the state. There was no exception as to cities. Ordinance, of course, must not conflict with state law. *People v. Dwyer*, 136 N. Y. S. 148, 26 N. Y. Cr. R. 315, following *People ex rel. v. Keeper of the Prison*, 190 N. Y. 315, 83 N. E. 44; *Chapman v. Selover*, 159 N. Y. S. 632, 172 App. Div. 858.

<sup>12</sup> *Vagrancy*, ordinance and statute, the latter imposing heavier penalty. *Portland v. Parker*, 69 Or. 271, 138 Pac. 852.

The rule in many states is that an ordinance is not necessarily repugnant to the state law on the same subject merely because it prescribes a greater penalty than that fixed by the statute.<sup>13</sup>

### § 880. Same—Georgia.

“When the state assumes to punish for the commission of an act which it has denounced as a crime, its reservation of jurisdiction is absolutely exclusive. It reserves to itself the sole right to punish the offender, not only in the maintenance of its own dignity and with a view to uniformity of procedure and penalty, but also in order to protect the citizen from being twice placed in jeopardy or from being twice punished for the same offense. There is no exception to this rule save where the state expressly delegates to some subordinate department of the government the right in its stead to punish for the particular act forbidden by the state law.”<sup>14</sup>

In Georgia it appears that these two propositions are well settled: (1) That a municipal corporation cannot punish for an offense against the criminal laws of the state, and (2) that the same physical act, by reason of the circumstances surrounding its commission, or by reason of the intent with which it is done or by reason of something else especially characterizing it, may draw to the person committing it such twofold guilt as to make him responsible for two separate offenses, one of which

Ordinance against selling or giving away liquor, held not “inconsistent with the laws of the state;” penalty of the ordinance was less than prescribed by statute. *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

<sup>13</sup> *Stark v. Geiser*, 90 Kan. 504, 135 Pac. 666; *Minneola v. Naylor*, 84 Kan. 147, 113 Pac. 309.

Under some laws, city may increase the statutory penalty—e. g., for operating amusements on Sunday. *Fenmann v. Atlantic City*,

90 N. J. L. 674, 101 Atl. 1054, affirming 88 N. J. L. 435, 97 Atl. 150.

State law made penalty \$25 for train to block a street crossing more than five minutes, and ordinance made fine not exceeding \$50, held valid. *Owosso v. Michigan Central R. Co.*, 183 Mich. 688, 150 N. W. 323.

<sup>14</sup> *Alexander v. Atlanta*, 13 Ga. App. 354, 79 S. E. 177, holding void an ordinance forbidding keeping a gaming house.

may be a municipal offense, and the other a crime under the public laws of the state.<sup>15</sup>

Accordingly an ordinance defining an offense separate and distinct from that defined by statute which may be incidentally committed in connection with it is valid in that state.<sup>16</sup>

On the contrary an ordinance which does not create a different offense from that defined by statute is void. Thus an ordinance penalizing the keeping of "a house of ill fame," defines the same offense as a statute forbidding under penalty the keeping of "a lewd house or place for the practice of fornication or adultery."<sup>17</sup>

"An act penalized by a law of the state may be penalized also by a municipal ordinance, if there is in the municipal offense some essential ingredient not essential to the state offense, or if the municipal offense lacks some ingredient essential to the state offense."<sup>18</sup>

"The test to be applied in determining whether or not the state law and the municipal ordinance cover the identical offense is whether the one can be violated without violating the other. \* \* \* A municipality may by ordinance penalize an act performed by one for the purpose of enabling him to accomplish another and distinct act which itself constitutes a violation of a state statute."<sup>19</sup>

### § 881. Same—Illinois.<sup>20</sup>

<sup>15</sup> Cotton v. Atlanta, 10 Ga. App. 397, 73 S. E. 683; Dannie v. Atlanta, 10 Ga. App. 471, 73 S. E. 684.

<sup>16</sup> Ramsey v. Atlanta, 15 Ga. App. 345, 83 S. E. 148.

<sup>17</sup> Cotton v. Atlanta, 10 Ga. App. 397, 73 S. E. 683.

<sup>18</sup> Loach v. La Fayette, 19 Ga. App. 639, 91 S. E. 1057; Morris v. State, 18 Ga. App. 684, 90 S. E. 36; following Hood v. Von Glahn, 88 Ga. 413, 14 S. E. 564; Howell v. State, 13 Ga. App. 74, 76, 78 S. E. 859; Athens v. At-

lanta, 6 Ga. App. 245, 64 S. E. 711; Alexander v. Atlanta, 6 Ga. App. 329, 64 S. E. 1105; Callaway v. Atlanta, 6 Ga. App. 354, 64 S. E. 1105.

<sup>19</sup> Loach v. La Fayette, 19 Ga. App. 639, 91 S. E. 1057, 1058, 1060.

Ordinance relating to weighing of agricultural products containing additional regulation to those embraced in a general law on the subject, not inconsistent, is valid. Cartersville v. McGinnis, 142 Ga. 71, 82 S. E. 487.

<sup>20</sup> Sunday closing — Ordinance



§ 882. Same—Kentucky.<sup>21</sup>

§ 883. Same—Missouri.<sup>22</sup>

§ 886. Same—Texas.<sup>23</sup>

§ 887. Offenses that may be made both state and municipal enumerated.

Late judicial decisions have sustained double regulations relating to various misdemeanors under particular statutes; <sup>24</sup> picketing; <sup>25</sup> penalizing private money lenders for charging usurious interest; <sup>26</sup> pawnbrokers; <sup>27</sup> junk

must not conflict with state law. *Clinton v. Chicago*, 257 Ill. 580, 101 N. E. 192.

License on motor vehicles imposed by ordinance on non-resident held violative of classification prescribed by statute. *Heartt v. Downers Grove*, 278 Ill. 92, 115 N. E. 869.

“This ordinance does not prohibit what the statute permits. While the ordinance attaches a less penalty for its violation than does the statute, we find no repugnancy between them. The general policy under both is the same.” *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872, 874, sustaining an ordinance forbidding the sale, under penalty, of adulterated food.

<sup>21</sup> By constitution, ordinance penalty cannot be less than statutory. *Owensboro v. Evans*, 172 Ky. 831, 189 S. W. 1153, holding valid an ordinance as to sale of milk.

<sup>22</sup> Ordinance may impose lighter penalty than the statute. *Moberly v. Deskin*, 169 Mo. App. 672, 155 S. W. 842.

<sup>23</sup> Double punishment for the same act is prohibited. An ordinance which provides a less pen-

alty for any offense than is fixed by statute is void. The ordinance must prescribe the same penalty for same offenses denounced by state law. *Neuvar v. State*, 72 Tex. Cr. App. 410, 163 S. W. 58; *Ex parte Brewer* (Tex. Cr. App.), 152 S. W. 1068.

Ordinance penalties may be different from those of the general law if the general law is not in force in the county in which the city is. *Conner v. Skinner* (Tex. Civ. App.), 156 S. W. 567.

<sup>24</sup> Laws expressly authorize municipal corporations by general ordinance to provide that state offenses of the grade of misdemeanors shall be offenses against city. *Richards v. Magnolia*, 100 Miss. 249, 56 So. 386; *Sloss-Sheffield Steel & Iron Co. v. Smith*, 175 Ala. 260, 57 So. 29.

Under such law the inclusion of felonies renders the ordinance void. *Dismukes v. Louisville*, 101 Miss. 104, 57 So. 547.

<sup>25</sup> *Ex parte Stout* (Tex. Cr. App.), 198 S. W. 967.

<sup>26</sup> Ordinance was sustained notwithstanding a statute against usury. *Columbia v. Phillips*, 101 S. C. 391, 85 S. E. 963.

<sup>27</sup> *Elsner Bros. v. Hawkins*, 113

dealers;<sup>28</sup> building regulations;<sup>29</sup> forbidding business on the Sabbath;<sup>30</sup> prohibiting Sunday labor;<sup>31</sup> liquor selling;<sup>32</sup> drunkenness in public places;<sup>33</sup> attempt at pocket picking;<sup>34</sup> keeping house of ill fame;<sup>35</sup> vagrancy;<sup>36</sup> license tax;<sup>37</sup> regulation and licensing of pool tables;<sup>38</sup> street traffic;<sup>39</sup> vehicle regulation and licensing;<sup>40</sup> speed of automobiles, motor vehicles, etc.;<sup>41</sup> jitneys or automobiles used for hire;<sup>42</sup> food regulations and forbidding

Va. 47, 73 S. E. 479; *Provident Loan Soc. v. Denver* (Colo.), 172 Pac. 10.

<sup>28</sup> *Shurman v. Atlanta*, 148 Ga. 1, 95 S. E. 698; *Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42.

<sup>29</sup> Require fire escapes in certain buildings. *Birmingham Ry. Light & Power Co. v. Milbrat* (Ala.), 78 So. 224.

<sup>30</sup> The statute made it a misdemeanor to pursue business or one's usual calling on the Lord's Day, and the ordinance forbid keeping open a place of business within the city on the Sabbath, held distinct offenses. *Loach v. La Fayette*, 19 Ga. App. 639, 91 S. E. 1057.

<sup>31</sup> *State v. Medlin*, 170 N. C. 682, 86 S. E. 597.

<sup>32</sup> *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

<sup>33</sup> *Morris v. State*, 18 Ga. App. 684, 90 S. E. 361.

<sup>34</sup> *Greenburg v. Cleveland* (Ohio 1918), 120 N. E. 829.

<sup>35</sup> *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 455, 173 S. W. 11.

<sup>36</sup> *Guidoni v. Wheeler*, 230 Fed. 93, 144 C. C. A. 391.

Statute imposed heavier penalty than the ordinance, and was enacted afterward, held did not repeal the ordinance. *Portland v. Parker*, 69 Or. 271, 138 Pac. 852.

<sup>37</sup> Power to levy a license tax on trades or professions is not forbidden because a tonnage tax for the purposes of inspection has been levied by statute which forbids "any other tax to be levied by county, city or town." That provision simply forbids any tonnage tax. *Pocomoke Guano Co. v. New Bern*, 158 N. C. 354, 74 S. E. 2, following *Royster Guano Co. v. Tarboro*, 126 N. C. 68, 35 S. E. 231; *Pocomoke Guano Co. v. Bidle*, 158 N. C. 212, 73 S. E. 996.

<sup>38</sup> Statute and ordinance both regulated and licensed pool table kept for hire. If no inconsistency both are valid. *Ex parte Rowe*, 4 Ala. App. 254, 59 So. 69.

<sup>39</sup> *Hood & Wheeler Fur. Co. v. Royal* (Ala.), 76 So. 965.

<sup>40</sup> *Ex parte Counts*, 39 Nev. 61, 153 Pac. 93, citing § 876, vol. 2, ante; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840; *Morristown-Madison Auto Bus Co. v. Madison*, 85 N. J. L. 59, 88 Atl. 829.

<sup>41</sup> *People v. Dwyer*, 136 N. Y. S. 148, 26 N. Y. Cr. R. 315; *St. Louis v. Hammond* (Mo.), 199 S. W. 411.

Ordinance conflicting with state law is void. *Baraboo v. Dwyer*, 166 Wis. 372, 165 N. W. 297.

<sup>42</sup> *Hazelton v. Atlanta*, 147 Ga.

selling adulterated food;<sup>43</sup> prohibiting selling impure and unwholesome milk;<sup>44</sup> weights and measures;<sup>45</sup> and weight of bread.<sup>46</sup>

### § 888. Can there be two punishments?

Late decisions answer in the affirmative in accordance with the great weight of authority.<sup>47</sup>

The theory is that when the offense is made penal by both the state and the municipal corporation, each act becomes a separate offense against the state and the city or town. The penalty imposed by the local community is superadded to that prescribed by the statute because of the additional injury, so that the offender is not punished twice for the same offense, but for two offenses arising from the same act.<sup>48</sup>

207, 93 S. E. 202; *Craddock v. San Antonio* (Tex. Civ. App.), 198 S. W. 634.

<sup>43</sup> Ordinance, of course, must conform to state law. *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872.

<sup>44</sup> *Chicago v. Bowman Dairy Co.*, 234 Ill. 294, 84 N. E. 913, 17 L. R. A. (N. S.) 684, 123 Am. St. Rep. 100; *Owensboro v. Evans*, 172 Ky. 831, 189 S. W. 1153; *St. Louis v. Scheer*, 235 Mo. 721, 139 S. W. 434; *St. Louis v. Schulte*, 235 Mo. 734, 139 S. W. 449.

<sup>45</sup> *Weighing coal. Brittingham & Hixon Lumber Co. v. Sparta*, 157 Wis. 345, 147 N. W. 635.

<sup>46</sup> *Chicago v. Schmidinger*, 243 Ill. 167, 90 N. E. 369.

<sup>47</sup> *Morris v. State*, 18 Ga. App. 684, 90 S. E. 361; *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 173 S. W. 11; *State ex rel. v. Long*, 164 Mo. App. 658, 147 S. W. 1116; *Milwaukee v. Ruplinger*, 155 Wis.

391, 145 N. W. 42; *State v. Hambley*, 137 Wis. 458, 119 N. W. 114.

"The great weight of authority is to the effect that the legislature may confer police power upon a municipality over subjects within the provisions of existing state laws. An act may be a penal offense under the laws of the state, and further penalties under proper legislative authority may be imposed for its commission by municipal ordinances. The enforcement of one would not preclude the enforcement of the other." *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872, citing § 888, vol. 2, ante.

A conviction under a municipal ordinance is a bar of a state prosecution or vice versa. *Canton v. McDaniel*, 188 Mo. 207, 228.

<sup>48</sup> *Kansas City v. Henre*, 96 Kan. 794, 153 Pac. 548; *Neola v. Reichart*, 131 Iowa 492, 497, 109 N. W. 5, 7.

## CHAPTER 25.

### MUNICIPAL POLICE POWERS AND ORDINANCES RELATING THERETO.

- I. GENERAL NATURE, SCOPE AND EXERCISE OF THE POLICE POWER.
- II. HEALTH AND SANITARY REGULATIONS—NUISANCE.
- III. PUBLIC SAFETY—STREETS—BUILDINGS.
- IV. OFFENSES AGAINST PUBLIC MORALS AND DECENCY.
- V. MARKETS—WEIGHTS AND MEASURES.
- VI. MISCELLANEOUS REGULATIONS.

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| § 892. The police power extends to the destruction of property.                   | § 898. General requisites of a valid police ordinance.                   |
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| <p>§ 913. Dead animals, garbage, of-<br/>fal, etc.</p> <p>§ 914. Exclusive right to remove<br/>dead animals, garbage, etc.</p> <p>§ 915. House dirt, rubbish, privy<br/>vaults, etc.</p> <p>§ 916. Drains, sewers, ponds, stag-<br/>nant water, pollution of<br/>water supply, etc.</p> | <p>§ 918. Emission of dense smoke as<br/>a public nuisance.</p> <p>§ 921. Regulating sale and smoking<br/>of cigarettes.</p> <p>§ 922. Regulating sale of cocaine.</p> <p>§ 923a. Pure water supply.</p> |
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### III. PUBLIC SAFETY—STREETS—BUILDINGS.

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#### I. GENERAL NATURE, SCOPE AND EXERCISE OF THE POLICE POWER.

### § 889. General nature and scope of the police power.

The police power is not susceptible of circumstantial precision; it knows no definite limitations. In its broadest sense it is the power to govern, and includes all legislation and almost every function of civil government. "It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."<sup>1</sup>

<sup>1</sup> District of Columbia v. Brooke, 214 U. S. 138, 149, 29 Sup. Ct. 560, 53 L. ed. 941. Statement quoted with approval in Eubank v. Richmond, 226 U. S. 137, 142, 143, 33 Sup. Ct. 76, 57 L. ed. 156.

General nature and scope. Clements v. McCabe (Mich. 1920), 177 N. W. 722.

The police power is "the most comprehensive and therefore necessarily, the vaguest," of govern-

It is the "law of overruling necessity."<sup>2</sup>

It extends to regulations designed to promote public morals, safety, health, convenience, welfare, and general prosperity. It is co-extensive with the necessities of the given case; the reasonable requirements, to safeguard the public interests.<sup>3</sup> The police power is the

mental powers. Freund, *Police Power*, Section 1.

"It aims directly to secure and promote the public welfare, and it does so by restraint and compulsion." "The police power is not a fixed quantity, but the expression of social, economic, and political conditions. As long as these conditions vary, the police power must continue to be elastic, e. g., capable of development." Freund, *Police Power*, Sections 3, 4; *Adair v. United States*, 208 U. S. 161, 173, 28 Sup. Ct. 277.

"The police power of the state has never been exactly defined or circumscribed by fixed limits. It is considered as capable of development and modification within certain limits, so that the power of governmental control may be adequate to meet changing social, economic and political conditions." *State Public Utilities Com. v. Quincy* (Ill. 1919), 125 N. E. 374.

2 "Whatever the city may do under the guise of the police power it must be remembered it does in its governmental capacity. The exercise of the police power has been most aptly and perhaps most comprehensively defined as 'the power to govern.' (*License Cases*, 5 How. 504, 582, 12 L. ed. 256), the 'most illimitable' of all powers of government (*Slaughterhouse Cases*, 16 Wall. 36, 62, 21

L. ed. 394) the 'law of overruling necessity' " (28 Cyc. 692). *Los Angeles Gas & Electric Co. v. Los Angeles*, 241 Fed. 912, 918.

<sup>3</sup> *Clinard v. Winston-Salem*, 173 N. C. 356, 91 S. E. 1039, citing section 889, vol. 3, ante.

"The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as those to promote public health, morals or safety; it is not confined to the suppression of what is offensive, disorderly or unsanitary but extends to what is for the greatest welfare of the state." *Bacon v. Walker*, 204 U. S. 311, 27 Sup. Ct. 289, 51 L. ed. 499.

"In a general way \* \* \* the police power extends to all the great public needs. \* \* \* It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912A, 487.

"The extent of this power has never been defined with precision. Indeed, it cannot be accurately defined and the courts have not been able or willing definitely to circumscribe it. \* \* \* Notwith-

power to prevent, the power to anticipate dangers to come; an active and earnest effort to protect the inhabitants of the community and in doing so to restrain individual tendencies.<sup>4</sup>

standing, however, it is very broad and far-reaching, it is not without its restrictions." *Chicago Sanitary Dist. v. Chicago & A. R. Co.*, 267 Ill. 252, 108 N. E. 312.

Defined as that "inherent plenary power in the state which permits it to prohibit all things hurtful to the welfare, comfort and safety to society. It is coextensive with self-protection, and is not inaptly termed 'the law of overruling necessity.'" (*Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71), *Chicago Sanitary Dist. v. Chicago & A. R. Co.*, 267 Ill. 252, 108 N. E. 312.

"The police power, so difficult to define, but so frequently invoked, is confined to such reasonable restrictions and prohibitions as are necessary to guard public health, morals and safety, and to conserve public peace, order and general welfare. Regulations and ordinances within such general definitions are valid. The city may make and enforce such regulations and ordinances, although they interfere with and restrict the use of private property. Compensation for such interference with and restrictions in the use of property is found in the share that the owner enjoys in common benefit secured to all." *Wineburg Adv. Co. v. Murphy*, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735, approved in *Peoples ex rel. v. Ludwig*, 218 N. Y. 540, 113 N. E. 532,

affirming 158 N. Y. S. 208, 172 App. Div. 41.

"The police power of the state extends to the protection of the lives, health, comfort, and quiet of all persons and the protection of all property within the state. In the exercise of the police power the General Assembly may suppress and prohibit any practice, trade or business endangering the public welfare and safety, or may regulate any business in such manner as may be necessary for the safety, morals and welfare of the people and may delegate that power to municipalities." *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825.

"The police power of the state is coextensive with self-protection and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety and welfare of society." *State v. Starkey*, 112 Me. 8, 90 Atl. 431.

"Under the police power things which are injurious to the public may be suppressed and prohibited, and other things which may or may not be injurious to the public according to the manner in which they are managed, conducted or regulated may be licensed for the purpose of regulation." *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825.

<sup>4</sup> *Mannix v. Frost*, 164 N. Y. S. 1050, 100 Misc. Rep. 36.



The police power is broad, but it has its limitations.<sup>5</sup> These limitations are difficult to define or describe.<sup>6</sup>

The exercise of this power may interfere in some respects with the liberty of the citizen, his right to follow any lawful occupation, or his right in the use of property. The interference with individual freedom by laws enacted to promote the public health, safety, order, general welfare, or for the prevention or suppression of immorality, dishonesty, unfair dealings or fraud, is justified to advance the highest interests of society. All businesses and occupations are carried on subject to the reasonable exercise of the police power. Obviously individual freedom must yield to the enforcement of just regulations for the public good. The general proposition is repeatedly stated in various forms that legislation is valid and constitutional which has for its object the promotion of the public health, safety, morals, convenience and general welfare, or the prevention of fraud and immorality.<sup>7</sup>

To avoid restriction on the reasonable exercise of the powers of government, within the limits designed, and as

<sup>5</sup> Chicago, M. & St. P. Ry. Co. v. Minneapolis, 238 Fed. 384, 404.

<sup>6</sup> Sligh v. Kirkwood, 237 U. S. 52, 59, 35 Sup. Ct. 501, 59 L. ed. 835.

<sup>7</sup> People ex rel. v. Warden, 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859, 5 Ann. Cas. 325, quoted in People ex rel v. Palmitter, 128 N. Y. S. 426, 71 Misc. Rep. 158, and People v. Horwitz, 140 N. Y. S. 437, 442, 443, 27 N. Y. Cr. R. 237.

"Property rights cannot be lawfully invaded under the pretense of protecting the public health. If, however, a municipality provides that garbage, bones, and kitchen refuse which are or may be reasonably expected to become a nuisance and a menace to public

health, if not promptly collected and removed in a sanitary manner, shall be collected and removed at specified times and in a particular manner and by a particular contractor, it is not necessarily unconstitutional even if private rights are thereby incidentally invaded. Such supervision when reasonable is not only lawful but an affirmative duty imposed upon municipalities. An ordinance affecting personal rights must be a reasonable regulation, in good faith designed to accomplish the general public good for which its adoption is authorized." Rochester v. Gutberlett, 211 N. Y. 309, 105 N. E. 548, affirming 135 N. Y. S. 1104, 151 App. Div. 900.

the requirements, necessities and exigencies develop from time to time courts have consistently refrained from attempting to circumscribe with accuracy an orbit within which such power may safely move. This has been the position of the Supreme Court of the United States from the beginning, yet that court perhaps in a larger sense than other courts has taken judicial cognizance of the everyday facts of modern complex, social and industrial life, and has responded thereto with less apparent reluctance than most of the courts of last resort of the several states.<sup>8</sup>

**§ 889a. Same—valid contracts affected by its exercise.**

Legislation relating to the police power or the public welfare may affect or render void existing valid contracts. The authority of the state itself, or through constituted agencies, to exercise the police power is implied in every contract made by and between individuals, partnerships, corporations or public utilities. As expressed by the Supreme Court of the United States, the public interest is omnipresent wherever there is a state and grows more pressing as population grows, and is paramount to private property.<sup>9</sup>

<sup>8</sup> *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530, 531, 37 Sup. Ct. 190, 161 L. ed. 191, affirming 267 Ill. 344, 108 N. E. 340, 8 Ann. Cas. 1916C, 488.

<sup>9</sup> "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject-matter." *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 356, 357, 52 L. ed. 828, 28 Sup. Ct. 528.

"It is the settled law of this court that the interdiction of statutes impairing the obligation

of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power which in its various ramifications is known as the police power is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contract between individuals." *Manigault v. Springs*, 199 U. S. 473, 480, 50 L. ed. 274,

That court further says that the exercise of the police power in the interest of the public health and safety is to be maintained unhampered by contract in private interest, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution.<sup>10</sup>

Accordingly, it was expressly held by that court that a contract for free transportation in consideration of the release of a valid claim for damages was rendered void by subsequent legislation forbidding free transportation.<sup>11</sup> So an ordinance of a city, valid under the laws of the state as construed by its highest court, compelling a railroad to repair a viaduct constructed after the opening of the railroad by the city in pursuance of a contract relieving the railroad for a substantial consideration from making any repairs thereon for a term of years, was held not to be void under the contract, or the due process clause of the Federal Constitution.<sup>12</sup>

Agreeably to this doctrine it has been held that a stat-

26 Sup. Ct. 127; *Detroit, Ft. Wayne & Belle Isle Ry. Co. v. Osborne*, 189 U. S. 383.

<sup>10</sup> *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 583, 597, 52 L. ed. 630, 28 Sup. Ct. 341; *Union Bridge Co. v. United States*, 204 U. S. 264; *C. B. & Q. R. R. Co. v. Illinois*, 200 U. S. 561; *C. B. & Q. R. R. Co. v. Nebraska*, 170 U. S. 57.

"All contracts whether made by the state itself, by municipal corporations or by individuals are subject to be interfered with or otherwise affected by subsequent statutes enacted in the bona fide exercise of the police power, and do not by reason of the contract clause of the federal constitution, enjoy any immunity from such legislation." *Hite v. Cincinnati & Western R. Co.*, 284 Ill. 297, 119

N. E. 904; *State Public Utilities Com. v. Quincy* (Ill. 1919), 125 N. E. 374, 376.

<sup>11</sup> *Louisville & Nashville R. R. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 31 Sup. Ct. 265, 34 L. R. A. (N. S.) 671, followed in *Re Southwest Missouri R. R. Co.*, 1 Mo. P. S. C. 36, 50; *Public Service Electric Co. v. Board of Public U. Com.*, 87 N. J. L. 128, 93 Atl. 707.

Neither the due process, nor the contract clause have the effect of overriding the powers of the state, and all contracts and property rights are held subject to its fair exercise. *Chicago & Alton R. Co. v. Tranbarger*, 238 U. S. 67, 35 Sup. Ct. 678, 59 L. ed. 1204.

<sup>12</sup> *Northern Pacific Ry. Co. v. Duluth*, 208 U. S. 582, 52 L. ed. 630, 28 Sup. Ct. 341.

ute requiring that the expense of building and maintaining so much of a town way or highway as is within the limits of the railroad, where such way crosses a track at grade, shall be borne by the railroad company, is constitutional, and the provisions thereof are applicable to a company, though its charter provides that it is not to be altered, amended or repealed, and such statute does not impair the obligation of any contract with such company.<sup>13</sup>

The state may, in the exercise of its police power, impose upon railroad companies whose lines intersect public highways laid out after the construction of the railroad the uncompensated duty of constructing and maintaining at such crossings all such safety devices as are reasonably necessary for the protection of the traveling public, e. g., a bridge over the railroad tracks; and a contract ordinance enacted by a city attempting to relieve a railroad company of such duty is ultra vires and void. The power of the state to require the railroad to construct the bridge "is an exercise of the police power which can neither be contracted away nor lost by inaction on the part of the public authorities."<sup>14</sup>

Even a municipal corporation, although an agent of

<sup>13</sup> "The power of the legislature to impose uncompensated duties and even burdens upon individuals and corporations for the general safety is fundamental. It is the police power. Its proper exercise is the highest duty of government. The state may in some cases forego the right to taxation, but it can never relieve itself of the duty of providing for the safety of its citizens. This duty and consequent power override all statute or contract exemptions. The state cannot free any person or corporation from subjection to this power. All personal, as well as property, rights must be held subject to the police power of the state." Boston

& Maine R. R. Co. v. County Comrs., 79 Me. 386, 393, 10 Atl. 113; Chicago & N. W. Ry. Co. v. Chicago, 140 Ill. 309, 317, 29 N. E. 1109.

<sup>14</sup> State ex rel. v. St. Paul, Minneapolis & Manitoba Ry. Co., 98 Minn. 380, 403, quoted from at length in American Tobacco Co. v. St. Louis, 247 Mo. 374, 446 to 467; Public Service Commission v. St. Louis and San Francisco R'd Co., 4 Mo. P. S. C. 116; Macon v. Chicago, Burlington & Quincy R. R. Co., 1 Mo. P. S. C. 640, 644-646; Smith v. Chicago, Burlington & Quincy R. R. Co., 1 Mo. P. S. C. 109, 111.

the state, cannot, unless specifically authorized to do so by the state, enter into a contract with a public utility corporation which is not subject to modification by statutes enacted for the public good.<sup>15</sup>

### § 890. Enumeration of subjects of the police power.

The subjects of the police power do not lend themselves to precise definition. The exigencies of municipal life and those appertaining to crowded urban centers vary from time to time and therefore accurate enumeration is not possible. When the power is exercised in good faith, every intendment will be indulged to sustain the regulation and all doubts will be resolved in favor of the exercise of the power.<sup>16</sup>

The subjects of the police power indubitably include the public health, morals, safety, order, convenience and the general welfare and prosperity.<sup>17</sup>

Under the police power state or municipal authorities may exercise reasonable inspection and supervision over public service companies within the corporate area, and as observed by the Pennsylvania court: "This is a police regulation which has always been recognized and always will be."<sup>18</sup>

However the imposition of a revenue tax cannot be sustained under the guise of the police power.<sup>19</sup>

### § 891. Basis of police power.

Safeguarding the public welfare in its most comprehensive sense is the basis which justifies the exertion of

<sup>15</sup> Wyandotte County Gas Co. v. Kansas, 231 U. S. 625; Home Telephone Co. v. Los Angeles, 211 U. S. 265; Manitowoc v. Manitowoc & Northern T. Co., 145 Wis. 13, 129 N. W. 925, 140 Am. St. Rep. 1056; Knott v. Southwestern T. & T. Co., 2 Mo. P. S. C. 531, 554-559, P. U. R. 1915E, 963, 988-994; State Public Utilities Com. v. Quincy (Ill. 1919), 125 N. E. 374.

<sup>16</sup> Guidoni v. Wheeler, 230 Fed. 93, 144 C. C. A. 391.

<sup>17</sup> Eubank v. Richmond, 226 U. S. 137, 142, 133 Sup. Ct. 76, 57 L. ed. 156, Chicago B. & Q. Ry. Co. v. People of Ill., 200 U. S. 561, 26 Sup. Ct. 341, 50 L. ed. 596.

<sup>18</sup> Kittanning Borough v. American Natural Gas Co., 239 Pa. 210, 86 Atl. 717.

<sup>19</sup> Ibid.

the police power and the imposition of restrictions on individual action and the use of property.<sup>20</sup> When necessary to protect public interest, the duty to exercise the police power is imposed upon the public authorities.<sup>21</sup>

**§ 892. The police power extends to the destruction of property.**

Private property being held subordinate to the public interest may be destroyed, to protect the public welfare, when such property becomes a nuisance or dangerous to the public health, morals, or safety. And if so, it may be destroyed in case of an emergency where such emergency distinctly appears, which is always a condition precedent to the invasion of private property rights.<sup>22</sup>

For example, where buildings or other structures become dangerous,<sup>23</sup> or to prevent the spread of fire.<sup>24</sup>

Although private property must be held at all times subordinate to reasonable police regulations, yet lawful property cannot be destroyed or confiscated under the guise of such regulations for its protection,<sup>25</sup> or where

<sup>20</sup> Willison v. Cooke, 54 Colo. 320, 130 Pac. 828, 831; Russell v. Fargo, 28 N. D. 300, 148 N. W. 610.

<sup>21</sup> Re Simmons, 4 Okl. Cr. 662, 672, 112 Pac. 952, 955, quoting with approval part of Sec. 891, Vol. 3, ante (McQuillin, Mun. Ord. Sec. 430); Ex parte Sullivan (Tex. Cr. App.) 178 S. W. 537, 546, quoting with approval part of Section 891, Vol. 3, ante (McQuillin, Mun. Ord. Section 430).

<sup>22</sup> Smith v. McCormick, 52 Mont. 324, 157 Pac. 1010.

<sup>23</sup> Goldstein v. Chicago, 172 Ill. App. 415.

<sup>24</sup> Page v. Warrenton, 210 Fed. 432.

Unsanitary buildings or buildings injurious to the public health

may be destroyed if necessary to abate the nuisance and protect the public health and safety. "In the exercise of the police power by the city property which is a menace to public safety or health may be destroyed without compensation when this is necessary to protect the public, but the public necessity is the limit of the right." *Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133.

Power to abate nuisances existing at common law gives power to destroy a thing, as a building, that is nuisance. Law expressly so authorizes in many cases. *Cummings v. Lobsitz*, 42 Okl. 704, 142 Pac. 993.

<sup>25</sup> *Spear v. Ward* (Ala. 1917), 74 So. 27, 30.

the property itself or the use thereof is not a public nuisance.<sup>26</sup>

### § 893. Limitations on the police power—province of the legislature and judiciary.

The rule is apodeictical that the police power is limited to the promulgation and enforcement of measures reasonably demanded for the public health, morals, comfort, safety or general welfare of society.<sup>27</sup>

The extent to which the police power will be carried in the advancement of the public welfare is not susceptible of precise determination, but it must be limited to the reasonable requirements, necessities or exigencies of each case.<sup>28</sup> Judicial utterances uniformly recognize that its limitations, as expressed by the United States Supreme Court, are hard to define. The power is not subject to accurate limitations, but it is generally admitted, as mentioned, that it is co-extensive with the necessities of the case and the safeguard of the public interest. It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety, the public morals, or the public health.<sup>29</sup>

<sup>26</sup> Property not a nuisance cannot be destroyed, as a frame barn lawfully and properly erected and maintained on private property in a reasonably safe condition. *Bloomfield v. West* (Ind. App.), 121 N. E. 4, 6.

<sup>27</sup> *Chicago v. Pennsylvania Co.*, 252 Ill. 186, 96 N. E. 833; *Ruhrstrat v. People*, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30.

<sup>28</sup> *California. Curtis v. Los Angeles*, 172 Cal. 230, 156 Pac. 462, 464.

*Colorado. Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816.

*Illinois. Chicago v. Chicago &*

*N. W. Ry. Co.*, 275 Ill. 30, 38, 113 N. E. 1017, citing Section 893, Vol. 3, ante.

*Indiana. Windle v. Valparaiso* (Ind. App.) 113 N. E. 429.

*Minnesota. State ex rel. v. Houghton*, 134 Minn. 226, 158 N. W. 1017.

*Texas. Span v. Dallas* (Tex. Civ. App.), 189 S. W. 999.

*Virginia. Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, 148, citing Section 893, Vol. 3, ante (*McQuillin, Mun. Ord.*, Section 432).

*Wisconsin. Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882.

<sup>29</sup> *Sligh v. Kirkwood*, 237 U. S. 52, 59, 35 Sup. Ct. 501, 50 L. ed.

In the first instance the legislature determines the necessity for the exercise of the police power, but what are subjects of the police power and the reasonableness of its exercise are necessarily judicial questions, and accordingly the courts have, within well defined limitations, a recognized power and control over its exercise.<sup>30</sup>

Therefore, as neither a municipal corporation nor the

835; *Eubank v. Richmond*, 226 U. S. 137, 142, 33 Sup. Ct. 76, 57 L. ed. 156; *Chicago, B. & Q. R. Co. v. People of Ill.*, 200 U. S. 561, 592, 26 Sup. Ct. 341, 50 L. ed. 596; *Camfield v. United States*, 167 U. S. 518, 524, 17 Sup. Ct., 864, 42 L. ed. 260.

<sup>30</sup> It is for the legislative department to determine the occasion for the exercise of the police power, and for the judiciary to determine the reasonableness of that exercise under incidental or general grant of authority. *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828.

"The necessity and propriety of a particular ordinance is primarily a legislative question, but whether a given ordinance (though one of its kind is authorized) is reasonable and not arbitrary, and is consistent with the state's policy of municipal government, is often a question for the courts." *Spear v. Ward* (Ala. 1917), 74 So. 27, 29, 30.

"What are subjects of the police power are necessarily judicial questions, and therefore the courts have within well-defined limitations, a revisionary power and control over such limitations." *Hiller v. State*, 134 Md. 385, 92 Atl. 842.

Police power elaborately discussed in *State v. Hyman*, 98 Md.

596, 57 Atl. 6, 64 L. R. A. 637, 1 Ann. Cas. 742.

Although the power to enact an ordinance exists, the courts will pass upon the question whether its exercise was justified by existing conditions, as an ordinance regulating advertising billboards. *Kansas City Gunning Advertising Company v. Kansas City*, 240 Mo. 659, 670, 144 S. W. 1099.

Courts hesitate to declare an ordinance unreasonable, arbitrary or oppressive except in a clear case, where ample municipal power exists. *Versailles v. Kentucky Highlands R. Co.*, 153 Ky. 83, 154 S. W. 388.

Applied to regulation of business of moving van companies: *Lawson v. Connolly*, 175 Mich. 375, 141 S. W. 623.

"While such regulations are subject to judicial scrutiny, upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the lawmaking power; and so long as the regulation is not shown to be clearly unreasonable and arbitrary and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the



state legislature may interfere under the guise of a police regulation with the liberty of the citizen in the conduct of his business—legitimate and harmless in its essential character—beyond a point reasonably required for the protection of the public, it is for the judiciary to ascertain and declare the limitation.<sup>31</sup>

equal protection of the laws, within the meaning of the fourteenth amendment.” *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. ed. 900, affirming 107 Ark. 174, 155 S. W. 105, sustaining an ordinance confining livery stables to specified districts.

“The courts have no supervisory power over the policy of municipal legislation. They can only interfere to curb action which is ultra vires because of some constitutional impediment or lack of antecedent legislative authority or because the action is so arbitrary, capricious, unreasonable and subversive of private right as to indicate a clear abuse rather than a bona fide exercise of power.” *Emporia v. Atchison T. & S. F. Ry. Co.*, 88 Kan. 611, 129 Pac. 161.

Where the exercise of the police power affects the free enjoyment of property, courts agree that it should be closely scrutinized, *Re Russell*, 158 N. Y. S. 162, holding valid an ordinance of Niagara Falls forbidding the operation of any factory in a prescribed area within the city boundaries without the consent of certain specified number of property owners.

“The legislative determination that a given regulation of the use of property or of the conduct of a business is necessary in the public interest will be given great weight in any judicial inquiry in-

to the validity of the enactment, and the courts will not interfere with the discretion of the law-making body ‘except where the case be plain that needless oppression is worked and constitutional rights invaded.’ (*Re Smith*, 143 Cal. 368, 372, 77 Pac. 180, 182).” *Ex parte Barmore*, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688.

<sup>31</sup> While at an earlier period the question of the reasonableness of regulatory measures was deemed more largely a legislative than a judicial one (*Brown v. Maryland*, 12 Wheat. (U. S. 419), 6 L. ed. 678; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77), the more modern doctrine is that whereas every intendment is to be indulged in favor of the validity of a statute, or an ordinance within the general powers of a city to adopt, it is for the courts to determine the reasonableness of the exercise of such power, having in view the apparent end sought. *Yee Gee v. San Francisco*, 235 Fed. 757, 763, 764.

“It is not true that when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of

Not only is it the province of the court to determine what are the subjects of the police power and what are reasonable regulations thereunder, but its obligation ex-

the citizen to pursue such business or profession." *Ex parte Whitwell*, 98 Cal. 78, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152, regulating laundries.

"A mere legislative declaration that a business or occupation harmless and innocuous in itself, is inimical to the public interest, either as a whole or as to some feature of its conduct, cannot make it so, unless by reason of the surrounding conditions the declaration can be said to accord with the fact as based upon common observation and human experience. The legislature cannot by its mere ipse dixit make that a guilty thing which is intrinsically an innocent one. \* \* \* Any attempt at police regulation which interferes with the individual in the conduct of an innocent and legitimate business must have an appreciable relation to some public evil justly to be apprehended, and be reasonably calculated to avoid such evil. Beyond that the legislature may not go." *Yee Gee v. San Francisco*, 235 Fed. 757, 764.

"But necessarily it has its limits and must stop when it encounters the prohibitions of the constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies may arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher

consideration expressed and determined by the provisions of the constitution. *Noble State Bank v. Haskell*, 219 U. S. 104. The point where particular interests or principles balance 'cannot be determined by any general formula in advance.' *Hudson Water v. McCarter*, 209 U. S. 349, 355, 28 Sup. Ct. 529, 52 L. ed. 828." *Eubank v. Richmond*, 226 U. S. 137, 143, 33 Sup. Ct. 76, 57 L. ed. 156.

"While it is for the legislative department of a municipality to determine the occasion for the exercise of the police power, it is clearly within the jurisdiction of the courts to determine the reasonableness of that exercise, when, as in the case at bar, it assumes that power by virtue of its incidental or a general grant of authority." *Willison v. Cooke*, 54 Colo. 320, 327, 328, 130 Pac. 828.

Reasonableness of exercise is for court under general or implied power. *Kay v. Chicago*, 263 Ill. 122, 104 N. E. 1104, 1106.

"It is for the courts to determine what are the subjects for the exercise of the police power and to determine whether an attempted exercise of the power in a particular instance is reasonably necessary to the comfort, morals, safety or welfare of the community, and the power is restricted by those provisions of the constitution which forbid unequal laws or an arbitrary invasion of personal rights of property." *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825, 827.

tends to ascertaining whether there is any real or substantial relation between the avowed objects of the law and the means devised therein for attaining those ends.<sup>32</sup> It is axiomatic, therefore, that the regulation must have a reasonable and substantial relation to the accomplishment of some purpose fairly within the legitimate range or scope of the police power. If the regulation is within such compass and has a reasonable and substantial relation to the legitimate purpose to be accomplished in its promulgation, that is, if such regulation is necessary to conserve and promote the public health, morals, safety, convenience, comfort and advance the general welfare, it will be sustained.<sup>33</sup>

As applied to restrictions on the use of private property, it may be remarked that restrictions are justified only when necessary to preserve or promote the public health, morals, safety, comfort, convenience or general welfare of the community. When the use of property does not infringe the rights of others, or limiting its use is not essential in the legitimate exercise of the police power, or when required where the restrictions imposed pass beyond that which is reasonably necessary to safeguard public welfare, limitations on the use of prop-

<sup>32</sup> Chicago Sanitary District v. Chicago, Alton R. R., 267 Ill. 252, 108 N. E. 312, 314.

"Police regulations must have a substantial relation to the public objects which government may legally accomplish." Willison v. Cooke, 54 Colo. 320, 130 Pac. 828, 831.

"Even if it should be conceded that the municipality is clothed with the whole police power of the state it will still not have the power to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency whatever to injure the public health or public

morals or interfere with the general welfare. An act of the legislature which deprives the citizen of his liberty or property rights cannot be sustained under the police power unless the public health, comfort, safety or welfare demand such enactment \* \* \* and there must be some logical connection between the object to be accomplished by such legislation and the means prescribed to accomplish that end." People v. Chicago, 261 Ill. 103 N. E. 609, 611, 49 L. R. A. (N. S.) 438.

<sup>33</sup> Sligh v. Kirkwood, 237 U. S. 52, 61, 35 Sup. Ct. 501, 50 L. ed. 835.

erty on the part of the owner are not a lawful exercise of the power of sovereignty, but merely an abuse of power, resulting in oppression, and are forbidden by the organic law.<sup>34</sup>

Restriction on the use of property for purely aesthetic purposes, in view of the present state of the law, are regarded as invasions of private property rights.<sup>35</sup>

<sup>34</sup> *Willison v. Cooke*, 54 Colo, 320, 130 Pac. 828, 831.

If the law has not sufficient relation to the public health or welfare and is palpably an invasion of the rights secured by fundamental law, or is unreasonable or discriminatory, its enforcement must be prevented by the judiciary. *State ex rel. v. New Orleans*, 141 La. 788, 75 So. 683; *Ex parte Barmore*, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688.

<sup>35</sup> **Aesthetic purposes.** Cannot use the police power and interfere with private property rights for purely aesthetic purposes. *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 Atl. 547, L. R. A. 1917A, 1216; *Haller Sign Works v. Physical Culture Training School*, 249 Ill. 436, 94 N. E. 920, 34 L. R. A. (U. S.) 998; *Welch v. Swasey*, 214 U. S. 91, 29 Sup. Ct. 567, 53 L. ed. 923.

The exercise of the police power cannot sanction the confiscation of private property for aesthetic purposes. Rule applied to an ordinance seeking to suppress or abate a manufacturing plant for making altars, chancels and carved wood maintained within six hundred feet of a public park. *St. Louis v. Dreisoerner*, 243 Mo. 217, 224, 147 S. W. 998.

The legislative department cannot deprive one of the legitimate

use of his property merely because such use offends the aesthetic or refined taste of other persons. *Anderson v. Shackelford* (Fla. 1917), 76 So. 343, 345.

"The legislature cannot permanently incumber for private aesthetic benefit its trusteeship over public property," speaking of an act abolishing certain restrictions on streets, etc. *Hall v. House of St. Giles the Cripple*, 154 N. Y. S. 96, 91 Misc. Rep. 122, affirmed in 158 N. Y. S. 1117.

A city cannot arbitrarily assume the right to control the location of buildings to be erected on lots. Aesthetic considerations alone, cannot impose restrictions on the use of private property, as locating buildings on lots which have no relation to the legitimate exercise of the police power. "Ordinary private owners of real property have the right to use their property for any and all legitimate purposes and place buildings on them where they please. If the use of such property is to be restricted or limited by law such governmental control must be confined to such reasonable enactments as are designed to conserve health, safety, morals, peace and order." *Buffalo v. Kellner*, 153 N. Y. S. 472, 476, 90 Misc. Rep. 407; *Ives v. South Buffalo Ry. Co.*, 201, N. Y. 305, 94

Where the relation of the regulation to the police power is fairly debatable, ordinarily the court will not interfere.<sup>36</sup>

### § 894. Exercise of the police power by municipal corporations.

The police power is a power belonging exclusively to sovereignty. Under our form of government it inheres in

N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156; *Lochner v. New York*, 189 U. S. 45, 25 Sup. Ct. 539, 49 L. ed. 937, 3 Ann. Cas. 1133.

The fact that an ordinance regulating bill boards has aesthetic considerations in view will not invalidate it, if it rests upon the substantial ground of a reasonable police regulation. *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269, 39 Sup. Ct. 274.

See section 929, vol. 3, ante.

<sup>36</sup> For example, where an ordinance was passed pursuant to statutes regulating the weight and grade of plumbing material, which was assumed to have a direct and substantial relation to the police power—the public health and welfare—and the legislature had so enacted, the court declined to interfere. *Kleinhein v. Wichita*, 98 Kan. 431, 157 Pac. 1190.

“When the city council considers some occupations or thing dangerous to the health of the community and in the exercise of its discretion passes an ordinance to prevent such danger it is the policy of the law to favor such legislation. Municipalities are allowed a greater degree of liberty of legislation in this direction than in any other. The necessity for action is often more urgent

and the consequences of neglect more detrimental to the public good in this than in other forms of local evil. If the subject covered by the ordinance is merely debatable as to power the legislature is entitled to its own judgment.” *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182, 185.

Whether it is essential to the public health to require rat-proofing of all houses, buildings, etc., within a city because of the existence of the bubonic plague is a question of fact for the city legislative department. “The validity of an ordinance \* \* \* is presumed as well as the existence of a danger to the people sufficiently great to warrant the board of health in adopting most drastic measure to suppress and eradicate the bubonic plague then prevalent in the City of New Orleans. There is nothing on the face of the ordinance to show that the defendants had been deprived of any of their constitutional rights. As to the measure provided for the suppression and eradication of the pestilence the court cannot substitute its judgment for that of the board of health.” *New Orleans v. Ricker*, 137 La. 843, 69 So. 273, relying on *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 992, 1257, 32 L. ed. 553.

the state without reservation in the constitution and is given expression by the legislature. The police power can neither be abridged nor abdicated, nor bargained away; it is inalienable even by express grant;<sup>37</sup> so that no state can divest itself in any way of the power to enforce it and subject to which all property rights are held, and no act of any legislature relating thereto can in any way bind or affect the act of any future legislature.<sup>38</sup>

<sup>37</sup> Constitution of Mo., 1875, Art. 12, Section 5.

<sup>38</sup> *Texas & New Orleans R. R. Co. v. Miller*, 221 U. S. 408, 414, 55 L. ed. 789, 31 Sup. Ct. 534; *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 754, 28 L. ed. 585, 4 Sup. Ct. 652; *Northwestern Pacific Ry. Co. v. Duluth*, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. 341, followed in *St. Paul M. & M. R. Co. v. Minn.*, 214 U. S. 493, 53 L. ed. 1060, 29 Sup. Ct. 698; *Boston Beer Co. v. Massachusetts*, 97 U. S. 23, 33, 24 L. ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667; *State v. Mississippi*, 101 U. S. 814, 819, 821; *Douglas v. Kentucky*, 168 U. S. 488, 496, 498; *Milwaukee v. Railroad Commission*, 162 Wis. 127, 155 N. W. 948, P. U. R. 1916C, 592; *Chicago, M. & S. P. R. Co. v. Milwaukee*, 97 Wis. 418, 72 N. W. 1118.

"The source of the police power of a municipality is the state. The extent of it must be ascertained from the law creating the municipality and from the laws of the state bearing upon the same subject. The power cannot be surrendered, alienated or abridged by contract, nor can it be delegated even with the consent of the legislature. Its exercise is a govern-

mental function, without it neither the state nor the municipality could protect the public welfare." *Helena Light & Ry. Co. v. Helena*, 47 Mont. 18, 130 Pac. 446, citing Section 890, Vol. 3, ante; *Northwestern Pac. Ry. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630.

"However positive the terms of the grant of the police power to the municipality the state will be held to have retained its original jurisdiction over the same subject and to possess the authority to exercise it concurrently with the municipality." *Public Service Comm. v. Helena*, 52 Mont. 527, 537, 159 Pac. 24; *Seibold v. People*, 86 Ill. 33; *Spring Valley v. Spring Valley Coal Co.*, 71 Ill. App. 432.

"The power of regulation is a power of government, continuing in its nature, and, if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the power." *Railroad Com. Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. ed. 631.

"Its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

Likewise the rule is equally fundamental that a municipality cannot divest itself of any part of the police power in any manner whatever.<sup>39</sup>

The exercise of such power by a municipality may not be bartered away or limited by contract.<sup>40</sup>

But the state may delegate the police power or a portion thereof to be exercised by municipalities,<sup>41</sup> or other subordinate subdivisions or state agencies, concurrently with the state,<sup>42</sup> or exclusively, without state intervention, or the state constitution may vest in municipalities,<sup>43</sup> or other duly constituted public agencies,<sup>44</sup> the authority to exercise specified portions of such power. As the state

*Providence v. Billings*, 4 Pet. (U. S.) 514, 561, 7 L. ed. 939, per Chief Justice Marshall. This rule is elementary.

Though no specific constitutional provision forbids it the legislature is without power to surrender it altogether. *Public Service Com. v. Helena*, 52 Mont. 527, 537, 159 Pac. 24; *Helena L. & R. Co. v. Helena*, 47 Mont. 18, 130 Pac. 446; *Northern Pac. Ry. Co. v. Minnesota*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630.

<sup>39</sup> *St. Paul v. Chicago, St. P., M. & O. Ry. Co.*, 139 Minn. 322, 166 N. W. 335.

"The general police power thus possessed by the city is a continuing power and is one of which the city cannot divest itself by contract or otherwise." *Chicago v. Pennsylvania Co.*, 252 Ill. 185, 96 N. E. 833.

<sup>40</sup> *Northern Pacific Ry. v. Duluth*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L. ed. 630; affirming 98 Minn. 429; *State ex rel. v. Public Service Commission*, 271 Mo. 270, 287, 288, 197 S. W. 56; *American Tobacco Co. v. Mo. Pac. R.*, 247 Mo. 374, 433, 157 S. W. 502.

<sup>41</sup> Section 124, Vol. 1, ante, Section 124, ante.

<sup>42</sup> "The police power of the state is an attribute of sovereignty, and exists without any reservation in the constitution. Such power cannot be exhausted or bargained away, and well may be exercised on the same subject-matter by the state and one of her municipalities." *State v. Lafayette Fire Ins. Co.*, 134 La. 78, 63 So. 630, 640, per Land, J., in dissenting opinion.

<sup>43</sup> Ohio constitution confers on municipal corporations power to adopt and enforce local police ordinance within their respective areas which are not inconsistent with the general laws of the state. *Cleveland Telephone Co. v. Cleveland (Ohio)*, 1918, 121 N. E. 701.

Power granted by constitution was held as broad as that granted to state, except it must be exercised within the municipal area, and not conflict with general state law. *Boyd v. Sierra Madre (Cal. App.)*, 1919, 183 Pac. 230.

<sup>44</sup> Section 229A, et seq., ante.

cannot divest itself of its police power, whenever it has delegated such power to a municipality it may at its pleasure, unless restricted by the constitution, withdraw such power in whole or in part and exercise such power itself or provide for its exercise by some duly constituted agency.<sup>45</sup>

From the beginning the doctrine has obtained that the state may delegate to its municipalities a portion of its police powers, to enable them to promote the peace, safety, morals, health, and general welfare of the local communities; especially to enact and enforce regulations so essential to crowded urban centers.<sup>46</sup>

<sup>45</sup> Legislature, of course, may withdraw police power from a city. *Chicago v. Walden W. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588.

"The state cannot divest itself of its police power and whenever it has delegated such power to a municipality it may at its pleasure assume such power and provide for its exercise." *Spokane v. Spokane & I. E. R. Co.*, 75 Wash. 65, 135 Pac. 636; *State ex rel. v. Superior Court*, 67 Wash. 37, 120 Pac. 861; *Ewing v. Seattle*, 55 Wash. 229, 104 Pac. 259.

Police powers over streets—City can exercise only to extent given by state and state may withdraw. Such police powers are not purely local to cities and incorporated towns, and may be modified or withdrawn. In granting franchises the municipality acts as the agent of the state. *Winfield v. Public Service Com.* (Ind., 1918), 118 N. E. 531.

<sup>46</sup> *Clinard v. Winston-Salem*, 173 N. C. 356, 91 S. E. 1039, citing Section 894, Vol. 3, ante; *Yee Bow v. Cleveland* (Ohio, 1919), 124 N. E. 132; *Froelich v. Cleveland*

(Ohio, 1919), 124 N. E. 212; *Chicago Sanitary Dist. v. Chicago & A. R. Co.*, 267 Ill. 252, 108 N. E. 312, 315, citing Section 894, Vol. 3, ante; *Re Simmons*, 4 Okl. Cr. 662, 672, 673, 112 Pac. 951, quoting with approval part of Section 894, Vol. 3, ante (*McQuillin, Mun. Ord.*, Section 433); *Ex parte Sullivan* (Tex. Cr. App.), 178 S. W. 537, 546, quoting with approval part of Section 894, Vol. 3, ante (*McQuillin Mun. Ord.*, Section 433).

Power to abate smoke nuisance. *Chicago v. Dunham Towing & W. Co.*, 161 Ill. App. 307.

Forbidding sales of certain things on Sunday. *Shermann v. Paterson*, 82 N. J. L. 345, 82 Atl. 889.

Building regulations, *Goldstein v. Conner*, 212 Mass. 57, 98 N. E. 701.

Necessary building regulations to provide safety in the erection of buildings and safeguard excavations. *Bergen v. Morton Amusement Co.*, 165 N. Y. S. 348, 178 App. Div. 400.

General police powers, gives power to regulate a millrace maintained along a city street in the



The power to create municipalities necessarily implies authority to confer upon them such police powers as may be necessary for their internal government.<sup>47</sup>

Organic laws provide that a municipality may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.<sup>48</sup>

Under the usual grant of power contained either in the municipal charter or the applicable legislative act or acts like broad authority is ordinarily delegated.<sup>49</sup>

What particular powers the city may exercise and the manner of the exercise thereof will depend upon the language of the grants and their reasonable construction

interest of public safety. *Gaston v. Thompson*, 89 Or. 412, 174 Pac. 717.

<sup>47</sup> *Bliss v. Kraus*, 16 Ohio St. 54.

"It has always been supposed that sufficient authority has been delegated cities to provide all reasonable regulations for the protection of the public health, morals, or safety, and private rights are subject to this exercise of the police power." *Williams v. Chicago*, 266 Ill. 267, 107 N. E. 599; *Wice v. Chicago & N. W. Ry. Co.*, 193 Ill. 351, 61 N. E. 1084, 56 L. R. A. 268, sustaining a building ordinance.

<sup>48</sup> *Ex parte Barmore*, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688.

"This is a direct delegation of the police power as ample within its limits as that possessed by the legislature itself. It requires no legislative sanction for its exercise so long as the subject matter is local, the regulation reasonable and consistent with the general laws." *Detamore v. Hindley*, 83 Wash. 322, 145 Pac. 462;

*Odd Fellows Cemetery Ass'n. v. San Francisco*, 140 Cal. 223, 73 Pac. 987.

<sup>49</sup> Power "to prevent or regulate the carrying on of any trade, business or vocation of a tendency dangerous to morals, health, or safety or calculated to promote dishonesty or crime." *Bryan v. Malvern*, 122 Ark. 379, 183 S. W. 957.

Power by acts not inconsistent with the laws of the state to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality is held to be ample grant to the city of the police powers of the state, and that it is no objection to a municipal ordinance which is not in contravention of the state law that it affords additional regulation complementary to the end the state legislation would effect. *Standard Chemical & Oil Co. v. Troy (Ala.)*, 77 So. 383, 386; *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

in accordance with the policy of the given state, as shown by its organic and statutory provisions, and judicial decisions relating to the subject.<sup>50</sup>

Municipal corporations can legislate or exercise powers only on matters authorized.<sup>51</sup>

<sup>50</sup> *Best v. Birmingham*. (Ala. App.), 78 So. 100; *Shurman v. Atlanta*, 148 Ga. 1, 95 S. E. 698; *Ex parte Goldberg* (Tex. Cr. App.), 200 S. W. 386.

General power to legislate in uniformity with the constitution on any subject appertaining to local government was construed to give city all police powers of state as to acts which might be made minor offenses. *Strauss v. State* (Tex. Cr. App.), 173 S. W. 663, sustaining ordinance forbidding sexual intercourse between white and negro.

The legislature did not intend "to confer unrestrained and unlimited police power upon municipalities. There are certain subjects over which the city has control and as to these subjects it may pass all necessary police ordinances." *People v. Chicago*, 261 Ill. 16, 103 N. E. 609, L. R. A. (N. S.) 438; *Chicago v. Kluver*, 257 Ill. 317, 100 N. E. 917; *Chicago v. M. & M. Hotel Co.*, 248 Ill. 264, 93 N. E. 753.

"We may admit that the legal incorporation and organization of a city for local governmental purposes necessarily invests it with certain primary police powers within the conceded sphere of such power fundamentally essential to the ends for which it was created. But beyond the comparatively narrow limits of such necessary implication, the police power like

any other power conferred upon a municipality, must be expressly delegated by the constitution or legislature of the state." *Clements v. McCabe* (Mich., 1920), 177 N. W. 722, 725.

<sup>51</sup> "A municipal corporation has no inherent power to enact police regulations." *Catholic Bishop v. Palos Park* (Ill. 1918), 121 N. E. 561; *Smith v. Hosford* (Kan. 1920), 187 Pac. 685.

Courts will not interfere unless the regulation has no relation to health, safety, etc., of community. *Boyd v. Sierra Madre* (Cal. App. 1919), 183 Pac. 230.

"All legislative power is vested in the General Assembly, and while it may delegate power to municipal authorities to legislate concerning local matters, the settled rule is that such power will be regarded as delegated only where it is given in express terms or is necessarily implied from powers expressly given." *Marion v. Criolo*, 278 Ill. 159, 115 N. E. 820, holding void an ordinance forbidding the delivery of intoxicating liquor to any person, unless entered in a book, etc.

"And all other local police, sanitary and other regulations," refers to things council was authorized to do and nothing on which the council was not empowered to legislate. *United Fuel & Gas Co. v. Commonwealth*, 159 Ky. 34, 166 S. W. 783, holding void an ordi-

Frequently the grant of power to regulate and license is combined.<sup>52</sup>

Where the court of last resort of the state determines that the grant of power to the municipality to enact the ordinance in question as an exercise of the police power is valid and constitutional, the determination is binding on the Supreme Court of the United States unless the action violates some provision of the United States constitution. Thus an ordinance sustained by the highest court of the State as within the scope of the power conferred by legislative grant and as valid under state legislation, is to be treated as emanating from the law making power of the state and a valid exercise of the police power unless shown to be clearly unreasonable and arbitrary and violative of the United States constitution because its enforcement would work a denial of the equal protection of the laws or would deprive complainant of property without due process of law.<sup>53</sup> Where, how-

nance imposing a fine on public service corporations that discriminate unlawfully between their patrons.

Authority to prohibit any offensive or unwholesome business and to regulate the location of certain enumerated places of business (business of manufacturing and selling ice not being mentioned) will not sustain an ordinance prohibiting an ice making plant within certain limits. It cannot be sustained as a health measure. *People ex rel. Lincoln Ice Co. v. Chicago*, 260 Ill. 150, 102 N. E. 1039.

<sup>52</sup> Thus a grant "to license, tax, regulate, suppress and prohibit" things enumerated, "and to revoke and license at pleasure," combines the power to regulate, suppress and prohibit which arises out of the police power with the

separate and distinct power to tax the objects and subjects therein mentioned, and authorizes the municipality to exercise either power by means of a license. At least this is the doctrine in Illinois. *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825; *Metropolis Theatre Co. v. Chicago*, 246 Ill. 20, 92, N. E. 597; *Harder's Storage Co. v. Chicago*, 235 Ill. 58, 85 N. E. 245, 14 Ann. Cas. 536.

<sup>53</sup> "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this court, concluding with *Armour & Company v. North Dakota*, 240 U. S. 510, 514, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We therefore content

ever, the state court of last resort has not passed on the question whether the ordinance involved exceeds the legislative grant of power to the municipality the United States Supreme Court will determine the question.<sup>54</sup>

**§ 895. Municipal police powers under the general welfare clause.<sup>55</sup>**

Under the Ohio Constitution conferring upon municipalities authority to exercise all powers of local self-government, and by virtue of a general grant of power, it has been held, a city may enact an ordinance against loitering about bar rooms, pool rooms, etc., wandering about streets, etc., without the loiterer or wanderer being able to give a satisfactory account of himself, etc.<sup>56</sup>

In Kansas cities of the first class may by ordinance regulate the transportation of intoxicating liquor for lawful objects and forbid it for unlawful purposes. Broad and varied powers are granted by the general welfare clause.<sup>57</sup>

ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the State enacting them and it so reluctantly disagrees with the local legislative authority primarily the judge of the public welfare, especially when its action is approved by the highest court of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. *Jacobson v. Massachusetts*, 197 U. S. 11, 30. And this, for the reasons stated, cannot be said of the

ordinance which we have here." *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 530, 531, 37 Sup. Ct. 190, 61 L. ed. 191, affirming 267 Ill. 344, 108 N. E. 340, 8 Ann. Cas. 1916C, 488.

<sup>54</sup> *North Western Laundry v. Des Moines*, 239 U. S. 486, 495, 36 Sup. Ct. 206, 60 L. ed. 396.

<sup>55</sup> Under the general police power all persons, natural or artificial, may be subjected to such reasonable restrictions and requirements as are found to be proper and essential to secure the health, comfort, convenience and general welfare of the people. *Chicago v. Union Traction Co.*, 199 Ill. 259, 65 N. E. 243, 59 L. R. A. 666.

<sup>56</sup> *Welch v. Cleveland (Ohio)*, 120 N. E. 206.

<sup>57</sup> *Kansas City v. Jordan*, 99 Kan. 814, 163 Pac. 188, 190, quot-

Charter power to pass "all such ordinances as may be expedient in maintaining the peace, good government, health and welfare of the city," authorizes a penal ordinance against disturbing the peace by offensive conduct and vile language even though the disturber stood meanwhile in his own back yard.<sup>58</sup>

Under general grant of power, and the general welfare clause reasonable ordinances and regulations, it has been held, are authorized on the following: safety in the construction of buildings;<sup>59</sup> prescribing eight hours as a day's work for laborers employed either by the city or a contractor on public work;<sup>60</sup> regulating advertising bill boards;<sup>61</sup> prohibiting charging usurious interest by

ing with approval part of § 895, vol. 3, ante.

<sup>58</sup> "Municipal corporations of this character are formed to meet the needs of denser populations, where propinquity renders the people dependent to a great extent upon the conduct of each other for the existence of those conditions of decency, cleanliness and morality necessary to peace, comfort and health in civilized communities. The filth that comes from the tongue, and addresses itself to the ear, is as revolting to normal people as the sensations that assail the other senses from nuisances against which the law protects them.

"The right of every person to use his own property, is subordinate to the right of society that he should so use it as not to violate any of those rules of decency and health upon which the peace and comfort of those in their vicinity largely depend. The vile, profane and noisy tirade of Mr. Sulpsky was of this character and was as offensive discharged from

one side of the wire fence as from the other. That the general welfare clause of the charter gives the Municipal Assembly the right to protect the people of the city against inflictions of that character is evident, and we therefore hold the ordinance in question to be within its powers and applicable as well to such acts done on the premises of the defendant in cases of this character as to those done upon the premises of another, or in a public place." *St. Louis v. Slupsky*, 254 Mo. 309, 316, 317, 162 S. W. 155.

<sup>59</sup> *Bergen v. Morton Amusement Co.*, 165 N. Y. S. 348, 178 App. Div. 400.

<sup>60</sup> *Milwaukee v. Raulf*, 164 Wis. 172, 59 N. W. 819.

<sup>61</sup> *Kansas City Gunning Advertising Company v. Kansas City*, 240 Mo. 659, 144 S. W. 1099.

A general welfare clause of the municipal charter authorizing the city "to pass all such ordinances not inconsistent with this charter, in maintaining the peace, good government, health and welfare of

private money lenders;<sup>62</sup> segregation of the white and negro races, and forbidding residing together on the same block;<sup>63</sup> (however, all such regulations have been declared unconstitutional in violation of the fourteenth amendment by the United States Supreme Court);<sup>64</sup> bawdy houses, and power to suppress a nuisance.<sup>65</sup>

On the other hand, the general welfare clause does not authorize the city to declare by ordinance the manufacture of altars, chancels and carved wood within six hundred feet of a public park, a nuisance where the operation of such plant is not a nuisance per se, nor had become such as carried on.<sup>66</sup>

Nor by virtue of general police powers and the general welfare clause can a city offer a reward for the apprehension of a murderer of an inhabitant of the community, since such power is strictly a state power and can only be exercised by express grant.<sup>67</sup>

Nor under such power can the city regulate and license the game of golf, because such game is harmless, does not draw disorderly crowds or cause peace disturbance.<sup>68</sup>

Nor will the general welfare clause sustain an ordinance forbidding the offering by any dealer in merchandise of "any prize, gift, or chance as a prize or gift to induce the sale of his goods or wares."<sup>69</sup>

the city, its trade, commerce and manufactures, and to enforce the same by fines and penalties," invests the legislative body with power to enact reasonable ordinances for licensing and regulating the construction of billboards on vacant lots, and even to suppress them entirely if in character they become a nuisance per se. *St. Louis Gunning Advertising Company v. St. Louis*, 235 Mo. 99, 137 S. W. 929.

<sup>62</sup> *Columbia v. Phillips*, 101 N. C. 391, 85 S. E. 963.

<sup>63</sup> *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, 148, citing

§ 895, vol. 3, ante; *Harris v. Louisville*, 165 Ky. 59, 177 S. W. 472.

<sup>64</sup> Section 742, ante.

<sup>65</sup> *Shreveport v. Price (La.)*, 77 So. 883.

<sup>66</sup> *St. Louis v. Dreisoerner*, 243 Mo. 217, 223, 147 S. W. 998.

<sup>67</sup> *Barrett v. Atlanta*, 145 Ga. 678, 89 S. E. 781, citing § 391, vol. 1, ante.

<sup>68</sup> *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825, holding license fee of \$750.00 per year on golf void.

<sup>69</sup> *Commercial Security Co. v. Lee (Ga. 1918)*, 97 S. E. 516.

**§ 896. Effect of decision of municipal authorities.<sup>70</sup>**

Municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their police ordinances. Every intendment is to be made in favor of the lawfulness and reasonableness of the exercise of the police power in promulgating regulations to promote the public health, morals, safety and general welfare, and only in clearest cases will courts interfere.<sup>71</sup>

The city is presumed to have full knowledge of local conditions and its determination of the reasonableness of any specific regulation in the light of this knowledge is *prima facie* valid.<sup>72</sup>

Appropriate means to the exercise of the police power rest largely within the discretion of municipal authorities and courts will not interfere unless the means employed amount to an unreasonable and oppressive interference with individual and property rights and constitute an abuse rather than a legitimate use of power.<sup>73</sup>

**§ 897. Exercise of police power within and without the corporate limits.<sup>74</sup>**

In the interests of police protection and the preservation of the public health, laws sometimes provide that

<sup>70</sup> Sections 730, et seq., 731, vol. 2 ante; section 794 ante; section 896, vol. 3, ante.

<sup>71</sup> *Elsner Bros. v. Hawkins*, 113 Va. 47, 73 S. E. 479, citing § 730, vol. 2, ante (*McQuillin*, Mun. Ord. 186).

<sup>72</sup> *California. Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714.

*Illinois. Chicago v. Walden W. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588.

*Michigan. Lawson v. Connolly*, 175 Mich. 375, 141 N. W. 623.

*Nebraska. State ex rel. v. Withnell*, 91 Neb. 101, 135 N. W. 376.

*Washington. Tacoma v. Keisel*, 68 Wash. 685, 124 Pac. 137.

*United States. Guidoni v.*

*Wheeler*, 230 Fed. 93, 144 C. C. A. 391.

<sup>73</sup> *Ex parte Barmore*, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688; *Emporia v. Atchison, T. & S. F. Ry. Co.*, 88 Kan. 611, 129 Pac. 161; *Detamore v. Hindley*, 83 Wash. 322, 145 Pac. 462; *Schawbe v. Moore*, 187 Mo. App. 74, 82, 172 S. W. 1157.

<sup>74</sup> *Ex parte Blois*, (Cal. 1918), 176 Pac. 449, 451.

Board of health, held to have no power by regulation, under certain laws to make it unlawful to maintain a slaughterhouse outside of the corporate limits. Whether ordinance could so lawfully prohibit was not determined.

all ordinances of a named city enacted for these purposes shall apply to the territory outside of the city limits within a specified distance of the same in all directions.<sup>76</sup>

**§ 898. General requisites of a valid police ordinance.<sup>76</sup>**

Police ordinances and regulations must not infringe the constitutional guaranties of the nation or state, invade personal or property rights, deny due process of law or equal protection of the laws;<sup>77</sup> must conform to the constitution and general laws of the state,<sup>78</sup> unless the constitution or the laws otherwise permit; must not constitute a delegation of legislative power;<sup>79</sup> must not discriminate arbitrarily and oppressively, but must conform to a reasonable classification, and be uniform, fair and impartial in their operation;<sup>80</sup> and must observe

*State v. Temple*, 99 Neb. 505, 56 N. W. 1063.

<sup>75</sup> *State v. Rice*, 158 N. C. 636, 74 S. E. 582.

<sup>76</sup> Section 645, vol. 2, ante.

Must be definite and certain.

*Portland v. Traynor* (Or. 1919), 183 Pac. 933.

<sup>77</sup> Section 740, vol. 2, ante; § 740, ante.

Must not be inconsistent with constitution and general laws. *People ex rel. v. Hamilton*, 161 N. Y. S. 425, 97 Misc. Rep. 437.

Confiscation of private property for aesthetic purposes forbidden by the constitution. *St. Louis v. Dreisoerner*, 243 Mo. 217, 147 S. W. 998.

Conferring arbitrary powers on officers, boards or departments. *Goldstein v. Conner*, 212 Mass. 57, 98 N. E. 701.

<sup>78</sup> Section 740, vol. 2, ante; § 740, ante.

Must be constitutional, not grant exclusive privileges or confer arbitrary powers, etc. *Noe v. Mor-*

*ristown*, 128 Tenn. 350, 161 S. W. 485.

"A municipality cannot authorize that which either the organic law or the legislature has forbidden." *Ex parte Lerner* (Mo. 1920), 218 S. W. 331, 334.

<sup>79</sup> *Chicago v. German Catholic Orphan Asylum*, 161 Ill. App. 45; *Spann v. Dallas* (Tex. Civ. App.), 189 S. W. 999.

Ministerial duties may be delegated. *Birch v. Ward* (Ala. 1917), 75 So. 566.

<sup>80</sup> Regulations and restriction must be uniform, and the obligations or burdens must be on all of the same class. *Vicksburg v. Mullane*, 106 Miss. 199, 63 So. 412.

*Mannix v. Frost*, 164 N. Y. S. 1050, 100 Misc. Rep. 36, holding order forbidding sale of loose or dipped milk not discriminatory which applied to all milk dealers engaged in a similar business in the same community.

Discrimination—*St. Louis v. Handlan*, 242 Mo. 88, 145 S. W.



good faith in their enactment and show clearly a substantial and a reasonable relation to the maintenance of the health, morals, peace, safety, order and general welfare of the community.<sup>81</sup>

## II. HEALTH AND SANITARY REGULATIONS—NUISANCES.

### § 899. Power to make and enforce.

As it is universally recognized that one of the most important objects of municipal government is the preser-

421; *Sherman v. Paterson*, 82 N. J. L. 345, 82 Atl. 889; *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182.

Reasonableness in classification, etc., required. *Motlow v. State*, 125 Tenn. 547, 145 S. W. 177.

Must not be unreasonable, arbitrary or oppressive. *State v. Wittles*, 118 Minn. 364, 136 N. W. 883; *St. Louis v. Dreisoerner*, 243 Mo. 217, 147 S. W. 998; *Dangel v. Williams (Del. Ch.)*, 99 Atl. 84; *Greene v. Cooke*, 219 Mass. 121, 106 N. E. 573; *People v. Kaye*, 212 N. Y. 407, 106 N. E. 122; *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182; *State ex rel. v. Rendigs (Ohio)*, 120 N. E. 836; *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883; *Salt Lake City v. Board of Education (Utah)*, 175 Pac. 654.

Ordinances need not grade misdemeanors or minor offenses which are defined. *New Orleans v. White (La. 1918)*, 78 So. 745.

Ordinances must be general in its terms and uniform in its application to the class of persons or subjects to be affected. *Ex parte Lerner (Mo. 1920)*, 218 S. W. 331, 333.

<sup>81</sup> Section 650, vol. 2, ante;

§ 650, ante; § 893, vol. 3, ante; § 893, ante.

*Yee Gee v. San Francisco*, 235 Fed. 757; *Chicago, M. & St. P. Co. v. Minneapolis*, 238 Fed. 384, 404; *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828; *State ex rel. v. Billings Gas Co. (Mont.)*, 173 Pac. 799; *Union Cemetery Ass'n. v. Kansas City*, 252 Mo. 466, 504, 161 S. W. 261; *Hopkins v. Richmond*, 117 Va. 692, 86 S. E. 139, citing §§ 724, 732, vol. 2, ante, and § 895, vol. 3, ante.

“The exercise of the power must not be unreasonable but must be enacted in good faith for the promotion of the public good, and not for the oppression or annoyance of a particular class.” *State v. Gury*, 121 Md. 534, 88 Atl. 546, 47 L. R. A. (N. S.) 1087; *Plessy v. Ferguson*, 163 U. S. 555, 16 Sup. Ct. 1138, 41 L. ed. 256.

An ordinance enacted to protect the public health that has no real or substantial relation to the subject-matter and is an unreasonable and unwarranted interference with the conduct of a lawful business is unconstitutional. *Portland v. Traynor (Or. 1919)*, 183 Pac. 933, 935.

vation of the health of the community,<sup>82</sup> broad discretion in the promulgation and enforcement of reasonable and sufficient police ordinances and regulations is given to the duly constituted local authorities for this purpose,<sup>83</sup> and such regulations will be liberally construed and sustained by the courts when this can be done without a violation of the fundamental principles of our governmental and legal system.<sup>84</sup>

Usually health officers are clothed under the law with summary powers to protect the people of a community as against conditions which affect the health and lives of the locality. For example, forbidding under penalty having possession of or in use unclean receptacles in the transportation or delivery of milk or cream,<sup>85</sup> or selling loose or dipped milk,<sup>86</sup> or imposing as a condition for the issuance of a license to sell milk in the city the requirement of a blood test, to ascertain whether or not the proposed licensee may be a carrier of typhoid fever germs.<sup>87</sup>

<sup>82</sup> *Oriental Oil Co. v. San Antonio* (Tex. Civ. 1918), 208 S. W. 177, 181, citing § 899, vol. 3, ante; *Thorpe v. Savannah*, 13 Ga. App. 767, 79 S. E. 949, 952, quoting with approval from § 899, vol. 4, ante; *Chicago v. Union Ice Cream Mfg. Co.*, 252 Ill. 311, 96 N. E. 872; *Chicago v. Mandel Bros.* 264 Ill. 206, 106 N. E. 181; *Vicksburg v. Mullaney*, 106 Miss. 199, 63 So. 412 (regulation of plumbing work); *Crayton v. Larabee* (N. Y.), 116 N. E. 355, 358.

"One of the most important objects of municipal government is the preservation of the public health." *Spear v. Ward* (Ala.), 74 So. 27, 30.

"The most important of the police powers is that of caring for the safety and health of the com-

munity." *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182.

<sup>83</sup> Power to establish hospital. *Stokes v. Montgomery* (Ala. 1919), 82 So. 663, 666.

<sup>84</sup> Ordinances designed to conserve the public health will be liberally construed. *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182.

**Hospitals**, power to regulate, means regulation according to law, e. g., requiring females to work over ten hours a day contrary to state statute limiting such persons, is void. *People v. Chicago*, 256 Ill. 558, 565, 100 N. E. 194.

<sup>85</sup> *People v. Frudenberg*, 209 N. Y. 218, 103 N. E. 166.

<sup>86</sup> *Mannix v. Frost*, 164 N. Y. S. 1050, 100 Misc. Rep. 36.

<sup>87</sup> This test was held to be only one of the precautions deemed

The police power, as stated, is a power to prevent, a power to anticipate dangers to come, an active and earnest effort to protect the inhabitants of the community, and in so doing to restrain individual tendencies.<sup>88</sup>

**§ 900. What constitutes a nuisance—classification.<sup>89</sup>**

Laws in substance define a nuisance to consist in unlawfully doing an act or in omitting to perform a duty which either annoys, injures or endangers the comfort, health, repose or safety of the citizen, or which unlawfully interferes with or tends to obstruct, or in any way render unsafe and insecure other persons in life or in the use of their property. Such commission or omission

necessary to provide for the people of the city a pure and wholesome supply of milk and cream, free from disease germs. This precaution was evidently in anticipation of the dangers of an epidemic to which, without the precautionary measure, the people might be subjected. The court expressed the opinion that it was equally important to anticipate dangers to public health and provide against them, as to take steps after the disease had appeared to eradicate the conditions. *People ex rel. v. Hamilton*, 161 N. Y. S. 425, 97 Misc. Rep. 437.

<sup>88</sup> "Modern bacteriological research has made it possible for us to understand and know the cause of disease, and the science of preventive medicine has developed to an extent and to a degree of efficiency heretofore unknown in the world. Within a comparatively recent period of time the world has learned the cause of yellow fever and of typhus fever, and the dangers to the people from a con-

taminated water or milk supply. We have recently learned of the possibilities of the transmission of poisons which inoculate the human system with germs of diseases carried by flies and other insects." *Mannix v. Frost*, 164 N. Y. S. 1050, 100 Misc. Rep. 36.

"It is a proper exercise of the police power in the interest of public health, as well as its duty, to prevent a condition likely to be detrimental to public health as much as it is to abate such condition after its evil consequences appear, and a board of health would meet with merited condemnation if it stood by and took no steps to provide by the exercise of ordinary prudence a sanitary condition which would prevent an epidemic of disease likely to grow out of known conditions." *Fenton v. Atlantic City* (N. J. L.), 103 Atl. 695.

<sup>89</sup> *Oriental Oil Co. v. San Antonio* (Tex. Civ. App. 1918), 208 S. W. 177, 181, citing § 900, vol. 3, ante.

becomes a public nuisance when it affects an entire community or any considerable number of persons.<sup>90</sup>

A classification of nuisances was made by the late Chief Justice Vickers of Illinois, as follows: "Nuisances may be divided into three classes: First, those which in their nature are nuisances per se or are so denounced by the common law or the statute; second, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted or managed; and, third, those which in their nature may be nuisances but as to which there may be honest difference of opinion in impartial minds. The power granted to cities in relation to nuisances authorizes the city council to declare those things falling within the first and third classes to be nuisances, but as to those things falling within the second class the only power the city has is to declare such of them to be nuisances as are so in fact."<sup>91</sup>

### § 901. Municipal power to declare and define nuisances.

To constitute a thing a legal nuisance it must be so in fact, irrespective of an ordinance declaration on the subject.<sup>92</sup>

<sup>90</sup> *Cummings v. Lobsitz*, 42 Okla. 704, 142 Pac. 993.

**Nuisance defined and illustrated.**  
"Whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable is a nuisance." *Chicago v. Atwood*, 269 Ill. 624, 110 N. E. 127, quoting from *Wahle v. Reinbach*, 76 Ill. 322; *Oehler v. Levy*, 234 Ill. 595, 85 N. E. 271, 17 L. R. A. (N. S.) 1025, 14 Ann. Cas. 891.

"A nuisance may be anything which essentially interferes with the enjoyment of life or property and a nuisance is public when it affects the rights to which every citizen is entitled." *Murden v.*

*Lewes*, 6 Boyce (Del. Super), 48, 96 Atl. 506, 507.

"Anything which is injurious to health may be a nuisance." *Fenton v. Atlantic City* (N. J. L.), 103 Atl. 695, sustaining regulation requiring buildings to be connected with public sewers irrespective of the fact of the existence of a private sewer.

An ice making house or cooling plant is not a nuisance per se. *People ex rel. v. Chicago*, 260 Ill. 150, 102 N. E. 1039.

<sup>91</sup> *People ex rel. v. Chicago*, 260 Ill. 150, 102 N. E. 1039.

<sup>92</sup> *Buffalo v. Kellner*, 153 N. Y. S. 472, 477, 90 Misc. Rep. 407.

Therefore, the well settled rule is that under general power to declare and define a nuisance, a municipal corporation has no power to declare that to be a nuisance which is not so in fact,<sup>93</sup> or to suppress in part or in toto any business within its limits which is not a nuisance per se.<sup>94</sup>

On the other hand, that which is in fact a nuisance may be so declared.<sup>95</sup>

### § 902. Same—illustrative cases.

The maintenance of a manufacturing plant for producing altars, chancels and carved wood, wherein three

<sup>93</sup> Alabama. *Spear v. Ward* (Ala.), 74 So. 27, 30.

Arkansas. *Merrill v. Van Buren*, 125 Ark. 248, 188 S. W. 537.

Delaware. *Murden v. Lewes*, 6 Boyce (Del. Super.), 48, 96 Atl. 506, 507.

Idaho. *Twin Falls v. Harlan*, 27 Idaho 769, 151 Pac. 1191.

Illinois. *People v. Chicago*, 280 Ill. 576, 117 N. E. 779; *Bushnell v. Chicago*, B. & Q. R. Co., 259 Ill. 391, 102 N. E. 785.

Indiana. *Bloomfield v. West* (Ind. App.), 121 N. E. 4, 6, following *Evansville v. Miller*, 146 Ind. 613, 618, 45 N. E. 1054, 1056, 38 L. R. A. 161.

West Virginia. *Parker v. Fairmont*, 72 W. Va. 688, 79 S. E. 660.

A nuisance cannot be made one by mere declaration of charter or ordinance. *Gunning System v. Buffalo*, 71 N. Y. S. 155, 62 App. Div. 497.

"To make a thing a legal nuisance it must be so in fact." *Buffalo v. Kellner*, 153 N. Y. S. 472, 477, 90 Misc. Rep. 407.

Declaration that building is a nuisance is not conclusive but

court may determine. *Forney v. Mounger* (Tex. Civ. App. 1919), 210 S. W. 240.

"Where property rights exist they cannot be taken away by an ordinance except when the property or the use to which it is put is a nuisance." *S. H. Kress & Co. v. Miami* (Fla. 1919), 82 So. 775.

<sup>94</sup> *St. Louis v. Dreisoerner*, 243 Mo. 217, 223, 147 S. W. 998.

<sup>95</sup> *Oriental Oil Co. v. San Antonio* (Tex. Civ. App. 1918), 208 S. W. 177, 181, citing § 901, vol. 3, ante; *Walther v. Cape Girardeau*, 166 Mo. App. 467, 149 S. W. 36.

That which is a common law nuisance may be forbidden by ordinance. *Tarkio v. Miller*, 167 Mo. App. 122, 151 S. W. 208.

Power to define and declare what are nuisances, held authority to define in general terms only, making general application, and not power to declare a particular thing, as a building, a nuisance. *Sevier v. Barbourville*, 180 Ky. 553, 204 S. W. 294.

May declare what shall be a nui-

saws are operated, within six hundred feet of a public park, not being a nuisance per se, nor having become such by reason of its operation, cannot be prohibited or abated by ordinance.<sup>96</sup>

Nor can an ordinance declare that billboards not constructed of metal are nuisances;<sup>97</sup> nor under general power will the nuisance theory alone support an ordinance requiring a street car company to sprinkle the space between its tracks (to lay the dust),<sup>98</sup> or justify the regulation of the location of a building to be used for a milk distributing depot with stables attached,<sup>99</sup> or support an ordinance forbidding the smoking of tobacco in any form in public street, parks and public places.<sup>1</sup>

sance and abate the same. *Forney v. Mounger* (Tex. Civ. App. 1919), 210 S. W. 240.

<sup>96</sup> "The clause of the ordinance upon which the information against defendant was framed refers to a calling which is not a nuisance per se, nor had it become such as carried on by defendant. Hence the City of St. Louis had no power under its charter to prohibit or abate it. It was a gainful occupation which the defendant was lawfully entitled to pursue in the manner which the evidence shows. The city had no specific power under its charter to regulate it, nor any authority so to do under the general welfare clause or as a police regulation. The police power is a necessary and wholesome faculty of municipal government, but it only extends to the regulation of employments prejudicial to the public safety, health, morals and good government of the citizens, and it ends where those public interests are not beneficially served thereby. It cannot sanction the confiscation of private property for aesthetic

purposes.'" *St. Louis v. Dreisoerner*, 243, Mo. 217, 223, 224, 147 S. W. 998, following *St. Louis Gunning Advertising Company v. St. Louis*, 235 Mo. 99, 147, 200, 137 S. W. 929.

<sup>97</sup> *People ex rel. v. Hastings*, 138 N. Y. S. 1137, 153 App. Div. 920, affirming 137 N. Y. S. 186, 77 Misc. Rep. 453; *Standard Bill Posting Co. v. Newburg*, 138 N. Y. S. 1144, 153 App. Div. 920.

<sup>98</sup> *South Bend v. Chicago, S. B. & N. I. Ry. Co.*, 179 Ind. 455, 101 N. E. 628.

<sup>99</sup> *People ex rel. v. Oak Park*, 268 Ill. 256, 109 N. E. 11; *People v. Chicago*, 280 Ill. 575, 578, 117 N. E. 779.

Injunction at the suit of municipal authorities denied to restrain the construction of a dam across a river because it would constitute a public nuisance in that it would obstruct navigation and interfere with rights of fishery-privileges appertaining to the inhabitants of the municipality. *Havre de Grace v. Harlow*, 129 Md. 265, 98 Atl. 852.

<sup>1</sup> *Zion v. Behrens*, 262 Ill. 510,

A declaration that a particular use of land is a nuisance is subject to judicial inquiry,<sup>2</sup> and so that a saw-mill is a nuisance,<sup>3</sup> or a bowling alley,<sup>4</sup> or a frame barn,<sup>5</sup> or an ice manufacturing or cooling plant,<sup>6</sup> or railroad tracks in streets constructed pursuant to lawful grant.<sup>7</sup>

By virtue of municipal power to declare and define nuisances, hospitals conducted for pay may be regulated and their location forbidden in certain sections;<sup>8</sup> and

<sup>1</sup> 104 N. E. 826, citing § 902, vol. 3, ante.

<sup>2</sup> *Palmberg v. Kinney*, 65 Or. 220, 132 Pac. 538.

<sup>3</sup> *Berger v. Smith*, 160 N. C. 205, 75 S. E. 1098, 156 N. C. 323, 72 S. E. 376.

<sup>4</sup> May declare a bowling alley a nuisance when it is a nuisance in fact. It is not a nuisance per se. *Shreveport v. Leiderkrantz Society*, 130 La. 802, 58 So. 578.

<sup>5</sup> A frame barn, or similar structure, lawfully and properly erected and maintained in private property in a reasonable safe condition is not a nuisance, but by reason of its use or condition it may become a nuisance. *Bloomfield v. West* (Ind. App.), 121 N. E. 4, 6.

<sup>6</sup> Ordinance which prohibits the establishment or maintenance of an ice manufacturing or cooling plant within four hundred feet of any church cannot be sustained as a health measure. The city has no power to prohibit absolutely "the erection or maintenance of such a plant within four hundred feet of a church without regard to any other conditions or circumstances." *People v. Chicago*, 260 Ill. 150, 102 N. E. 1039.

<sup>7</sup> "A railroad, having acquired a right to the use of the streets of a city, cannot be required to

take up its tracks or abandon the use of the streets by the declaration of the city council that the operation of the railroad is a nuisance." *Bushnell v. Chicago, B. & Q. R. Co.*, 259 Ill. 391, 102 N. E. 785, 787.

<sup>8</sup> A proposed hospital building to be of gracious design, with modern equipment, directed by a high personnel, to take care of and cure crippled children is not a nuisance per se, but should an obnoxious or improper use cause the institution to develop into an actual nuisance, relief will then be available. *Hall v. House of St. Giles the Cripple*, 154 N. Y. S. 96, 91 Misc. Rep. 122, affirmed 158 N. Y. S. 1117.

Ordinance forbidding the location of hospitals for pay, within the city, and within one hundred feet of a residence, and declaring a building for such purpose so located a nuisance, was sustained, under power to define and condemn nuisances, and "to prohibit the construction of any building or structure which, in the judgment of the board of aldermen may be a nuisance or of injury to adjacent property or to the general public." *Lawrence v. Nissen*, 173 N. C. 359, 91 S. E. 1036.

"A hospital may not be a nuisance per se, but it may become

the selling of intoxicating liquor in violation of law may be declared a nuisance;<sup>9</sup> street obstructions, as electric light posts;<sup>10</sup> or dilapidated and unsanitary buildings.<sup>11</sup>

Certain offensive occupations in residence sections may be forbidden as nuisances.<sup>12</sup>

### § 903. Same—doubt as to nuisance.

Some things are in their nature nuisances and are so recognized by the law. Other things are of such a character that in their nature may or may not be nuisances, but as to which honest difference of opinion may exist among men of impartial minds.<sup>13</sup>

such because of its location, or by reason of the manner in which it is conducted.” *Lawrence v. Nissen*, 173 N. C. 359, 91 S. E. 1036; *Deaconess Home & Hospital v. Bontjes*, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215, 39 Ann. Cas. 126; *Statler v. Rochelle*, 83 Kan. 86, 109 Pac. 786, 29 L. R. A. (N. S.) 49; *Commonwealth v. Charity Hospital of Pittsburgh*, 198 Pa. 270, 279, 47 Atl. 984.

<sup>9</sup> Ordinance may declare the selling intoxicating liquors by a club contrary to law to be a nuisance under power to declare what shall be a nuisance, etc. *Houston v. Walton*, 25 Colo. App. 282, 129 Pac. 263.

Selling intoxicating liquor in violation of ordinances. *Toole v. Hoffman*, 42 Utah 596, 134 Pac. 58, citing §§ 901-903, vol. 3, ante.

<sup>10</sup> *Duncan Electric & Ice Co. v. Duncan* (Okl.), 166 Pac. 1048.

<sup>11</sup> Ordinance declaring all dilapidated buildings nuisances. *Crossman v. Galveston* (Tex. Civ. App.), 204 S. W. 128.

An ordinance pursuant to express statutory grant may declare

that no building which is so unsanitary or out of repair as to be fit for habitation, or that may be dangerous to the public or injurious to the public health shall be allowed to be used. Under such ordinance whether such conditions exist, of course, is a question of fact in each given case. *Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133, 1135.

<sup>12</sup> “A municipality under the provisions of this section (Ohio General Code) is authorized to regulate and suppress all places that in its judgment are likely to be injurious to the health of its inhabitants or to disturb the people living in the immediate neighborhood by offensive odors.” *State v. Rendigs* (Ohio), 120 N. E. 836, 838, sustaining an ordinance forbidding the storage, cleaning or renovating of uncured animal hair and the by-products thereof in residential districts.

<sup>13</sup> Those things which in their nature are not nuisances but which may become nuisances, by reason of their locality, surroundings, or the manner in which they are con-



Accordingly under some conditions it is competent in the exercise of the police power for the municipal corporation to declare that under particular circumstances and in particular localities specified businesses which are not nuisances per se are to be deemed nuisances in fact and law. This principle has been declared by the Supreme Court of the United States. The maintenance of livery stables,<sup>14</sup> brick yards,<sup>15</sup> slaughter houses, the deposit of offal, garbage and of the carcasses of dead animals within the city, the obstruction of streets and sidewalks for the display of goods, are of this class. In this class of cases the exercise by the municipality of the legislative authority to declare what shall be a nuisance is usually conclusive of the question.<sup>16</sup>

In such cases some decisions hold that if the city declares the thing a nuisance it is a nuisance.<sup>17</sup>

duced, "the city has no power to declare conclusively such things to be nuisances but can only declare such of them to be nuisances as are so in fact." *Bushnell v. Chicago*, B. & Q. R. Co., 259 Ill. 391, 102 N. E. 785, 787.

<sup>14</sup> *Reinman v. Little Rock*, 237 U. S. 171, 35 Sup. Ct. 511, 59 L. ed. 900, affirming 107 Ark. 174, 155 S. W. 105.

*Albany Christian Church v. Wilborn*, 112 Ky. 507, 66 S. W. 285, 23 Ky. Law. Rep. 1820.

<sup>15</sup> *Hadacheck v. Los Angeles*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. ed. 348, affirming 165 Cal. 416, 132, Pac. 584.

"Whether or not this trade (burning brick) however strictly the manner of its conduct may be regulated, can be pursued at all in a residential district without causing undue annoyance to persons living in the district, is certainly a question upon which reasonable minds may differ. If this

be so, the propriety of entirely prohibiting the occupation within such districts is one for the legislative determination. The courts will not substitute their judgment upon this issue for that of the legislative body." *Ex parte Hadacheck*, 165 Cal. 416, 132 Pac. 584, 586.

<sup>16</sup> "While a city having authority 'to define, regulate, suppress, and prevent nuisances' cannot arbitrarily use it to prohibit harmless and inoffensive private enterprises, the acts of the city council in exercising such police power may be held conclusive if the subject of municipal legislation might or might not be a nuisance, depending upon the 'conditions and circumstances.'" *State ex rel. v. Withnell*, 91 Neb. 101, 135 N. W. 376, 378.

<sup>17</sup> *Bushnell v. Chicago*, B. & Q. R. Co., 259 Ill. 391, 102 N. E. 785, 787.

Ordinance passed pursuant to

### § 904. Power to abate nuisances—costs.

A nuisance must in fact exist before it can be abated.<sup>18</sup>

When it exists its abatement is justified by virtue of the reasonable exercise of the police power.<sup>19</sup>

It is sometimes held that a grant of power to abate a nuisance can be exercised only in accordance with an ordinance or resolution duly enacted,<sup>20</sup> or at least by

statute regulating weight and grade of plumbing material sustained; the court expressing the opinion whether the ordinance had a substantial relation to health the legislature having acted, the court would not interfere. *Kleinhein v. Wichita*, 98 Kan. 431, 157 Pac. 1190.

<sup>18</sup> *Murden v. Lewes*, 6 Boyce (Del. Super.), 48, 96 Atl. 506, 507.

May abate only that which is a nuisance per se or branded as such by a valid statute or ordinance. *Donohoe v. Fredlock*, 72 W. Va. 712, 79 S. E. 736, citing § 901, vol. 3, ante.

Ordinance requiring rat-proofing of all houses, buildings, etc., within the city to eradicate the bubonic plague, held valid and constitutional. What was essential was a question of fact for the legislative department of city. *New Orleans v. Ricker*, 137 La. 84, 69 So. 273.

City may declare that when water closets are found to be a nuisance they shall be removed. City must establish fact of nuisance. Notice to remove need not be given by city. *Chicago v. Atwood*, 269 Ill. 624, 110 N. E. 127.

<sup>19</sup> *Walther v. Cape Girardeau*, 166 Mo. App. 267, 149 S. W. 36.

Express power to abate. *Duncan Electric & Ice Co. v. Duncan (Okla.)*, 166 Pac. 1048.

Houses of prostitution are nuisance per se, and under general welfare clause municipality may suppress. *Shreveport v. Price (La.)*, 77 So. 883.

<sup>20</sup> *Wilson v. Ottumwa*, 181 Iowa 303, 164 N. W. 613.

Under general power to abate nuisances city cannot in the absence of reasonable ordinance, abate the production and emission of coal smoke and soot from dye works, and injunction may be invoked to restrain the city. General power to abate means a nuisance per se. *Parker v. Fairmount*, 72 W. Va. 688, 79 S. E. 660.

Ordinance may provide that all dilapidated buildings in fire limits may be declared nuisances and procedure may be prescribed for determining whether building is a nuisance in fact. Wooden buildings in fire limits may be removed. *Crossman v. Galveston (Tex. Civ. App.)*, 204 S. W. 128.

A building as a nuisance, on due notice and hearing. *Defferari v. Galveston (Tex. Civ. App. 1918)*, 208 S. W. 188.

If in seeking to abate a nuisance the city destroys a building which in fact is not a nuisance it will be liable in damages. *Forney v. Mounger (Tex. Civ. App. 1919)*, 210 S. W. 240.

“The abatement as a remedy

some affirmative action on the part of the municipal authorities. However, in certain circumstances, a formal declaration of the existence of the nuisance is not essential.<sup>21</sup>

Laws providing for the abatement of nuisances are generally so drawn that the usual remedies may be invoked by the appropriate public authorities,<sup>22</sup> that is, by summary proceedings,<sup>23</sup> or by injunction,<sup>24</sup> or by par-

must be limited by its necessity, and no unnecessary injury to property must be permitted." *Forney v. Mounger* (Tex. Civ. App. 1919), 210 S. W. 240, 242.

<sup>21</sup> *Kenesaw v. Chicago, B. & Q. R. Co.*, 91 Neb. 619, 136 N. W. 991, holding that it was not incumbent on the municipality to enact an ordinance forbidding the maintenance of stockyards in the locality involved as a condition precedent to seeking relief by injunction.

Compare *Richmond v. House*, 177 Ky. 829, 198 S. W. 218.

<sup>22</sup> Laws frequently sanction the abatement of a nuisance by any public body or officers authorized by law or by individuals and confer power to abate by removal, or if necessary, by destruction. *Cummings v. Lobsitz*, 42 Okl. 704, 142 Pac. 993.

<sup>23</sup> Summary abatement lies. *Murden v. Lewes Comrs.* (Del. 1919), 108 Atl. 74, 77, citing §§ 904, 926, and 1370, vol. 3, ante.

"It is the duty of municipal corporations to abate public nuisances, and it is well settled that a municipal corporation has at common law the power to cause the abatement of such nuisances and if it cannot otherwise be abated, to destroy the thing which

constitutes the nuisance. This authority has been given to municipal corporation from the earliest days of the common law down to the present time." *Cummings v. Lobsitz*, 42 Okl. 704, 142 Pac. 993, holding particular municipality possessed power by state grant and could destroy or remove a building that had become a nuisance.

Buildings so unsanitary or out of repair as to be a menace to public health and constitute nuisances per se may be removed or destroyed, if necessary. "If the structure is so out of repair or so unsanitary as to be unfit for habitation, or is dangerous to the public, and the trouble cannot be remedied at a reasonable cost considering the value of the structure when improved, the court may order it removed, or he may in his discretion allow the owner to elect which course he will pursue where the matter is doubtful." *Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133.

City in exercising police power may enter premises and remove the thing constituting the nuisance or compel its removal. *Vossler v. De Smet*, 204 Ill. App. 292, 296.

Trees which interfere with sewers may be cut down by city, be-

ticular legal steps outlined by charter or statute at the expense of the property causing the nuisance.<sup>25</sup>

cause they constitute a continuous nuisance. *Birmingham v. Graves* (Ala.), 76 So. 395.

<sup>24</sup> *Santa Ana v. Santa Ana Valley Irrigation Co.*, 163 Cal. 211, 124 Pac. 847.

Injunction to abate an alleged nuisance arising from the sale of intoxicating liquor contrary to law by municipal authorities denied. *Billings Hotel Co. v. Enid* (Okla.), 154 Pac. 557.

Injunction to restrain selling liquor in violation of law, or use of property for bawdy house. *Spence v. Fenchler* (Tex. Civ. App.), 151 S. W. 1094.

Injunction will not be granted against a threatened nuisance when the thing complained of is not a nuisance per se, but may or may not become such, according to circumstances, e. g., stock yards. *Richmond v. House*, 177 Ky. 829, 198 S. W. 218. Compare *Kenesaw v. Chicago, B. & Q. R. Co.*, 91 Neb. 619, 136 N. W. 991.

Beer garden. *Pfingst v. Senn*, 94 Ky. 561, 23 S. W. 358, 58 Ky. Law Rep. 325, L. R. A. 569.

Base ball park. *Alexander v. Tebean*, 24 Ky. Law Rep. 1305, 71 S. W. 427.

**Stock yards**; injunction to restrain operation denied in the absence of evidence establishing nuisance, and of valid ordinance requiring permit to operate. An ordinance failing to prescribe a uniform rule, but which confers arbitrary power on officers, held void. *Richmond v. House*, 177 Ky. 829, 198 S. W. 218.

<sup>25</sup> City may abate a nuisance on

private premises at cost of property owner. *Kasch v. Akron* (Ohio 1919), 126 N. E. 61, 65.

Cleaning closets, or privies by levying an assessment to cover expense in land, held valid exercise of the police power. *Rathford v. Gastonia* (N. C. 1919), 99 S. E. 21.

Abatement at cost of property. Special tax a lien for abating nuisance. *Philadelphia v. Hyde*, 48 Pa. Super Ct. 269; *Philadelphia v. Gouss*, 56 Pac. Super Ct. 496.

At cost of benefited property city may construct bulkheads or retaining walls and fill in tide lands, when necessary to abate nuisance. *Palmberg v. Kenney*, 65 Or. 220, 132 Pac. 538.

City may fill in low ground when necessary to protect health, comfort, convenience, etc. *Kaler v. Puget Sound Bridge & D. Co.*, 72 Wash. 497, 130 Pac. 894; *Martin v. Olympia*, 69 Wash. 28, 124 Pac. 214; *Bowes v. Aberdeen*, 58 Wash. 535, 109 Pac. 369.

City may order building liable to fall and endanger persons or property to be removed, or city may remove and assess expense to land owner. Wooden buildings to prevent fire may be removed, when buildings are old and dilapidated and likely to fall and composed of combustible materials and endanger other buildings close thereto by fire, etc., city by resolution may order its removal. When such building is ordered removed and owner declines, but proceeds to repair it for a stable which made it more dangerous and more likely

§ 905. Contagious and infectious diseases—quarantine.<sup>26</sup>

§ 906. Burial of the dead—cemeteries—crematories.<sup>27</sup>

§ 907. Nuisances arising from trades, manufactures, etc.

To be valid and constitutional ordinances regulating trades, businesses, industries and manufactories of the several kinds so generally carried on in urban centers, directing their location, and excluding certain of them from specified districts, must have a reasonable relation to the preservation of the public health, safety, morals and comfort of the inhabitants. Any kind of industry which is a menace, or likely to become such due to its location and surroundings, or the manner in which it is conducted to the conservation of any of those things fairly within the scope of the legitimate exercise of the police power, which the government exists to preserve and promote, may be regulated.<sup>28</sup>

Where the conditions justify the distinction and classification, familiar examples are: Undertaking establishments, which may be restricted within prescribed limits, and forbidden on residential streets;<sup>29</sup> the storage, clean-

to take fire, etc., injunction may be invoked to prevent proposed repairs and require removal as a nuisance. *Howell v. Sweetwater* (Tex. Civ. App.), 161 S. W. 948.

<sup>26</sup> To prevent the spread of contagious and infectious diseases an ordinance may require a milk dealer to obtain a license who sells milk to submit to blood test to show whether he has had typhoid fever and was a carrier of typhoid germs. *People ex rel. v. Hamilton*, 161 N. Y. S. 425, 97 Misc. Rep. 437.

See § 899, ante.

<sup>27</sup> City may by ordinance forbid burials in places when they constitute a public nuisance, but

the courts may investigate and determine whether such cemetery is in fact injurious to public health, that is, the reasonableness of the exercise of such police power. *Union Cemetery Association v. Kansas City*, 252 Mo. 466, 504, 161 S. W. 261.

<sup>28</sup> *State v. Woolley*, 88 Conn. 715, 92 Atl. 662.

*Storing rags in thickly settled parts of city.* *Commonwealth v. Hubley*, 172 Mass. 58, 51 N. E. 448, 42 L. R. A. 403, 70 Am. St. Rep. 242.

<sup>29</sup> *Osborn v. Shreveport (La.)*, 79 So. 542; *St. Paul v. Kessler* (Minn. 1920), 178 N. W. 171.

*Saier v. Joy*, 198 Mich. 295, 164

ing and renovating of uncured animal hair and its by-products;<sup>30</sup> tanneries;<sup>31</sup> laundries;<sup>32</sup> lumber yard;<sup>33</sup> brick yards, brick making and brick kilns;<sup>34</sup> livery stables;<sup>35</sup> stone quarries, and stone crushers;<sup>36</sup> opera-

N. W. 507, L. R. A. 1918A, 825, holding that an undertaking establishment including a morgue on one of the principal residence streets of the capital of Michigan is a nuisance to nearby property owners entitling them to an injunction against the maintenance of such establishment.

<sup>30</sup> State ex rel. v. Rendigs (Ohio), 120 N. E. 836.

<sup>31</sup> State v. Taubert, 126 Minn. 371, 148 N. W. 281.

<sup>32</sup> Ex parte Quong Wo, 161 Cal. 220, 118 Pac. 714.

See § 977, post; § 977, vol. 3, ante.

<sup>33</sup> Ex parte Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130.

<sup>34</sup> **Brick yards.** An ordinance forbidding the manufacturing of bricks within a specified section of a municipality may be made a valid and constitutional exercise of the police power. The fact that the business is not forbidden in all sections of the city does not render the ordinance objectionable as denying equal protection of the law to those following the business in the forbidden section, where the conditions justify the distinction and classification. *Hadacheck v. Los Angeles*, 239 U. S. 394, 36 Sup. Ct. 143, 60 L. ed. 348, affirming 165 Cal. 416, 132 Pac. 584, observing that though a brickyard may not be a nuisance per se, the burning of brick is a trade which may, when conducted in close prox-

imity to dwelling houses, be so offensive to those residing in the vicinity as to constitute a nuisance, and hence, such plants may be restricted to specified localities. This is true of all trades, which, in their operation involve the discharge of smoke or offensive odors into the surrounding atmosphere.

"Brick kilns are frequently condemned as nuisances and are proper subjects of police regulation. If a brick kiln is in fact a nuisance modern methods of construction and careful operation are immaterial." *State ex rel. v. Withnell*, 91 Neb. 101, 135 N. W. 376; *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. App. 713, 78 S. W. 646.

<sup>35</sup> Section 910, post.

<sup>36</sup> **Stone quarry.** Ordinance forbidding operation of a stone quarry without permission of the legislative body held void under power to regulate, the court holding that the exaction of permission to operate is not a regulation. No uniform rule was established, but there was reserved to the legislative body the right to grant or withhold the privilege arbitrarily. *St. Louis v. Atlantic Quarry & Const. Co.*, 244 Mo. 479, 148 S. W. 948.

**Stone crusher.** Must be a nuisance and likely to become such by reason of location and surroundings. An ordinance forbidding the maintenance of certain factories, including stone crushers within a

tion of factories.<sup>37</sup>

But if such regulations have no reasonable relation to the preservation and promotion of any of these things, the constitutional guaranties relating to the use of property will serve effectually to defeat them. Accordingly judicial decisions have condemned ordinances declaring it unlawful to establish or operate any sort of business whatever on a specified street;<sup>38</sup> ordinances prohibiting store buildings to be erected in named residential sections;<sup>39</sup> ordinances forbidding the erection of four family flat buildings in residential districts;<sup>40</sup> ordinances regulating the location of retail stores;<sup>41</sup> ordinances directing

large sparsely inhabited and unimproved section of the city but allowing them in small densely inhabited section by poor people, was held void, discriminatory and unreasonable. *Ex parte Throop*, 169 Cal. 93, 145 Pac. 1029.

**Blasting rock.** *Commonwealth v. Parks*, 155 Mass. 531, 30 N. E. 174.

<sup>37</sup> Ordinances forbidding erection of factory in residential district. *Meyers v. Houghton*, 137 Minn. 481, 163 N. W. 754, following *State v. Houghton*, 134 Minn. 226, 158 N. W. 1017.

<sup>38</sup> Ordinance declaring it unlawful "to establish or operate any sort of business whatever on" a named street is ultra vires and void; the purpose of the ordinance was to confine buildings on said avenue for residential purposes only. Cannot "suppress legitimate business on the city streets, unless and until such business has become a nuisance or is likely to become detrimental to the health or comfort of the citizens generally." "The ordinance was not adopted to safeguard the public

health, safety, morals, comfort or general welfare. It embraces aesthetic considerations only; and these are not named in the city charter as matters for consideration. The aesthetic does not fall within the exercise of the police power. It is not such necessity as will authorize the police to interfere with liberty of action and property rights of individual citizens." *Calvo v. New Orleans*, 136 La. 480, 67 So. 338.

<sup>39</sup> *State ex rel. v. Houghton*, 134 Minn. 226, 158 N. W. 1017, with dissenting opinion, where numerous similar cases are considered.

<sup>40</sup> *State ex rel. v. Minneapolis*, 136 Minn. 479, 162 N. W. 477, held unconstitutional.

<sup>41</sup> **Regulating location of retail stores.** An ordinance made it unlawful to locate, build or construct any store for the sale, at retail of goods, wares and merchandise in any block used exclusively for residence purposes without the frontage consent of a majority of the property owners on both sides of the street in the block in which the building was to be located.

the location of ice houses and cooling plants;<sup>42</sup> and ordinances regulating the location of milk distributing stations.<sup>43</sup>

Where the exercise of the police power affects the free enjoyment of property, courts agree that it should be closely scrutinized.<sup>44</sup>

### § 908. Slaughtering of animals—slaughter houses.<sup>45</sup>

The ordinance did not in terms purport to forbid the establishment of a retail store in such residence block, but it directed against the location and construction of a building in which such business might be carried on. The ordinance made no attempt to classify retail store building, but their location and construction were indiscriminately forbidden except upon the frontage consent mentioned. The ordinance was held void and unconstitutional as an unlawful invasion of property rights and having no relation to the public health, morals, comfort or general welfare. "There is nothing inherently dangerous to the health or safety of the public in conducting a retail store. It may be that in certain exclusively residential districts the owners of the residence property would prefer not to have any retail stores in such blocks; but, if such be the case, it manifestly arises solely from aesthetic considerations, disconnected entirely from any relation to the public health moral, comfort or general welfare. Legislation either by the state or municipal corporations which interfere with private property rights or personal liberty, cannot be sustained for purely aesthetic pur-

poses." *People ex rel. v. Chicago*, 261 Ill. 16, 103 N. E. 609, 612, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A, 292.

<sup>42</sup> Ordinance forbidding erection of ice house or cooling plant within 400 feet of any school, church or hospital, held unauthorized as it had no relation to the preservation of health. *People ex rel. v. Chicago*, 260 Ill. 150, 102 N. E. 1039.

<sup>43</sup> General police power held insufficient to authorize regulation of the location of milk distributing station connected with which was to be a stable for horses. Power was denied on ground that it was not a nuisance per se. *People ex rel. v. Oak Park*, 268 Ill. 256, 109 N. E. 11.

<sup>44</sup> *Re Russell*, 158 N. Y. S. 162, holding valid an ordinance of Niagara Falls forbidding the operation of any factory in a prescribed area within the city boundaries without the consent of certain specified number of property owners.

<sup>45</sup> Ordinance making premises of one concern only for inspection, slaughtering and sale of animals for food in city, held ultra vires the charter. The franchise, although of a limited character, could only be granted by virtue of



**§ 909. Dairies and cow stables.**

The keeping of cows and dairies within the corporate area are subject to local police regulations.<sup>46</sup>

**§ 910. Livery stables.**

Granting that a livery stable in an urban center is not

express power. Moreover, the constitution forbids monopolies of business of this nature which is of common right. As to power of inspection of animals, meat, etc., city cannot confer arbitrary power on inspection to be controlled by his will, without other restraint. *Noe v. Morristown*, 128 Tenn. 350, 161 S. W. 485.

Regulations adopted by the board of health forbidding erection of slaughter house within certain distance of city limits, held invalid. Question, as to whether the mayor and council could enact such an ordinance was not involved in the case. Power to make regulations in regard to quarantine and the prevention of contagious and infectious diseases in the city does not empower board of health to define and provide punishments for crimes committed outside of the city. Without special grant of power board of health cannot by regulation forbid the maintenance of slaughter house within certain distance or corporate limits. *State v. Temple*, 99 Neb. 505, 156 N. W. 1063.

Regulations as to slaughtering animals valid provided there is no discrimination. Express authority over subject-matter was conferred by legislature. Ordinance forbidding the rendering of any animal or animal matter except where the

produce when rendered is to be used for human food, and excepting the fresh material from animals slaughtered on the premises where rendered does not discriminate. Only question as to whether there is reasonable ground for discriminating between business of rendering offal and shop fats, collected from butcher shops and that of premises where rendered. Held, that classification is reasonable as there is "apparent natural reason" therefor. *Maereker v. Milwaukee*, 151 Wis. 324, 139 N. W. 199.

<sup>46</sup>*Thorpe v. Savannah*, 13 Ga. App. 767, 772, 79 S. E. 949, 952 (citing § 899 and 909, vol. 3, ante), holding discretion may be conferred on health officer as to granting license to keep cows within the city.

Ordinance required that hereafter a permit be secured for the erection of any building to be used as a stable for horses, mules, cows or other animals. It was held invalid because it discriminated between stables in operation at the date of the passage and such as might be established and maintained thereafter. *Re Dondero*, 19 Cal. App. 66, 124 Pac. 884.

Ordinances conferring authority on health officers, with the consent of the sanitary commission to forbid keeping cows in congested

a nuisance per se,<sup>47</sup> as expressed by the United States Supreme Court, and other courts, it is clearly within the police power of the state to regulate the business,<sup>48</sup> and to that end to declare that in particular circumstances and in particular localities a livery stable shall be a nuisance in fact and in law,<sup>49</sup> provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the fourteenth amendment. The general subject of the regulation of livery stables, with respect to their location and the manner in which they are to be conducted in a thickly populated city is well within the range of the power of the state to legislate for the health and general welfare of the people.<sup>50</sup>

parts of the city and to revoke existing permits was sustained. *Davis v. Savannah* (Ga.), 95 S. E. 6.

<sup>47</sup> Section 910, Vol. 3, ante.

<sup>48</sup> *Newton v. Joyce*, 166 Mass. 83, 44 N. E. 116, 55 Am. St. Rep. 385.

Reasonable regulations authorized as they may become nuisances. *State v. Bass*, 171 N. C. 780, 87 N. E. 972, 973, citing Section 910, Vol. 3, ante (*McQuillin Mun. Ord.*, Section 450).

In some locations a livery stable would become a nuisance, however built and conducted, "because of many objectionable features which are inevitable incident to its existence and operation. Its proper location, therefore, depends upon a variety of circumstances which involve the exercise of judgment and discretion when the matter is viewed from the standpoint of public health, safety and comfort, and it is therefore subject to municipal regulation." *Douglass v. Greenville*, 92 S. C. 374, 75 S. E. 687, citing Section 910, Vol. 3, ante

(*McQuillin, Mun. Ord.*, Section 450).

Power as to private stables under particular law. *People ex rel. v. Oak Park*, 268 Ill. 256, 109 N. E. 11.

<sup>49</sup> The business of a livery stable keeper "while in and of itself legitimate and beneficial is one of a class peculiarly the subject of police regulation. \* \* \* The power to regulate a legitimate business does not contain as a part of itself the power to suppress, yet it does contain within itself the power to prohibit within delimited areas and districts, if reasons appear for so doing." *Curtis v. Los Angeles*, 172 Cal. 230, 156 Pac. 462, 464.

**Contra.** Power to "preserve the good order and to provide and maintain the cleanliness and sanitary condition" of the town is not authority to prohibit the operation of a livery stable within a certain section of the city. *Patout Bros. v. New Iberia*, 138 La. 697, 72 So. 616.

<sup>50</sup> *Reinman v. Little Rock*, 237 U.

A municipality has power by ordinance, to divide its territorial limits into business and residence districts, and prohibit in the residence districts the maintenance of any corral wherein mules and burros are kept for hire.<sup>51</sup>

### § 911. Automobile garage may be regulated.

The location, erection and management of automobile garages is clearly within the police power.<sup>52</sup>

S. 171, 176, 177, 35 Sup. Ct. 511, 59 L. ed. 900, affirming 107 Ark. 174, 155 S. W. 105, 107, which quotes with approval from Section 910, Vol. 3, ante.

Unreasonable requirements and restrictions in keeping stables which extended far beyond the city's sewer system. *Mobile v. Orr*, 180 Ala. 308, 61 So. 920.

An ordinance which specified the manner in which stables or other buildings in which more than one horse, mule or cow is to be kept should be constructed was held to be unreasonable and discriminatory in that it did not apply to owners of one animal—unreasonableness because of certain specification of the ordinance with reference to local conditions. *Mobile v. Orr*, 181 Ala. 308, 61 So. 920.

<sup>51</sup> *Boyd v. Sierra Madre* (Cal. App., 1919), 183 Pac. 230, 232.

<sup>52</sup> Construction of may be regulated. *Storer v. Downey*, 215 Mass. 273, 102 N. E. 321.

**Public garages.** Statutes expressly authorize the municipality to direct the location and regulate the use and construction of public garages. *People ex rel. v. Ericson*, 263 Ill. 368, 106 N. E. 315;

*People ex rel. v. Oak Park*, 266 Ill. 365, 107 N. E. 636.

Location of public garage, construction of. *Weeks v. Henrich*, 40 App. D. C. 46.

Regulations discretionary with officers (Commission). *Joscelyn Stable Co. v. Johnson*, 142 N. Y. S. 643, 157 App. Div. 779.

Erection and management of garage may be regulated by ordinance. *Ninth Street Improvement Co. v. Ocean City* (N. J. L.), 100 Atl. 568.

Ordinance making it unlawful to keep any motor vehicle containing volatile inflammable oil except in a building for which a garage permit shall have been issued by Fire Commissioner, and prohibiting issuance of such permit for any building situated within 50 feet of school, theatre or other place of public amusement or assembly or of a tenement house or hotel, held a fair reasonable and appropriate exercise of the police power. *McIntosh v. Johnson*, 211 N. Y. 265, 105 N. E. 414, affirming 145 N. Y. S. 763, 160 App. Div. 653.

**Public filling station**, may be regulated. *State v. Dauben* (Ohio, 1919), 124 N. E. 232.

To maintain a license or permit may be required,<sup>53</sup> as well as the consent of a specified portion of residents or property owners.<sup>54</sup>

However, the latter requirement is denied by judicial decisions on the ground it constitutes an unlawful delegation of legislative power and fails to prescribe a general and uniform rule.<sup>55</sup>

They may be excluded from residential districts.<sup>56</sup>

### § 912. Hogs and hog pens.

Under sufficient charter power, it has been held, that an ordinance may forbid the keeping of hogs within the

<sup>53</sup> *McIntosh v. Johnson*, 211 N. Y. 265, 105 N. E. 414, affirming 145 N. Y. S. 763, 160 App. Div. 563.

Construction and validity of an ordinance prohibiting the maintenance and conduct of a public garage without permission of the superintendent of buildings. *People ex rel. v. Stroebel*, 209 N. Y. 434, 103 N. E. 735, reversing 141 N. Y. S. 1014, 156 App. Div. 457.

Ordinance prohibiting erection of garage until owner obtains license from city council on petitions, giving particulars, held valid. *Page v. Brooks* (N. H.), 104 Atl. 786.

<sup>54</sup> Ordinance making it unlawful to build or maintain a garage within 200 feet of a hospital, church, or public or parochial school, or in any city block where two-thirds of buildings are exclusively residence buildings without consent of majority of owners is a reasonable and valid exercise of police power. *People v. Ericsson*, 263 Ill. 368, 105 N. E. 315.

§ 929 post.

<sup>55</sup> Ordinance which prohibits the erection of a public garage in the

residence portions of the city without the consent of the owners of adjoining lands, is not a general and uniform regulation, and is a delegation to the adjoining owners of power which can only be exercised by the duly constituted legislative body. *Dangel v. Williams* (Del. Ch.), 99 Atl. 84.

<sup>56</sup> Excluding from residential sections. *Prendergast v. Walls*, 256 Pa. 347, 100 Atl. 826.

When two-thirds of the lots fronting on one street in any block not within the business section are occupied by buildings devoted to residence purposes no garage shall be erected on any lot in such block on such street. *State ex rel. v. Harper*, 166 Wis. 303, 165 N. W. 281.

No garage shall be built on any street where two-thirds of the buildings on both sides of the street in the block are used exclusively for residence purposes, unless the consents of majority of property are obtained. Validity of ordinance was not questioned. *Wise v. Chicago et al.*, 183 Ill. App. 215.

municipal area or within one-fourth mile thereof,<sup>57</sup> or forbid them from running at large within the corporate limits.<sup>58</sup>

Under general power to protect the health, and declare and suppress nuisances undoubtedly the keeping of hogs may be forbidden in certain thickly built up parts, or residential sections, of the city,<sup>59</sup> because such keeping is likely to be detrimental to health and thus constitute a nuisance per se.<sup>60</sup>

### § 913. Dead animals, garbage, offal, etc.

A municipality cannot interfere with the right of the owner in the carcasses of dead animals before they become a nuisance, i. e., a reasonable time for removal by the owner must be given.<sup>61</sup>

It is generally recognized that garbage is a nuisance per se, and hence a municipality may regulate the manner of its collection and disposition.<sup>62</sup>

"Garbage is widely regarded as an actual and potential source of disease or detriment to the public health, and therefore it is within the well-recognized limits of the police power for the municipality, acting for the common good of all, either to take over itself or to confine to a single person or corporation the collection, transporta-

<sup>57</sup> *State v. Rice*, 158 N. C. 635, 74 S. E. 582.

<sup>58</sup> *Whitley v. Stephens* (Ky., 1919), 211 S. W. 770.

Section 943, post.

<sup>59</sup> *Ex parte Botts* (Tex. Civ. App.), 154 S. W. 221.

<sup>60</sup> Ordinance may prohibit keeping of hogs and swine in certain parts of a city even though the sections affected were at a prior time rural. If reasonable in the light of present conditions, the ordinance is valid. Court said that "keeping of hogs in the thickly built-up part of a city is held to be a nuisance per se." *Bockun v.*

*Philadelphia*, 59 Pa. Super. Ct. 441.

<sup>61</sup> *Whelan v. Daniels*, 94 Neb. 642, 143 N. W. 929.

Liability under a penal ordinance for failure of one in possession to remove the carcass of a dead horse beyond the corporate limits within twelve hours after death. *Moberly v. Lash*, 167 Mo. App. 4.

<sup>62</sup> *Grand Rapids v. Vink*, 184 Mich. 688, 151 N. W. 672, Section 914, post; Section 914, Vol. 3, ante. "Garbage" defined; power of city to cause removal. *Pantlind v. Grand Rapids* (Mich., 1920), 177 N. W. 302.

tion through the streets and final disposition of a commodity which so easily may become a nuisance. Private interests must yield to that which is established for the general benefit of all.”<sup>63</sup>

**§ 914. Exclusive right to remove dead animals, garbage, etc.**

As garbage, bones and kitchen refuse become a nuisance and a menace to public health, undoubtedly the power and obligation to provide for and regulate the manner of the removal thereof, exists in the appropriate municipal authorities, who may prescribe that all scavenger work within the corporate area shall be done by a person selected by them, and forbid such work from being done by any other person.<sup>64</sup>

<sup>63</sup> *Wheeler v. Boston* (Mass., 1919), 123 N. E. 684, 686, per Rugg, C. J., denying mandamus to compel issuance of permits to farmers doing business in neighboring towns, to convey garbage through the streets of Boston on their way to their farms, there to be fed to swine. The order of the board of health duly promulgated limited the removal of garbage, etc., to the city, its contractors or agents.

<sup>64</sup> *Wheeler v. Boston* (Mass., 1919), 123 N. E. 684, 686.

City may regulate cleaning of cesspools and removal of garbage and may require that this work be done exclusively by person designated by the city. *Gulfport v. Shepperd* (Miss.), 77 So. 193.

Ordinance providing that all scavenger work within the city be done by a person appointed by the city and prohibiting anyone else from engaging in such work, held valid. *Ex parte Howell*, 71 Tex. Cr. R. 71, 158 S. W. 535.

City may create department for

removal of garbage and prohibit any other person from engaging in that business. *Ex parte London*, 73 Tex. Cr. R. 208, 163 S. W. 968.

Ordinance may forbid collection of garbage by unlicensed persons, revoke license existing, and give right to city garbage contractor. *Rochester v. Gutberlett*, 211 N. Y. 309, 105 N. E. 548, affirming 135 N. Y. S. 1104, 141 App. Div. 900, 133 N. Y. S. 541, 73 Misc. Rep. 607.

City may provide for collection, exclusively by contractor selected by it of “all organic waste and residue of animal, food or vegetable matter from kitchens and dining rooms and from the preparation of dealing in or storage of meats, fowls, fruit, vegetables and grain.” Presence of articles which might have value as food in garbage does not change its character. *Kirksey v. Wichita*, 103 Kan. 761, 175 Pac. 974.

Monopoly, constitutionality, etc., of regulations. *Schwarz v. Jersey*

**§ 915. House dirt, rubbish, privy vaults, etc.<sup>65</sup>**

Regulations respecting the removal of house dirt, ashes,<sup>66</sup> rubbish,<sup>67</sup> contents of privy vaults, etc.,<sup>68</sup> the installation and maintenance of a sanitary system of sewers and closets to be used in the various classes of buildings and proper sewer connection and providing for public inspection and supervision thereof,<sup>69</sup> are generally sustained as a necessary exercise of the police power, provided, of course, that such regulations are reasonable, uniform, and not arbitrary or oppressive.

Board of Health, 84 N. J. L. 735, 87 Atl. 463, affirming 83 N. J. L. 81, 83 Atl. 762.

<sup>65</sup> Gulfport v. Shepperd (Miss.), 77 So. 193, 195, citing Section 915, Vol. 3, ante (McQuillin, Mun. Ord., Section 453).

<sup>66</sup> Ashes. The duty of removing ashes is primarily that of property owners. Ordinance may regulate. *People v. Chicago*, 277 Ill. 394, 115 N. E. 570, affirming 200 Ill. App. 35.

Building from which owner must remove ashes at his own expense. *People ex rel. v. Chicago*, 209 Ill. App. 142.

Ordinance provided for removal of ashes from "dwellings and other places." Held, that city board of estimate could not, by an arbitrary definition of the term "dwelling" limit duty of commissioner to remove ashes from apartment houses. *Baltimore v. Hampton Court*, 126 Md. 341, 94 Atl. 1018.

<sup>67</sup> Ordinance which prohibits the placing of rubbish of any kind on any lot within the city and makes no distinction between that which is offensive and harmful and that which is not, is void. *Goolland v.*

*Popejoy*, 98 Kan. 183, 157 Pac. 410.

<sup>68</sup> Cleaning of closets or privies at expense of lands by assessment, sustained. *Ratchford v. Gastonia* (N. C., 1919), 99 S. E. 21.

<sup>69</sup> Law required the installation and maintenance of sanitary systems of sewers and closets. This is recognized as one of the most important duties of municipal government, and falls clearly within the police powers of government, "subject to which the inhabitant and citizen, of the municipality holds his individual rights to property and to liberty." In the absence of a showing that such regulations are unreasonable, arbitrary, unduly oppressive, or inconsistent with the legislative policy of the state, courts will indulge presumptions in their favor as to their necessity, propriety and validity. "The special provisions and the extent of such ordinances are matters usually, and almost of necessity, left in a large measure to the discretion and judgment of the municipal authorities. They have, of course, no absolute power to pass any arbitrary ordinance which their caprice or whim might

**§ 916. Drains, sewers, ponds, stagnant water, pollution of water supply, etc.<sup>70</sup>**

Property owners may be required to install and connect water closets with the city sewer system.<sup>71</sup>

desire; but the law does of necessity vest in them judicial discretion to be exercised reasonably, with regard to the circumstances of each particular case, the object to be accomplished, and the existing necessity of the occasion." *Spear v. Ward* (Ala.), 74 So. 27, 29.

Section 896, ante, Section 896, Vol. 3, ante.

An ordinance provided that when water-closets in buildings were found to be a nuisance they should be removed. In holding it valid it was said: "It is contended the ordinance is indefinite and therefore invalid, because it does not ordain who shall remove the closets or who shall find the closets to be a nuisance and does not define the physical conditions which shall constitute the closets a nuisance. The language 'such closets were found to be a nuisance shall be removed,' etc., does not require a judicial or official finding. The words 'found to be a nuisance' mean found, discovered, or perceived to be a nuisance by any one affected by the nuisance. It is not necessary that the ordinance should define the physical condition which shall constitute a nuisance." *Chicago v. Atwood*, 269 Ill. 624, 110 N. E. 127.

Ordinance regulating kinds of toilet equipment to be used in various classes of buildings and making the particular type to be used in a certain class of buildings depend on approval of health commissioner, held valid. *Chicago v.*

*German Catholic Orphan Asylum*, 160 Ill. App. 45.

Under authority to compel owners of buildings to connect with established sewers, to prohibit maintenance of vaults within sewer district, and to cleanse or remove vaults, a city cannot compel an owner of an outdoor vault to connect with sewer where such vault was not being used and was not a nuisance. *Gault v. Ft. Collins*, 57 Colo. 324, 142 Pac. 171.

Ordinance prohibiting the building of any privy, stable or stables nearer a neighbor's residence than the owner's and providing that no privy shall be constructed within 25 feet of any public street held void, as unreasonable and not uniform. *State v. Bass*, 171 N. C. 780, 781, 87 S. E. 972, citing Section 910, Vol. 3, ante (*McQuillin*, Mun. Ord., Section 450).

Ordinance forbidding the use of earth closets on property situated not more than 200 feet from the "main sewer line or the water main," without reference to whether such closets are a nuisance, held void. *Malone v. Quincy*, 66 Fla. 52, 62, So. 922, 925.

Ordinance compelling the construction of a sanitary privy in every building in which people lived or congregated, held unreasonable. *Cary v. Ellis* (Fla., 1919), 82 So. 781.

<sup>70</sup> Section 916, Vol. 3, ante.

<sup>71</sup> *Spear v. Ward* (Ala.), 74 So. 27, 29.

Section 915, ante.



Connection of buildings with public sewers may be required, although a private sewer may exist.<sup>72</sup>

### § 918. Emission of dense smoke as a public nuisance.

As the mere emission of smoke within a city is not a nuisance per se,<sup>73</sup> clearly municipal power so to declare to be valid must exist.<sup>74</sup>

But as stated by the Supreme Court of the United States, "so far as the Federal Constitution is concerned, we have no doubt the State may by itself or through authorized municipalities declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the terms of the law or ordinance." <sup>75</sup>

<sup>72</sup> Fenton v. Atlantic City (N. J. L.), 103 Atl. 695.

<sup>73</sup> Section 918, Vol. 3, ante.

<sup>74</sup> Without a reasonable ordinance applicable to all alike, a city under general power to abate a nuisance cannot abate emission of coal smoke and soot from dye works, since the power is applicable to nuisances per se. Parker v. Fairmont, 72 W. Va. 688, 79 S. E. 660.

Without express delegated power an ordinance forbidding the emission of smoke from locomotive engines in sufficient quantity to cause damage to property whether it results from negligence or not is void. Pennsylvania R. Co. v. Jersey City, 84 N. J. L. 716, 87 Atl. 465.

<sup>75</sup> "Recent cases in this court

are Reinman v. Little Rock, 237 U. S. 171; Chicago & Alton R. R. v. Tranberger, 238 U. S. 67; Hada-check v. Los Angeles, 239 U. S. 394. That such emission of smoke is within the regulatory power of the State, has been often affirmed by state courts. Harmon v. Chicago, 110 Illinois 400, 51 Am. Rep. 698; Bowers v. Indianapolis, 169 Indiana 105; People v. Lewis, 86 Michigan 273, 49 N. W. 140; St. Paul v. Haughbro, 93 Minnesota 59, 100 N. W. 470, 66 L. R. A. 441, 106 Am. St. Rep. 427; State v. Tower, 185 Missouri 79, 84 S. W. 10, 68 L. R. A. 402; Rochester v. Macauley-Fien Milling Co., 199 N. Y. 207, 92 N. E. 641, 32 L. R. A. (N. S.) 554. And such appears to be the law in Iowa, McGill v. Pintsch Compressing Co., 140 Iowa

Ordinances forbidding the emission of dense smoke from furnaces, locomotives, buildings, establishments, etc., are often declared invalid when sought to be applied to certain boilers where there is no known method or device by which such smoke can be abated,<sup>76</sup> or the application of such ordinances is denied in certain instances, e. g., to locomotive engines.<sup>77</sup>

429." *Northwestern Laundry v. Des Moines*, 239 U. S. 486, 491, 492, 36 Sup. Ct. 206, 60 L. ed. 396.

Illinois legislature conferred express authority upon Chicago to enact smoke abatement ordinance. Validity of ordinance sustained. *Chicago v. Dunham Towing & Wrecking Co.*, 161 Ill. App. 307; *Glucose Refining Co. v. Chicago*, 138 Fed. 209. Smoke abatement ordinance held valid exercise of the police power. *Chicago v. Dunham Towing & Wrecking Co.*, 175 Ill. App. 549; 161 Ill. App. 307, following *Harmon v. Chicago*, 110 Ill. 400, 51 Am. Rep. 698.

<sup>76</sup> Ordinance prohibited the emission of dense black or gray smoke from any smokestack or chimney used in connection with any steam boiler, locomotive or furnace of any description, in any apartment house, building, boat or any other structure, or in any building used as a factory or for any purpose of trade, or for any other purpose whatever within the corporate limits of the city and declared such emission a public nuisance per se. The evidence showed that there was no known device in marine practice that would prevent the emission of smoke; no known appliance that could be used upon marine boilers to prevent the emission of smoke. Held, ordinance so

applied was unreasonable and void. *People v. Detroit B. I. & W. Ferry Co.*, 187 Mich. 177, 153 N. W. 799.

The ordinance prohibited the discharge of dense smoke from any building, locomotive, etc. The evidence showed that the railroad company adopted the best methods of kindling fires in locomotives known and that a fire could not be started in an engine without causing smoke. "There was no evidence to show that there was an excess of smoke over that necessary for the operation of the locomotive engines and no evidence to show that by any other method than that adopted by the defendant could a fire be started in a locomotive engine which would produce less smoke than that produced by the locomotive engines of the defendant." The conviction was reversed and the fine remitted. Constitutionality of ordinance was not passed on. *People v. New York Central & H. R. R. Co.*, 144 N. Y. S. 699, 159 App. Div. 329.

<sup>77</sup> Ordinance made it unlawful to permit the emission of dense smoke from any stack connected with any engine or locomotive within the city limits which smoke contains soot or other substance in sufficient quantity to cause injury to the health or damage to

**§ 921. Regulating sale and smoking of cigarettes.**

The usual police power will not authorize an ordinance declaring it unlawful to smoke tobacco in any form in or upon streets or public places.<sup>78</sup>

**§ 922. Regulating sale of cocaine.<sup>79</sup>****§ 923a. Pure water supply.**

An ordinance may require a supply of pure water for human consumption, but the municipality cannot declare that "all water which contains a certain percentage of solid matter is unwholesome and unfit for use if such

property within the corporate limits of the city. The ordinance made no distinction between locomotive engines operated on railroads and any other kind of engine. Such an ordinance was upheld in *Atlantic City v. France*, 75 N. J. L. 910, 70 Atl. 163, 18 L. R. A. (N. S.) 156.

The rule in New Jersey is that if the ordinance is reasonable in part, it will not be set aside in toto, but will be permitted to stand, leaving the reasonableness of its operation in a particular case to be tested by a review of a conviction thereunder. *Neumann v. Hoboken* (N. J.), 82 Atl. 511; *North Jersey Street Ry. Co. v. Jersey City*, 75 N. J. L. 349, 67 Atl. 1072.

Upon the reasonability of the ordinance as affecting factories and other private interests the court did not pass. The court declined to sustain the conviction of railroads for emitting smoke from their locomotives under the ordinance, holding that so applied it was unreasonable saying, "Whatever might be said of an ordinance forbidding smoke from rail-

road engines needlessly and negligently emitted, we think it plain that the breadth of scope of that under consideration in prohibiting all smoke containing soot, etc., sufficient to cause injury to property, is in derogation of the charter rights of the railroad, and as to it unreasonable." *Erie R. Co. v. Jersey City*, 83 N. J. L. 92, 84 Atl. 697.

<sup>78</sup> Ordinance declaring it unlawful to smoke tobacco in any form in or upon any street, alley, avenue, boulevard, park, parkway, public passageway, depot, depot platform, depot grounds, hospice, hotel, store, post-office, or other public building or public place within the city, held void. *Zion v. Behrens*, 262 Ill. 510, 104 N. E. 836, citing Section 921, Vol. 3, ante.

<sup>79</sup> Ordinance forbidding sale of morphine or cocaine to a person addicted to habitual use of such drugs, and without a written order of a duly registered physician, etc., construed and applied. *Chicago v. Truax Greene & Co.*, 192 Ill. App. 524.

is not the hygienic fact." Such regulation must not be unreasonable; arbitrary, and capricious.<sup>79a</sup>

### III. PUBLIC SAFETY—STREETS—BUILDINGS.

#### § 924. Regulating use of streets, etc., and keeping same free from obstruction.

As affirmed in a Louisiana case more than a century ago, the use of streets belong to the public, "the use of them belong to the whole world,"<sup>80</sup> and the public right "goes to the full width of the street and extends indefinitely upward and downward."<sup>81</sup>

Therefore, the municipal authorities are obligated to prevent obstructions of them which preclude or hamper the public use.<sup>82</sup>

Municipal power to accomplish such purpose is extensive. It is usual to grant plenary power to open and keep open, free from obstructions streets, public ways, squares, etc., and broad power to remove encroachments and nuisances thereon.<sup>83</sup>

<sup>79a</sup> Hyman v. Dillon (Fla., 1920), 84 So. 666, 668, 671.

<sup>80</sup> Daublin v. New Orleans, 1 Mart. (O. S.), 187.

§ 1391, post.

<sup>81</sup> New Orleans v. Kaufman, 138 La. 897, 70 So. 874, citing Section 2775, Vol. 6, ante; Nessen v. New Orleans, 134 La. 462, 64 So. 286, 51 L. R. A. (N. S.) 324.

<sup>82</sup> "The streets and banks of the river are loci publici, out of commerce, and the municipal authorities are bound to see that the use of them by the public be not obstructed, but they have no power to allow any erection thereon which may render their use incommensurable. They may indeed temporarily tolerate works thereon which they may deem not injurious to

the rights of the public, but no permission of a council can prevent a subsequent council from putting an end to such toleration." Shepherd v. Municipality No. 3, 3 Rob. (La.) 349, 41 Am. Dec. 269.

<sup>83</sup> Sanders v. Atlanta, 147 Ga. 819, 95 S. E. 695; Commonwealth v. Fenton, 139 Mass. 195, 29 N. E. 653; Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406, 10 Am. St. Rep. 506; Pugh v. Des Moines, 176 Iowa 593, 156 N. W. 892, 895, L. R. A. 1917F, 345, quoting with approval part of Section 924, Vol. 3, ante (McQuillin, Mun. Ord., Section 458); Kansas City v. Holmes, 274 Mo. 159, 169, 202 S. W. 392, citing Section 924, Vol. 3, ante.

Necessity of regulation stated.

To obviate inconvenience, annoyance or even danger to pedestrians the hours for washing or cleaning sidewalks may be regulated, and forbidden during specified hours at the time of the heaviest foot passenger traffic, e. g., between 8 o'clock A. M. and 6 o'clock P. M.<sup>84</sup>

And to secure public safety an ordinance may prohibit one on roller skates or a bicycle from catching or attaching himself to any street car or moving vehicle on the street.<sup>85</sup>

That the police power extends to the reasonable control of travel upon public ways is firmly established.<sup>86</sup>

"Regulation of the operation of vehicles used for the conveyance of passengers was an early and is a well-recognized subject for local by-law or ordinance."<sup>87</sup>

It is within municipal competence to prescribe that "no vehicle shall be allowed to remain upon or be driven through any street so as willfully to blockade or obstruct the traffic of that street."<sup>88</sup>

So an ordinance may provide that "three or more persons shall not stand together or near each other in any street or on any footwalk or sidewalk \* \* \* so as to obstruct the free passage for foot passengers, and any person or persons so standing shall move on immediately

Kelly v. James, 37 S. D. 272, 157 N. W. 990.

Permit to grade street. Flinn v. Zion (Cal. App., 1918), 173 Pac. 602.

<sup>84</sup> Della Mora v. Favilla (Cal. App.), 173 Pac. 770.

<sup>85</sup> Renfroe v. Collins & Co. (Ala.), 78 So. 395, distinguishing Miller v. Eversole, 184 Ill. App. 362, as an ordinance relating to stationary vehicles and not depending for its rationale upon the safety of either person or property in public thoroughfares, but to the contrary, conditioned its restraint or inhibition upon the consent of the owner, whereas the ordinance here under consideration intends without re-

striction the preservation of the safety of persons in public thoroughfares."

<sup>86</sup> Greene v. San Antonio (Tex. Civ. App.), 178 S. W. 6.

Municipality may be given power to regulate transportation in streets. Gill v. Dallas (Tex. Civ. App., 1919), 209 S. W. 209, 212.

<sup>87</sup> Commonwealth v. Slocum (Mass.), 119 N. E. 687. Carriers on streets may be regulated, e. g., drays, omnibuses, hackney coaches, taxicabs, motor busses, jitneys. Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, P. U. R. 1915E, 93.

<sup>88</sup> People v. Zecolla, 157 N. Y. S. 373, 92 Misc. Rep. 625.

after a request to do so made by the mayor, chief of police or any police officer or watchman." <sup>89</sup>

In the control of streets and public ways the municipality is a trustee for the entire public,<sup>90</sup> and as such trustee it should permit nothing to be done that will interfere with the condition of the streets or their free use by all alike. Even public gatherings which obstruct the public ways and places are often not permissible unless the use of them is licensed, and yet the right of free speech is one of the inalienable rights under our constitutional government. A municipality through its legislative body, has the right to prohibit the use of the streets by persons for any purposes detrimental to the common good, or that may conflict or interfere with the rights of others in the enjoyment of the highways, which should be unincumbered and clean, so as to promote the safety, health and comfort of the public.<sup>91</sup>

The regulation of hack stands and the use and occupation of streets therefor;<sup>92</sup> forbidding hacks awaiting

<sup>89</sup> The purpose of the ordinance is "to secure to the public the use of the street for unobstructed travel. Streets and highways are dedicated, secured and maintained primarily for public transit, and must be so preserved. All other uses, thereof must be subordinated or yield to the right of free and unobstructed passage. This ordinance must be considered as in aid of this primary use of the streets, and not as a prohibition or regulation of assemblies therein, except as these interfere with public travel." *State v. Sugarman*, 126 Minn. 477, 148 N. W. 466, 52 L. R. A. (N. S.) 999, quoting with approval part of Section 924, Vol. 3, ante (McQuillin, Mun. Ord., Section 458).

<sup>90</sup> Section 1307, post, Vol. 3, ante.

<sup>91</sup> *People v. Horwitz*, 140 N. Y. S. 437, 442, 27 N. Y. Cr. R. 237.

<sup>92</sup> Regulation of public hack stands, valid. *Yellow Taxicab Co. v. Gaynor*, 143 N. Y. S. 279, 82 Misc. Rep. 94, affirmed in 144 N. Y. S. 299, 159 App. Div. 893, 144 N. Y. S. 494, 159 App. Div. 888; *People v. May*, 164 N. Y. S. 717, 98 Misc. Rep. 561.

May regulate hackmen at railroad stations soliciting patronage. *City Cab, Carriage and Transfer Co. v. Hayden*, 73 Wash. 24, 131 Pac. 472, reviewing cases cited on the subject in Section 924, Vol. 3, ante, p. 1985; *Oregon Short Line R. Co. v. Davidson*, 33 Utah 370, 94 Pac. 1016, L. R. A. (N. S.) 777, 14 Ann. Cas. 489, containing many cases relating to detailed regulations on the subject.

The reasonableness of the method

employment to stand on public streets at points other than those designated;<sup>93</sup> and prohibiting hackmen or taxicab drivers from entering upon passenger station property or wharves to solicit traffic at specified times<sup>94</sup> are all sanctioned by virtue of a reasonable exercise of the police power to safeguard public convenience and safety.<sup>95</sup>

The fact that the municipality has failed to enforce its ordinances forbidding street obstructions will not estop it from thereafter removing all unlawful obstructions.<sup>96</sup>

### § 925. Obstructions in public streets as nuisances.<sup>97</sup>

### § 926. Power to remove obstructions and nuisances exists.<sup>98</sup>

### § 927. Awnings, signs, etc.

#### Ordinances reasonable and uniform in their operation

is solely for the determination of the legislative department. *Swann v. Baltimore*, 132 Md. 256, 103 Atl. 441, approving *State v. Hyman*, 98 Md. 596, 57 Atl. 6, 64 L. R. A. 637, 1 Ann. Cas. 742.

General power of municipalities cannot be questioned, only question is whether power has been exercised reasonably. *City Cab Co. v. Hayden*, 73 Wash. 24, 131 Pac. 472, L. R. A. 1915F, 726, Ann. Cas. 1914B, 731, approving *McFall v. St. Louis*, 232 Mo. 716, 135 S. E. 51, 33 L. R. A. (N. S.) 471.

<sup>93</sup> Sight seeing car on motor driven vehicle included. Clearly the city authorities are vested with power to regulate how and in what manner the streets may be used by those engaged in the business of owning and controlling motor vehicles for the purpose of soliciting public patronage on the streets, and therefore all persons engaged

in such business must abide by the terms and conditions which the city imposes upon them. *People v. May*, 164 N. Y. S. 717, 98 Misc. Rep. 561; *Yellow Taxicab Co. v. Gaynor*, 144 N. Y. S. 299, 159 App. Div. 893.

<sup>94</sup> *Seattle Taxicab & Transfer Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134.

<sup>95</sup> Section 1357, post; Section 1357, Vol. 3, ante.

<sup>96</sup> *Kennedy v. Fargo* (N. D. 1918), 169 N. W. 424, 427.

<sup>97</sup> Ordinance may impose fine for train to obstruct street, though a statute covers the same subject. *Oswosso v. Michigan Central R. Co.*, 183 Mich. 688, 150 N. W. 323.

<sup>98</sup> Summary power to remove, in public ways exists in the municipality. *Murden v. Lewes Comrs.* (Del., 1919), 108 Atl. 74, 77, citing Sections 904, 926, and 1370, Vol. 3 ante.

regulating the construction and maintenance of signs, awnings, etc.,<sup>99</sup> or forbidding them, and requiring the removal of such as are unsafe or likely to become so,<sup>1</sup> are generally sustained in the interest of public convenience and safety in the use of public ways.

### § 929. Billboards and structures for advertising.

Under ample charter power reasonable regulations respecting the erection and maintenance of billboards and structures for advertising purposes will be sustained.<sup>2</sup>

<sup>99</sup> Ordinances enacted in the interest of public safety or to conserve the general welfare, and reasonable in their terms and uniform in their operation may restrict roof sign structures in height, and differentiate between those solid and those open, although it may be possible to build such signs higher than the limit prescribed and make them approximately safe. *People ex rel. v. Ludwig*, 218 N. Y. 540, 113 N. E. 532, affirming 158 N. Y. S. 208, 172 App. Div. 41, distinguishing *Wineburgh Adv. Co. v. Murphy*, 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N. S.) 735.

<sup>1</sup> An ordinance of New Orleans forbidding the erection of signs, sheds or other obstructions on or over any part of the sidewalk, roadway or neutral ground of a designated avenue and compelling the removal of existing signs, sheds or other obstructions on such avenue which excepted existing balconies of dwelling houses and marquee or awnings to protect show windows, providing no signs or advertisements appear thereon, was sustained. *New Orleans v. Kaufman*, 138 La. 897, 70 So. 874, distinguishing *Calvo v. New Orleans*, 136 La. 480, 67 So. 338.

Under power vested in the city council "to make and establish such and so many rules and regulations as to them may seem expedient for the better regulations of awnings, awning posts," projecting on and occupying city sidewalks, an ordinance requiring the removal within ninety days of all awnings and awning poles on sidewalks of a particular busy trading street was sustained. *Lenon v. Porter*, 65 Pa. Super. Ct. 94.

<sup>2</sup> *Thomas Cusack Co. v. Chicago*, 267 Ill. 344, 108 N. E. 340, approving *Chicago v. Gunning System*, 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 230, 2 Ann. Cas. 892 (set out in Section 929, Vol. 3, ante); *State v. Staples*, 157 N. C. 637, 73 S. E. 112; *Ex parte Savage* (Tex. Civ. App.), 141 S. W. 244.

An ordinance regulating advertising billboards forbidding the construction and maintenance of such boards within one hundred feet of the line of any public park or boulevard was held void. *Kansas City Gunning Advertising Company v. Kansas City*, 240 Mo. 659, 661, 144 S. W. 1099.

Ordinance may control and regulate the construction, location and use of billboards, but cannot pro-



Power to enact all ordinances not inconsistent with the charter and the state laws "as may be expedient in maintaining the peace, order, good government, health and welfare of the city; and to license, tax and regulate all occupations, professions and trades," etc., is sufficient to authorize an ordinance regulating the construction and maintenance of advertising billboards as an exercise of the police power so conferred.

The general welfare clause, it has been held, will support necessary, reasonable and uniform regulations.<sup>3</sup>

Aesthetic consideration alone, it is generally held, will not sanction unreasonable restrictions relating to the erection and maintenance of such structures.<sup>4</sup>

hibit any sign or advertisement of any wholesale or retail liquor dealer, being displayed within the corporate limits, either upon any vehicle or in, or about any building or premises. *Haskell v. Howard*, 269 Ill. 550, 109 N. E. 992, L. R. A. 1916B, 893.

*Kansas City Gunning Company v. Kansas City*, 240 Mo. 659, 670, 674, 144 S. W. 1099, approving *St. Louis Gunning Advertising Company v. St. Louis*, 235 Mo. 99, 200, 137 S. W. 929 (which is set out in Section 929, Vol. 3, ante).

<sup>3</sup> *Cream City Bill Posting Co. v. Milwaukee*, 158 Wis. 86, 147 N. W. 25.

See Section 895, ante; Section 985, Vol. 3, ante.

<sup>4</sup> Section 893, ante; Section 929, Vol. 3, ante.

"In so far as the city undertakes to regulate the erection or construction of billboards that might be dangerous to the public by falling or being blown down, or constructed of such material and in such manner as to endanger life or property, or to increase the

danger of loss by fire, or to have printed or displayed upon them obscene characters and words tending to injure and offend public morals, it has the power; but to attempt to exercise the power of depriving one of the legitimate use of his property merely because such use offends the aesthetic or refined taste of other persons is quite a different thing, and cannot be exercised under the constitution forbidding the taking of property for public use without compensation." *Anderson v. Shackelford (Fla.)*, 76 So. 343, 345.

*Pittsburgh Poster Advertising Co. v. Swissvale Borough*, 70 Pa. Super. Ct. 224, 228, citing Section 929, Vol. 3, ante, holding a billboard ordinance unreasonable among other requirements that it must be painted, saying "The borough cannot forbid the erection of an unpainted structure on private property because it may offend the aesthetic taste of any one."

It is within legislative competence to put such structures into a distinct class, require them to be constructed of incombustible material, within named districts, as the fire limits,<sup>5</sup> within a specified distance from the surface of the ground, of a designated strength to withstand a certain wind pressure; forbid the granting of permits to erect and maintain until such provisions are observed; and compel the removal of all existing structures not complying with the regulations.<sup>6</sup>

An ordinance forbidding the erection of billboards in residence districts without first obtaining "the consent in writing of the owners or duly authorized agents of such owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed or located," and requiring such written consent to be filed with the building commissioner, before a permit shall be issued for the erection of such billboard or signboard, was held not a delegation of legislative power.<sup>7</sup>

<sup>5</sup> Ordinance requiring billboard erected throughout the municipal area to be constructed of metal to safeguard the public safety, preventing the spread of fire, held void. *People ex rel. v. Hastings*, 138 N. Y. S. 1137, 153 App. Div. 920, affirming 137 N. Y. S. 186, 77 Misc. Rep. 453; *Standard Bill Posting Co. v. Newburg*, 138 N. Y. S. 1144, 153 App. Div. 920.

<sup>6</sup> *Cream City Bill Posting Co. v. Milwaukee*, 158 Wis. 86, 147 N. W. 25; *Horton v. Old Colony Bill Posting Co.*, 36 R. I. 507, 90 Atl. 822 (reviewing many cases); *Gilmarlin v. Standish-Barnes Co. (R. I.)*, 100 Atl. 394.

<sup>7</sup> "The claimed infirmity in the ordinance consists in the requirement that before any billboard or sign board of over twelve square feet in area may be erected in any

block in which one-half of the buildings are used exclusively for residence purposes the owners of a majority of the frontage of the property on both sides of the street in such block shall consent in writing thereto. This it is claimed, is not an exercise by the city of power to regulate or control the construction and maintenance of billboards, but is a delegation of legislative power to the owners of a majority of the frontage of the property in the block "to subject the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors." \* \* \*

"The claim is palpably frivolous that the validity of the ordinance is impaired by the provision that such billboards may be erected in

**§ 930. Distribution of hand bills, circulars, advertising matter, etc.**

Ordinances may forbid under penalty the throwing, casting or distribution of hand-bills, circulars, cards or any advertising matter on streets, sidewalks, parks and public places, and sometimes the forbidden places include front yards or stoops.<sup>8</sup> Under such prohibition

such districts as are described if the consent in writing is obtained of the owners of a majority of the frontage on both sides of the street in any block in which such billboard is to be erected. The plaintiff in error cannot be injured, but obviously may be benefitted by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or property. *Tyler v. Judges of Registration*, 179 U. S. 405; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531. To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations, which are properly the subject of regulation in the exercise of the police power, it is not uncommon in laws which have been sustained against every possible claim of unconstitutionality such as the right to maintain saloons. *Swift v. People*, 162 Illinois 534, and as to the location of garages. *People v. Ericsson*, 263 Ill. 368. Such treatment is plainly applicable to offensive structures.

\* \* \*

"The plaintiff in error relies chiefly upon *Eubank v. Richmond*,

226 U. S. 137. A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the block designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances." *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 531, 37 Sup. Ct. 190, 61 L. ed. 191, affirming 267 Ill. 344, 108 N. E. 340, 8 Ann. Cas. 1916C, 488.

May be forbidden in the residence districts. *St. Louis Poster Advertising Co. v. St. Louis*, 249 U. S. 269, 39 Sup. Ct. 274.

<sup>8</sup> Section 930, Vol. 3, ante.

a newspaper vendor who inserts and distributes handbills, circulars and advertising matter by delivering such matter contained in copies of newspapers sold by him is guilty of a violation, as it is not necessary to show that the matters were thrown upon the street because under the ordinance the act of throwing is one offense and the act of distributing another. The ordinance forbids a public distribution. Hence distribution in a private place as a store or delivery of newspapers containing the matter specified in the home of the reader is not a violation.<sup>9</sup>

Where the ordinance did not impose a penalty upon one who furnished to another, circulars for distribution on the streets but only related to the actual distribution, as the offense denounced is not a misdemeanor one cannot be lawfully convicted of aiding and abetting a violation. Ordinances often declare that violation thereof shall constitute a misdemeanor but in the absence of such declaration in the particular ordinance or a general provision of law to that effect, a violation of an ordinance is not always a misdemeanor.<sup>10</sup>

<sup>9</sup> "It must be perfectly plain that the person who stands upon the highway and openly distributes handbills and circulars, or who distributes them in any other way, must, in a measure, annoy or tend to annoy persons thereon who have a right to go along peaceably and without molestation. Such conduct, in my opinion, tends to a breach of the peace, and the board of aldermen recognizing that fact, have ordained this ordinance for the proper regulation of the use of the streets of the city." *People v. Horwitz*, 140 N. Y. S. 437, 443, 27 N. Y. Cr. R. 237, declaring the case was in the same class as *People ex rel. v. Palmiter*, 128 N. Y. S. 426, 71 Misc. Rep. 158

(stated in note 23, p. 1985, Section 924, Vol. 3, ante), expressing the opinion that *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578 (set out in note 96, p. 2025, Section 930, Vol. 3, ante) was "not in accord with the weight of authority," and approving *Philadelphia v. Brahender*, 201 Pa. 574, 51 Atl. 374, 58 L. R. A. 220; *Wetengel v. Denver*, 20 Colo. 552, 39 Pac. 343; and *Anderson v. State*, 69 Neb. 686, 96 N. W. 149, 5 Ann. Cas. 421, the rulings of all of which cases are given fully in Section 930, Vol. 3, ante.

<sup>10</sup> *People v. Loostein*, 139 N. Y. S. 680, 78 Misc. Rep. 306.

### § 931. Advertising on vehicles or on persons using streets.

An ordinance forbidding under penalty any sign or advertisement of any wholesale or retail liquor dealer to be displayed or posted on any vehicle used by him, was held void, unauthorized, unreasonable and an unlawful invasion of the rights and liberties of citizens.<sup>11</sup>

### § 932. Riding and driving on streets.

In the interest of public safety undoubtedly reasonable street traffic regulations for riding and driving thereon may be promulgated by ordinance and enforced.<sup>12</sup>

Thus a rate of speed for riding and driving of vehicles may be established,<sup>13</sup> excluding from the operation thereof fire wagons and engines responding to an alarm;<sup>14</sup> may require drivers of vehicles to give signals on turn-

<sup>11</sup> *Haskell v. Howard*, 269 Ill. 550, 109 N. E. 992, L. R. A. 1916B, 893.

<sup>12</sup> *Pugh v. Des Moines*, 176 Iowa 593, 156 N. W. 892; *Fisher v. Cedar Rapids & Marion City Ry. Co.*, 177 Ia. 406, 157 N. W. 860; *Briggs v. Lake Auburn Crystal Ice*, 112 Me. 344, 92 Atl. 185; *Freeman v. Green* (Mo. App.), 186 S. W. 1166.

City may regulate use of streets. State regulation of the use of highways in general by motor vehicles does not abrogate the powers of the municipality. *Beck v. Cox*, 77 W. Va. 442, 87 S. E. 492.

City may enact and enforce a law of the road for all kinds of vehicles and such ordinance is not prohibited by a general law forbidding municipalities to regulate motor vehicles or their use of the public highways. *Kelly v. James*, 37 S. D. 272, 157 N. W. 990.

See Section 935, post.

**Motorcycles.** "It shall be un-

lawful for any person operating a motorcycle to carry any other person on said machine in front of the operator," held valid, classification reasonable, and in the public interest, to protect persons on streets and also persons on motorcycle. *Re Wickstrum*, 92 Neb. 523, 138 N. W. 733.

<sup>13</sup> Section 935, post.

<sup>14</sup> Ordinance regulating speed at which vehicles may be driven on the streets does not apply to members of fire department of the city when responding to a fire alarm. *Devine v. Chicago*, 172 Ill. App. 246.

Fire wagons and engines being excluded from operation of speed regulation when responding to alarm, it is immaterial whether alarm of fire is within city or outside of city limits. *Hubert v. Granzow*, 131 Minn. 361, 155 N. W. 204.

ing or when changing their course, or on approaching street corners and intersections;<sup>15</sup> and may ordain the law of the road, the right of way, the method of turning on meeting and passing vehicles, etc.<sup>16</sup>

### § 933. Regulating width of tires of vehicles.<sup>17</sup>

### § 934. Limiting weight of loads of vehicles passing over streets.<sup>18</sup>

### § 935. Regulating the running of automobiles.

The power to enact and enforce reasonable regulations touching the operation of automobiles in highways, streets and public places cannot be doubted.<sup>19</sup>

<sup>15</sup> Section 1392, et seq., post.

May require drivers of moving vehicles to give signal when turning and may give traffic on east and west streets right of way over traffic on north and south streets. Traffic ordinance admissible as evidence to prove negligence. *Johnson v. Galesburg Ry. L. & P. Co.*, 200 Ill. App. 392.

<sup>16</sup> Right of way. *Seager v. Foster* (Iowa, 1918), 169 N. W. 681.

Ordinance may prohibit stopping as well as driving of a vehicle with left side to curb. *Weihe v. Rathyen Co.* (Cal. App.), 167 Pac. 287.

Ordinance requiring vehicles to travel on right side of street does not prohibit chauffeurs in congested district from backing automobiles into limited parking space. *Sheldon v. James* (Cal.), 166 Pac. 8.

Ordinance giving U. S. mail collectors in case of conflict, preferential right of way in use of streets does not create liability on favor of person injured by its breach,

but may be shown as evidence to prove negligence. *Bain v. Fort Smith Light & Traction Co.*, 116 Ark. 125, 172 S. W. 843.

<sup>17</sup> May regulate. *Froelich v. Cleveland* (Ohio, 1919), 124 N. E. 212.

An ordinance regulating the width of tires of vehicles not authorized by the charter is void. *St. Louis v. St. Louis Transfer Co.*, 256 Mo. 476, 488, et seq., 163 S. W. 1077, following *State ex rel. v. Clifford*, 228 Mo. 194, 128 S. W. 755 (set out in Section 933, Vol. 3, ante).

<sup>18</sup> May regulate the weight of loads. *Froelich v. Cleveland* (Ohio, 1919), 124 N. E. 212.

<sup>19</sup> Illinois. *Chicago v. Francis*, 262 Ill. 231, 104 N. E. 662; *Ayres v. Chicago*, 239 Ill. 237, 87 N. E. 1072.

Iowa. *State v. Gish*, 168 Iowa 70, 150 N. W. 37.

Maryland. *Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 874.

Michigan. *Johnson v. Sargeant*, 168 Mich. 444, 134 N. W. 468.

Maine. *State v. Mayo*, 106 Me.

Automobiles may be regulated as a class.<sup>20</sup>

It has been aptly said that the regulation of the rate of speed of automobiles is "too plain for discussion."<sup>21</sup>

A speed limit may be established for running generally,<sup>22</sup> usually permitting greater speed in the residential than in the business and congested districts, and a lesser rate allowed at street crossings and intersections,<sup>23</sup> in turning curves, in congested streets,<sup>24</sup> in passing vehicles, etc.<sup>25</sup>

62, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512.

Massachusetts. *Dudley v. Northampton St. R. Co.*, 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561.

Missouri. *Hall v. Compton*, 130 Mo. App. 675, 108 S. W. 1122.

"Common observation and experience shows that unrestricted use of motor vehicles on public streets would be extremely dangerous to life and limb and the property of the public. Their use thus becomes a fit subject for state regulation. Every person who uses a motor vehicle must be regarded as exercising a privilege and not an unrestricted right. It being a privilege granted by the legislature, a person enjoying it must take it subject to all proper restrictions." *Ex parte Kneedler*, 243 Mo. 632, 641, 147 S. W. 983, 40 L. R. A. (N. S.) 622, Ann. Cas. 1913C, 923.

<sup>20</sup>*St. Louis v. Hammond* (Mo., 1917), 199 S. W. 411.

§ 935, Vol. 3, ante.

<sup>21</sup>*Commonwealth v. Kingsbury*, 198 Mass. 542, 544, 88 N. E. 848, L. R. A. 1915E, 264, 127 Am. St. Rep. 513; *State v. Mayo*, 106 Me. 62, 66, 67, 75 Atl. 295, 26 L. R. A. (N. S.) 502, 20 Ann. Cas. 512; *St. Louis v. Hammond* (Mo., 1917), 199 S. W. 411.

<sup>22</sup>*Pilgrim v. Brown*, 168 Iowa 177, 150 N. W. 1; *Forgy v. Rutledge*, 176 Ky. 182, 180 S. W. 90; *Ginter v. O'Donoghue* (Mo. App.), 179 S. W. 732; *Radwick v. Goldstein*, 90 Conn. 701, 98 Atl. 583; *People v. Untermyer*, 138 N. Y. S. 335, 153 App. Div. 176 (question whether by state or local law); *People v. Bell*, 148 N. Y. S. 753; *People v. Chapman*, 152 N. Y. S. 204, 88 Misc. Rep. 460; *Chapman v. Selover*, 159 N. Y. S. 632, 172 App. Div. 858.

Speed ordinance of 8 miles per hour in business district and 10 miles per hour in other portions, held reasonable. *St. Louis v. Hammond* (Mo.), 199 S. W. 411.

<sup>23</sup>*State v. Waterman*, 112 Minn. 157, 127 N. W. 473; *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523; *Ware v. Lamar*, 16 Ga. App. 560, 85 S. E. 824; *Ware v. Lamar*, 18 Ga. App. 673, 90 S. E. 364; *Moye v. Reddick*, 20 Ga. App. 649, 93 S. E. 256; *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041, *Windsor v. Bast*. (Mo. App., 1917), 199 S. W. 722.

"Intersecting highway" defined, *Manley v. Abernethy*, 167 N. C. 220, 83 S. E. 343.

<sup>24</sup>*Hood & Wheeler Fur. Co. v. Royal* (Ala.), 76 So. 965.

<sup>25</sup>*Schaar v. Conforth*, 128 Minn. 460, 151 N. W. 275.

A standard of care, reasonable and uniform, for the operation of automobiles may be prescribed,<sup>26</sup> and also necessary street traffic regulations, as the law of the road,<sup>27</sup> precautions to be observed at street crossings and intersections,<sup>28</sup> turning corners and into streets,<sup>29</sup> the giving of signals,<sup>30</sup> the mode of passing vehicles,<sup>31</sup> and approaching standing street cars in dropping and taking on passengers,<sup>32</sup> and the location and time of

<sup>26</sup>Section 1394, et seq., post.

Between crossing and at crossings, requiring highest degree of care. *Aronson v. Ricker*, 185 Mo. App. 528, 172 S. W. 641.

Ordinance making it unlawful to operate an automobile on the streets "in a careless or reckless manner" is altogether too uncertain and indefinite to be capable of enforcement. "Manifestly it will not do to denounce as a crime the operation of an automobile in a careless and reckless manner without undertaking to define in any way what shall constitute carelessness and recklessness in the manner in which the machine is being operated. The case would vary with circumstances." *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523, 527.

Automobile shall be driven "in a careful and prudent manner and at a rate of speed that will not endanger the property or life or limb of another," and driving in excess of the prescribed rates of speed for a specified distance "shall be presumptive evidence of driving at a rate of speed which is not careful and prudent." *Young v. Dunlap*, 195 Mo. App. 119, 124, 125, 190 S. W. 1041.

<sup>27</sup>Ordinance required travelers to keep as near the right hand

side of the curb as possible, and a state statute required travelers on highways to turn to the right, held ordinance did not violate state law, as it established law of the road within the city. *Hiscock v. Phinney*, 81 Wash. 117, 142 Pac. 461.

<sup>28</sup>Section 1394, et seq., post.

<sup>29</sup>*Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.

Requiring to look to rear before turning. Companion riding with driver may look and direct the driver and this will be sufficient compliance with the ordinance. *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542.

<sup>30</sup>Sounding horn as signal for approach when necessary to prevent injury to those using the streets. *Sullivan v. Smith*, 123 Md. 546, 91 Atl. 456.

<sup>31</sup>Section 1394, et seq., post.

Street cars. *Chicago v. Keogh* (Ill. 1919), 125 N. E. 881.

<sup>32</sup>On approaching or passing street cars, taking and discharging passengers, either slow down or stop, if necessary, for safety. *Grouch v. Heffner*, 184 Mo. App. 365, 171 S. W. 23.

In passing street car in taking and discharging passengers, automobile shall stop at least four feet from the right hand running



parking in the streets, and regulations relating thereto.<sup>33</sup>

Whether power to prescribe regulations is concurrent with the state and municipality or only so in part, or within the exclusive jurisdiction of the central or local authority, must depend on the law of the particular state. Statutes establish general motor-vehicle laws, uniformly applicable throughout the state,<sup>34</sup> and some of them expressly forbid local regulations of automobiles,<sup>35</sup> especially speed regulations.<sup>36</sup>

In such case all conflicting local or ordinance regulations are usually superseded by the state laws.<sup>37</sup>

board or lowest step of the street car, or if not possible, to bring vehicle to full stop. Held, not in conflict with state motor-vehicle law. *Kolankiewicz v. Burke* (N. J. L.), 103 Atl. 249.

In passing street cars receiving and discharging passengers the driver of the automobile must exercise prudence and care, as the passengers have the right of way. *Kling v. Thompson-McDonald Lumber Co.*, 127 Minn. 468, 149 N. W. 947.

<sup>33</sup> *Pugh v. Des Moines*, 176 Iowa 593, 156 N. W. 892.

<sup>34</sup> *Buffalo v. Lewis*, 192 N. Y. 193, 84 N. E. 809, stating necessity for uniform laws as to automobiles throughout the state, approved in *Baraboo v. Dwyer*, 166 Wis. 372, 165 N. W. 297, 298.

<sup>35</sup> *Seattle v. Rothweiler* (Wash., 1918), 172 Pac. 825.

State laws may prevent cities from limiting speed of automobiles. *Chicago v. Kluener*, 257 Ill. 317, 100 N. E. 917.

State laws restricting cities as to use of vehicles, motor vehicle. *Chicago v. Walden W. Shaw Liv-  
ery Co.*, 258 Ill. 409, 101 N. E. 588.

<sup>36</sup> *Ayrea v. Chicago*, 239 Ill. 237, 87 N. E. 1073; *People v. Sargent*, 254 Ill. 514, 98 N. E. 959.

<sup>37</sup> See § 647, ante; § 647, vol. 2, ante.

Conflicting ordinances as to regulations are superseded by state laws on the subject. Ex parte *Smith*, 26 Cal. App. 116, 146 Pac. 82.

State law prohibited a speed of eight miles per hour and the ordinance ten miles per hour. The court said that the ordinance did not undertake to license automobiles to run at a speed in excess of eight miles per hour and was therefore not in conflict with the statute. "It is merely a matter of policy whether a municipality may choose to punish those who exceed any specified rate of speed; and the state regulation not forbidding municipalities may with respect to their own streets, prescribe a rate of speed either lower or higher than that fixed by the state, so far at least, as their own punitive action is concerned." *Adler v. Martin*, 179 Ala. 97, 59 So. 597, 602.

State and local as to speed to conform. "Bridge," held public

But state regulations will not always prevent or supersede all local regulations,<sup>38</sup> as authority to license,<sup>39</sup> or mere traffic regulations, relating for example, to turning to the right in passing a street car overtaken which are consistent with the provisions of the state law,<sup>40</sup> or other local regulations where there is no conflict with the state law.<sup>41</sup>

Under the Oregon Constitution a city may regulate automobiles, and a state law will not supersede an ordinance on the subject.<sup>42</sup>

highway as to speed of automobile. *Baraboo v. Dwyer*, 166 Wis. 372, 165 N. W. 297.

An ordinance requiring the owner of a motor vehicle to display thereon city license number is void where such state law provides that owner of motor vehicle shall not be required to display any other number than that of the registration issued by the state. *Chicago v. Francis*, 262 Ill. 331, 104 N. E. 662.

<sup>38</sup> Ordinance regulating motor vehicles in the streets which extends the statutory regulations on the subject, held not invalid. *Pemberton v. Army* (Cal. App. 1919), 183 Pac. 356.

<sup>39</sup> State motor vehicle act sometimes forbids local regulations as to speed, use or equipment, yet a city may license automobiles run for hire, notwithstanding, but cannot regulate them since state law forbids. *State v. Scheidler*, 91 Conn. 234, 99 Atl. 492.

<sup>40</sup> *Chicago v. Keogh* (Ill. 1919), 125 N. E. 881.

<sup>41</sup> Local regulations not inconsistent with state regulations may be enforced. *Commonwealth v. Giles*, 217 Mass. 18, 104 N. E. 572, sustaining a local regulation that a

vehicle overtaking another vehicle shall, in passing, keep to the left.

State regulations of the use of highways in general by motor vehicles does not abrogate the power of the municipality to regulate the use of the streets. *Beck v. Cox*, 77 W. Va. 442, 87 S. E. 492.

Although a state law regulates all motor vehicles and provides local authorities shall have no power to license automobiles or regulate them as to speed, held city may enact an ordinance as to the law of the road, e. g., keeping to the right and as close as possible to the curb, as such ordinance does not conflict with state law. *Kelly v. James*, 37 S. D. 272, 157 N. W. 990.

The state law regulated motor vehicles only, whereas the ordinance regulated all vehicles; held no conflict. Ordinance regulating right of way, as those going in an easterly or westerly direction over specified streets having the right of way over those going in a northerly or southerly direction. *Freeman v. Green* (Mo. App.), 186, S. W. 1166.

<sup>42</sup> *Kalich v. Knapp*, 73 Or. 558, 145 Pac. 22, reversing 142 Pac. 594.

The Michigan constitutional reservation to cities of the reasonable control of their streets is held power to pass reasonable ordinances regulating automobiles, and hence a state law forbidding local regulation and licensing was declared void.<sup>43</sup>

### § 935a. Same—jitneys.

Motor vehicles, auto-busses or jitneys run for hire are clearly within the range of necessary, appropriate and reasonable police regulations.<sup>44</sup>

Automobile regulations may be applicable to them in whole or in part,<sup>45</sup> or they may be regulated as a distinct class,<sup>46</sup> and their routes and hours of service may be prescribed. They may be required to provide indemnity or a bond against injury to persons and property occasioned by their negligent operation,<sup>47</sup> secure a license

<sup>43</sup> *People v. McGraw*, 184 Mich. 233, 150 N. W. 836.

<sup>44</sup> Requiring applicant to state he was the owner of the vehicle, as jitney, held unreasonable, as it does not tend to promote the safety or convenience of the public, and is therefore not within the proper exercise of the police power. *Carrish v. Richmond*, 119 Va. 180, 89 S. E. 102.

City may regulate operation of jitney busses charging fare of 15 cents or less as common carriers. "The jitney by reason of its low fare and manner of operation comes in direct competition with the street cars which are common carriers," and "presents a menace to its passengers and the people upon the street which is greater than that from the ordinary cab or vehicle." *Commission v. Booth*, 156 N. Y. S. 140, 170 App. Div. 590, affirming 155 N. Y. S. 568.

Public Service Commission has

power to permit operation of an auto-bus line between the same termini as the street railway line already in operation if public interest will thereby be served. *Pottsville Traction Co. v. Commission*, 67 Pa. Super. Ct. 301, 304, 307.

<sup>45</sup> Ordinance may regulate handling of automobiles, on streets and public way, including jitneys run for hire. *Ex parte Bogle* (Tex. Cr. App.), 179 S. W. 1193.

<sup>46</sup> Ordinance providing special regulations for operation of "jitney busses" is valid, but city cannot impose an unreasonable license fee on operations of "jitneys." *Hazelton v. Atlanta*, 147 Ga. 207, 93 S. E. 202, affirming 144 Ga. 775, 87 S. E. 1043.

<sup>47</sup> *Iowa. Houston v. Des Moines*, 176 Iowa 455, 156, N. W. 883.

*Louisiana. New Orleans v. Le Blanc*, 139 La. 113, 71 So. 248.

*Massachusetts. Commonwealth*

as a condition precedent to operate,<sup>48</sup> and maintain a regular schedule of trips.<sup>49</sup>

**§ 936. Automobiles may be excluded from certain streets.**

An ordinance may exclude jitneys from prescribed districts.<sup>50</sup>

**§ 940. Regulating street parades.**

Ordinances may regulate street parades and meetings, requiring written notice to the proper authorities of the object, time, place and route of the parade or of the time, place and object of the meeting.<sup>51</sup>

Such ordinances may confer power upon the municipal authorities to designate the route of the parade and the portions of the street to be used. Discriminations in

v. Slocum (Mass.), 119 N. E. 687.

Nevada. Ex parte Counts, 39 Nev. 61, 153 Pac. 93.

Texas. Auto Transit Co. v. Ft. Worth (Tex. Civ. App.), 182 S. W. 685; Green v. San Antonio (Tex. Civ. App.), 178 S. W. 6; Ex parte Sullivan (Tex. Cr. App.), 178 S. W. 537.

West Virginia. Ex parte Dickey, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840, P. U. R. 1915E, 93.

Law requiring city motor carries to give bond although the kind of bond required is not obtainable is valid. The state under police power can prohibit use of street as a place of private business. Harfield v. Lundin, 98 Wash. 657, 168 Pac. 516.

Construction of a state law requiring jitney bus operator to give bond to pay damages sustained by person injured by his negligence and giving right of action to "sur-

viving husband and children" does not exclude recovery by parent for death of child. Bruner v. Little, 97 Wash. 319, 166 Pac. 1166.

<sup>48</sup> West v. Asbury Park (N. J. L.), 99 Atl. 190.

Section 1012 A, post.

Provision of an ordinance to regulate and license operation of "jitneys," which required that applicant for a license shall be the owner of the vehicle he proposes to operate, held void as unreasonable and not tending to promote safety and convenience of public. Parrish v. Richmond, 119 Va. 180, 89 S. E. 102.

<sup>49</sup> Auto bus required to maintain a regular schedule from 6 A. M. to 12 midnight, held constitutional. Ex parte Lee, 28 Cal. App. 719, 153 Pac. 992.

<sup>50</sup> Gill v. Dallas (Tex. Civ. App. 1919), 209 S. W. 209, 212.

<sup>51</sup> Commonwealth v. Curtis, 55 Pa. Super. Ct. 184.

favor of or against organizations or societies without reason will invalidate such regulations, as excepting from its operation designated associations.<sup>52</sup>

### § 941. Loitering on streets—picketing.

An ordinance, it has been held, cannot prohibit picketing where there is a state law permitting labor unions to use peaceable and legitimate means to further their interests in trade disputes.<sup>53</sup>

But a municipality may by ordinance, it has been held, prohibit picketing on the ground that picketing is in itself an act of intimidation and that there is no such thing as "peaceable" picketing, but where such ordinance includes a prohibition of voluntary abandonment of employment by workmen acting together (strike) the whole ordinance is invalid.<sup>54</sup>

An ordinance making it "unlawful for any person to walk back and forth, loiter or remain upon the streets or sidewalks in front of any business house for the purpose of persuading any person from entering said place of business for the purpose of transacting business therein," was held to be within the authority of the city to "pass and enforce ordinances to preserve the good government, order, and security of the city and its inhabitants and to protect the lives, health and property of

<sup>52</sup> Commonwealth v. Mervis, 55 Pa. Super. Ct. 178.

<sup>53</sup> Re Sweitzer (Okl. Cr. App.), 162 Pac. 1134.

<sup>54</sup> "The question of peaceable picketing is one that has been discussed frequently and for many years past by the courts. The judicial opinions have been conflicting, and it is difficult to determine accurately where the weight of authority falls. All the authorities agree that picketing accompanied by threats, force and intimidation, is unlawful. Many courts have held that peaceable

picketing is not illegal while many others have held, and we think with reason, that there can be no such thing as peaceable picketing." Hall v. Johnson, 87 Or. 21, 169 Pac. 515, 518, quoting statements, with approval from Pierce v. Stablemen's Union, 156 Cal. 70, 103 Pac. 324; Barnes & Co. v. Chicago Typographical Union, 232 Ill. 424, 83 N. E. 940, 13 Ann. Cas. 54, 14 L. R. A. (N. S.) 108; St. Germain v. Bakery & Confectionery Worker's Union (Wash.), 166 Pac. 665; Jones v. Leslie, 61 Wash. 107, 112 Pac. 81.

its inhabitants." The acts described in the ordinance naturally lead to disturbances and have a tendency to intimidate and prevent persons from entering the establishment picketed.<sup>55</sup>

On the other hand it has been held that laboring men have a legal right to strike and quit work in a body, and they have a right, to post men near by to persuade quietly and peaceably other workmen not to take their places. But they have no right to break the law by using force, intimidation or threats.<sup>56</sup>

Nor have they any right to conspire to break up their late employer's business.<sup>57</sup>

#### § 942. Regulating hotel drummers—hackmen.<sup>59</sup>

A municipality may regulate the place and manner in

<sup>55</sup> Ex parte Stout (Tex. Cr. App.), 198 S. W. 967.

Peaceful picketing may be enjoined. Baldwin Lumber Co. v. International Brotherhood of Teamsters (N. J. Eq., 1920), 109 Atl. 147.

<sup>56</sup> "In the eyes of the law the rights of a union man are no higher and no more sacred than those of the non-union man. The rule of equality prevails. Any person may join a union or not, as he pleases, and no one has the right to deny him the privilege of working, or to harass, annoy, abuse or maltreat him because he works, or is willing to work in the place made vacant by a strike. \* \* \* Lawful picketing is permissible, but the number of pickets should not be large. There is power in number, and when the number is large and unfriendly, it intimidates and terrorizes. Every man, be he friend or foe, has the right to work and to come and go to his work without fear or molestation. He may be invited to dis-

cuss the strike situation, and if he chooses, may stop and listen. The right to persuade him peacefully, but not by violence, threat or intimidation, exists. If he does not wish to stop and hear he may not be compelled to do so. No one or more may lawfully follow him, and while following him, or while he is passing, annoy or abuse, or threaten or intimidate him, or apply to him offensive language or names, or opprobrious epithets. The streets and highways are for the use of all law-abiding people. To such they should be as free as air that whoever will, having due regard to the rights of others, may travel them in the pursuit of his legitimate business, without hindrance or annoyance." Niles-Bement-Pond Co. v. Iron Moulders' Union, 246 Fed. 851, 856, 860.

<sup>57</sup> Berry Foundry Co. v. International Moulders' Union, 177 Mo. App. 84, 87, 88, 164 S. W. 245.

<sup>59</sup> State v. Kern, 130 Minn. 191, 153 N. W. 311.

which hack and taxi drivers and hotel runners may solicit patronage.<sup>60</sup>

Regulations of solicitation by and stands for hackmen at a railroad depot are not necessarily unreasonable although the stands assigned to different hotels are not of equal value as positions for solicitation of incoming passengers.<sup>61</sup>

A city may by ordinance prohibit drumming for any hotel or for the transportation of persons or baggage on any boat or in any depot, and the application of such ordinance will not be limited by a contract between individuals, e. g., a contract between a transfer company and a railroad company permitting the former to solicit in the depot.<sup>62</sup>

It is within the police power to prohibit drumming on the streets and public places as well as on trains. Thus an ordinance forbidding any proprietor of a hotel and boarding house to drum or solicit on streets and public places, except within fifty feet of his or her establishment, was sustained.<sup>63</sup>

General power to regulate, it has been held, is not authority to require hotel drummers to wear a badge, or pay a license.<sup>64</sup>

### § 942a. Soliciting business on streets and sidewalks.

An ordinance instead of prohibiting the general personal solicitation of persons for business purposes upon streets and sidewalks but which is limited in its application to forbidding such solicitations to persons in like lines of trade in front of the stores or places of business of a competitor is unconstitutional, because such classi-

<sup>60</sup> *Seattle Taxicab & Transfer Co. v. Seattle*, 86 Wash. 594, 150 Pac. 1134.

<sup>61</sup> *City Cab, Carriage & Transfer Co. v. Hayden*, 73 Wash. 24, 131 Pac. 472.

<sup>62</sup> *Ex parte Barmore*, 174 Cal. 286, 163 Pac. 50, L. R. A. 1917D, 688.

<sup>63</sup> *Baird v. Bray*, 125 Ark. 511, 189 S. W. 657.

<sup>64</sup> *Baird v. Bray*, 125 Ark. 511, 189 S. W. 657.

The wearing of a badge may be required by virtue of express power. Section 942, vol. 3, ante.

fication is neither general in its terms as to the persons to whom it is intended to apply, or to the streets the use of which is attempted to be regulated.<sup>65</sup>

### § 943. Animals at large.

An ordinance may make it unlawful for horses, mules, cattle, sheep, swine and goats to run at large on public streets and impose a reasonable fine for allowing it.<sup>66</sup>

### § 944. Impounding and selling animals at large.<sup>67</sup>

An ordinance providing for the impounding of animals running at large was held applicable even though the animal escaped through no negligence of the owner and though he continued pursuit until taken by the impounder.<sup>68</sup>

Regulations of this character frequently make no distinction between resident and non-resident owners.<sup>69</sup>

<sup>65</sup> "The ordinance therefore cannot be otherwise construed than as special in its terms and local in its application, contravening the constitutional provision that 'where a general law can be made applicable, no local or special law shall be enacted,' which salutary rule regulating legislation we have shown applies with equal force to an ordinance as well as to a state law." *Ex parte Lerner* (Mo. 1920), 218 S. W. 331, 333.

<sup>66</sup> *Halderman v. Colorado City*, 52 Colo. 233, 235, 120 Pac. 1041, citing §§ 901, 902, vol. 3, ante (§§ 441, 442, *McQuillin*, Mun. Ord.); *Whitley v. Stephens* (Ky. 1919), 211 S. W. 770.

<sup>67</sup> *Pueblo v. Kurtz* (Colo. 1919), 182 Pac. 884; *Whitley v. Stephens* (Ky. 1919), 211 S. W. 770; *Connor v. Skinner* (Tex. Civ. App.), 156 S. W. 567; *Rose v. Salem*, 77 Ore. 77, 150 Pac. 276.

An ordinance making it unlawful to allow animals to run at large and imposing a fine for a violation, held not to conflict with a state law providing a system of procedure in cases when animals are found running at large contrary to ordinance; providing for manner of sale and disposition of funds arising from sale. *Halderman v. Colorado City*, 52 Colo. 233, 235, 120 Pac. 1041.

<sup>68</sup> *Ferry v. Sawyer*, 198 Mo. App. 30, 195 S. W. 574, following *McVey v. Barker*, 92 Mo. App. 498, and *Evans v. Holman*, 202 Mo. 284, 100 S. W. 624.

<sup>69</sup> Ordinance making it unlawful to allow hogs to run at large within a city applies although owner resides outside of city. *Marshall v. Patterson*, 105 Ark. 698, 150 S. W. 694.

If the owner residing outside of the city drives stock within the



**§ 945. Regulation of dogs.**

To safeguard and promote the public health, safety and convenience municipal power to regulate the keeping and licensing of dogs within the corporate area is generally recognized.<sup>70</sup>

**§ 946. Regulating the keeping of chickens.**

An ordinance may declare it unlawful to allow "chickens, geese, turkeys, guineas and like fowls," to run at large within the corporate limits.<sup>71</sup>

**§ 948. Fire limits—wooden buildings—building regulations.**

The supervision of the construction, maintenance, repair, etc., of buildings and like structures fall strictly within the scope of the police power,<sup>72</sup> and the power to enact and enforce all reasonable and necessary regula-

city or they run at large therein with his knowledge, he is guilty of an infraction of the ordinance. *De Queen v. Fenton*, 100 Ark. 514, 140 S. W. 716.

<sup>70</sup> Ordinance requiring that all dogs be licensed, held authorized under the general welfare clause. *McPhail v. Denver*, 59 Colo. 248, 149 Pac. 257. City may by ordinance require that all dogs be licensed and impose a higher license fee on one class of dogs than on another. *Robberson v. Gibson* (Okl.), 162 Pac. 1120.

City may prohibit dogs from running at large, but provision for notice to the owner (of impounded dog) if known and that dog be killed if not redeemed within three days, held invalid in state where dogs are declared by statute to be personal property and it is larceny to steal a dog. *Rose v. Salem*, 77 Ore. 77, 150 Pac. 276.

Provision of the New York City Sanitary Code enacted by the board of health providing that no unmuzzled dog shall be permitted on public highway or any public park or place, held constitutional and a reasonable regulation to secure protection against rabies. *People ex rel. Knoblanck v. Warden of City Prison*, 153 N. Y. S. 463, 89 Misc. Rep. 243, 32 N. Y. Cr. 494, affirmed in 153 N. Y. S. 1137, 168 App. Div. 951.

<sup>71</sup> *Merrill v. Van Buren*, 125 Ark. 248, 188 S. W. 537.

<sup>72</sup> *McCray v. Chicago* (Ill. 1920), 126 N. E. 557; *Hartman v. Chicago* (Ill. 1918), 118 N. E. 731; *Chicago v. Mandel Bros.*, 264 Ill. 206, 106 N. E. 181; *Ashley v. Ashley Lumber Co.* (N. D. 1918), 169 N. W. 87, 89, citing § 948, vol. 3, ante (*McQuillin, Mun. Ord.*, § 470); *State ex rel. v. Stahlman*, 81 W. Va. 335, 94 S. E. 497.

tions appertaining thereto may be vested by the state in municipal corporation.<sup>73</sup>

Building codes and ordinances being remedial should be construed liberally.<sup>74</sup>

Under ample power, in the interest of public safety, a municipal corporation may prescribe fire limits touching the construction and material used in buildings,<sup>75</sup> prevent wooden buildings therein,<sup>76</sup> and require the re-

<sup>73</sup> Goldstein v. Couter, 212 Mass. 57, 98 N. E. 701.

Incorporated district in Kentucky, held to have power to pass ordinance regulating the erection, alteration, repair, etc., of buildings and structures in the district. Gleason v. Weber, 155 Ky. 431, 159 S. W. 976.

<sup>74</sup> People ex rel. v. Miller, 146 N. Y. S. 403, 161 App. Div. 138.

Courts are extremely liberal in construing building ordinances, deferring to the fullest extent to the discretion of the municipal authorities. Detroit Building Commission v. Kunin, 181 Mich. 604, 148 N. W. 207.

Use of term "dead load" instead of "live load," as to warehouse floors, held not important. O'Rourke v. Fulton Bag and Cotton Mills, 133 La. 955, 63 So. 480.

<sup>75</sup> Mosher v. Phoenix (Ariz. 1919), 181 Pac. 170; Deem v. Davis (Idaho), 175 Pac. 959; Bates v. Monticello, 173 Ky. 244, 190 S. W. 1074; Russell v. Fargo, 28 N. D. 300, 148 N. W. 610; Howell v. Sweetwater (Tex. Civ. App.), 161 S. W. 948.

Fire proof material, in walls and roofs in fire limits may be compelled. Brenham v. Holle & Seelhorst (Tex. Civ. App.), 153 S. W. 345.

"Ordinances creating fire districts in municipalities are upheld as being within the general police power; they are designed to prevent the erection of inflammable buildings in congested districts so as to lessen the danger from fire and conflagration to the adjoining and nearby property." Monticello v. Bates, 163 Ky. 38, 173 S. W. 159.

Ordinance may create a fire zone and regulate the construction of buildings therein, under general power to enact and enforce police ordinances. Monticello v. Bates, 169 Ky. 258, 183 S. W. 555.

City may establish fire limits and regulate the erection and repair of any building of wood or other inflammable material. Special grant given for this purpose. Courts strongly defer to discretion of local authorities. Such regulations may require outer walls to be brick, stone or concrete. State v. Lawing, 164 N. C. 492, 80 S. E. 69.

<sup>76</sup> Commercial Club v. Chicago, St. P. M. & O. Ry. Co. (Minn. 1919), 171 N. W. 312; Galanty & Alper v. Mayville, 176 Ky. 523, 196 S. W. 169.

Construction of words "building tent" relating to erections within fire limits in ordinance. St.

moval of such buildings as are found to be nuisances.<sup>77</sup> Within reasonable limits a municipal corporation may by ordinance define the objects designed to be affected by its fire limit regulations. In construing such ordinances the courts are ordinarily bound to follow the city's definition of buildings and other structures so affected.<sup>78</sup>

Under a law declaring that "the council may provide, by ordinance, limits within which no building shall be constructed except of stone or brick or other incombustible materials, with fireproof roofs, and impose a penalty for violation of such ordinance, and may cause a building commenced, put up or removed into such limits, in violation of such ordinance, to be removed," the city, it was held, had power to enact an ordinance forbidding the construction of any building of combustible material within defined limits.<sup>79</sup>

Discrimination, unreasonable and arbitrary classification, and unlawful delegation of power, will invalidate building regulations.<sup>80</sup> Thus under a law conferring

Louis v. Nash, 266 Mo. 523, 181 S. W. 1145.

Authority to establish fire limits and to prescribe kind of buildings, materials, etc., will support ordinance forbidding re-building of wooden buildings when partly destroyed, and also prohibiting repairs therein without a permit. State v. Shannonhouse, 166 N. C. 241, 80 S. E. 881.

<sup>77</sup> Crossman v. Galveston (Tex. Civ. App.), 204 S. W. 128.

<sup>78</sup> "Building" defined. St. Louis v. Nash, 266 Mo. 523, 533, 181 S. W. 1145.

<sup>79</sup> Hays v. Poplar Bluff, 263 Mo. 516, 173 S. W. 676.

<sup>80</sup> It is a delegation of legislative power forbidding building, remodeling or maintenance of garages, livery stables, etc., without

written consent of real estate owners within the specified distance of the proposed business. State v. Harper, 162 Wis. 589, 156 N. W. 941.

Prohibiting erection of store building in a resident street, which is neither a park or a parkway without the consent in writing of a specified number of the residents property owners in the block on both sides of the street and without consenting to restrictions as to building line, held void and unconstitutional. In brief, object was to prevent the erection of a store building in the locality, without the consent of property owners, etc. Restriction, held invalid "because they have no relation to any object which the municipality, in the exercise of its police power

ample powers to enact ordinances, prescribing limits within which buildings of incombustible material shall not be erected and power to remove therefrom buildings so erected in violation of the ordinance, the municipal corporation, it was held, has no power to enact an ordinance declaring that no such building shall be constructed without "special permission" of the mayor and city council" and that such permission is not to be granted unless the application therefor is "accompanied by the written consent of all persons owning property in the block in which such proposed building is to be erected." The law it was said, laid down a rule applicable to all alike but the ordinance made an arbitrary classification, and moreover, constituted a delegation of legislative powers to property owners.<sup>81</sup>

That property rights may be duly protected all regulations touching the use of property must be reasonable,<sup>82</sup> including, of course, building restrictions.<sup>83</sup> The only possible basis to enact and enforce building regulations rests on the ground alone that it is part of the police power, but as often mentioned, this power has its limits. It is realized that it is necessary to vest in the municipal authorities ample power relating to the erection, operation and repair of buildings, notwithstanding the exercise of such power may often work hardship on owners of property which they desire to improve, and on the other hand, those who have already expended

may legally accomplish, and are unreasonable, arbitrary and oppressive." *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828, 831, 832.

<sup>81</sup> *Hays v. Poplar Bluff*, 263 Mo. 516, 532-537, 173 S. W. 676, disapproving *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872.

<sup>82</sup> Special permit enacted "to store, file, place or keep upon or in any place within the city any empty or unused boxes, barrels or other like receptacles or any accumulation of similar inflammable

materials," held unreasonable; too broad. *State v. Wittles*, 118 Minn. 364, 136 N. W. 883.

<sup>83</sup> *Williams v. Chicago*, 266 Ill. 267, 107 N. E. 599; *Hollatz v. Gerberding*, 204 Ill. App. 419, when building not used for business purposes.

Reasonableness as to repairing building. Tearing down building half destroyed by fire, held reasonableness. *Skowhegan v. Heseltun*, 117 Me. 17, 102 Atl. 772.

large sums of money may suffer injury due to improvements made by others of an undesirable character in the neighborhood.<sup>84</sup>

Restrictions on the use of property can be justified only to protect the public health, safety, comfort or general welfare.<sup>85</sup>

Aesthetic considerations alone, as mentioned,<sup>86</sup> will not support them.<sup>87</sup>

Restrictions as to the location<sup>88</sup> (except as applied to reasonable regulations relating to buildings which may

<sup>84</sup> *Stubbs v. Scott*, 127 Md. 86, 95 Atl. 1060.

<sup>85</sup> *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 828, 831.

Ordinance cannot limit, right to erect and occupy buildings for lawful purposes, as sale of vehicles, automobiles and motorcycles. *People ex rel. v. Stroebel*, 209 N. Y. 434, 103 N. E. 735.

Forbidding owners of two-story buildings, from leasing the attic floor to a person or persons living independently of those occupying the lower floors, held unreasonable and discriminatory, since regulation does not include three story buildings, etc. *State v. McCormick*, 120 Minn. 97, 138 N. W. 1032.

<sup>86</sup> Section 893, ante.

Aesthetic consideration may be incidental. Re Opinion of the Justices (Mass. 1920), 127 N. W. 525.

<sup>87</sup> An ordinance establishing a building line based solely on aesthetic consideration, held, unconstitutional. *Fruth v. Charleston*, 75 W. Va. 456, 84 S. E. 105, L. R. A. 1915C, 981.

<sup>88</sup> Power "to define the limits within which wooden buildings shall be erected," and declare that

"every building erected or placed contrary to any ordinance passed under the above provision shall be deemed a common nuisance, and may be abated as such," does not confer power to designate the location of any building on any lot on which it is erected, nor does it confer power to enact ordinances regulating the location of buildings. Restriction on the use of property is limited to reasonable enactments designed to conserve health, safety, morals, peace and order. Restrictions induced alone by aesthetic considerations are unconstitutional and void. "Reasonable building ordinances may be enacted and enforced, designed to conserve health and safety, and to that end such ordinances may require that sanitary plumbing shall be installed, proper fire escapes provided, suitable ventilation had, and matters of that kind regulated." *Buffalo v. Kellner*, 153 N. Y. S. 472, 90 Misc. Rep. 407.

Restricting location of automobile battery station in which to be kept, sold and repaired automobile storage batteries. *Clements v. McCable* (Mich. 1920), 177 N. W. 722.

become nuisances due to their use),<sup>89</sup> distance specified kinds of buildings are to be from each other,<sup>90</sup> restrictions as to erection and use of buildings for a lawful business in residence districts, looking to the establishment of an exclusively residence section,<sup>91</sup> and as to

<sup>89</sup> Public; none to be in any building within 50 feet of the nearest wall of a building occupied by a school or a place of public amusement or assembly or occupied as a tenement house or hotel, held valid and may apply to existing public garages. *Re McIntosh*, 211 N. Y. 265, 105 N. E. 414, affirming 145 N. Y. S. 763, 160 App. Div. 563.

See § 911.

Clearly cities may regulate and control the construction of buildings, repairs, use, etc., in the interest of public health, safety and morals, to guard against fire, etc., and may to this end, require plans, permit, etc. May also prescribe districts within which no business or occupation of a noxious or offensive character or when tends to interfere with convenience, comfort, etc., of others may be conducted. But under the constitution such restriction cannot invade property rights. The decision is to be directed by the facts and circumstances of each particular case when it arises. *State ex rel. v. Houghton*, 134 Minn. 226, 158 N. W. 1017.

<sup>90</sup> State law prescribing that dwellings constructed in a defined area in B, shall be unattached, and if of frame they shall be 20 feet apart, and if of stone or brick they shall be ten feet apart, held unconstitutional as not relating to

the police power and interfering with property rights guaranteed by the constitution. *Byrne v. Maryland Realty Co.*, 129 Md. 212, 98 Atl. 547, L. R. A. 1917A, 1216, approving *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 394.

<sup>91</sup> Residence districts cannot be established. *People ex rel. v. Roberto*, 153 N. Y. S. 143, 90 Misc. Rep. 439, affirmed in 155 N. Y. S. 1133.

Forbidding erection of store buildings on land in residential district, held unconstitutional. *State ex rel. v. Houghton*, 134 Minn. 226, 158 N. W. 1017.

Prohibiting erecting a four family flat building in residential district, held unconstitutional. *State ex rel. v. Minneapolis*, 136 Minn. 479, 162 N. W. 477, unhealthy congestion, added fire risk and greater difficulty in police supervision rejected as grounds to sustain.

Ordinance forbidding erection of one-story building on certain territory, held void. *Mobridge v. Brown* (S. D.), 164 N. W. 94.

Restrictions on erection of business buildings, in residence districts and requiring consent of resident property owners. *Spann v. Dallas* (Tex. Civ. App.), 189 S. W. 999.

Law authorizing cities and towns to limit buildings according to their use or construction

boundary or building lines<sup>92</sup> are excellent examples.<sup>93</sup>

declared constitutional. *Re Opinion of the Justices* (Mass. 1920), 127 N. E. 525.

**92 Building line.** Authority given a municipality by charter or statute "to prescribe rules and regulations for the erection and repair of buildings," in connection with and in aid of the power to fix fire limits, was held not to confer power to provide that no dwelling, etc., in the residential portion of the city shall be constructed so that the front porch, or if there be no porch, the front of the house, shall be closer than fifteen feet to the inner side of the sidewalk, as established by ordinance. *Wyeth v. Whitman*, 72 Fla. 40, 72 So. 472.

Building line or boundary line on boulevard, discrimination. *St. Louis v. Handlan*, 242 Mo. 88, 145 S. W. 421.

The ordinance provided "that whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line so that the same shall not be less than five feet nor more than thirty feet from the street line. And no permit for the erection of any building upon such front of the square upon which such building line is so established shall be issued except for the construction of houses within the limits of such line."

"It leaves no discretion in the committee on streets as to whether

the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders virtually to control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality. There may be one taste or judgment of comfort or convenience on one side of a street and a different one on the other. There may be diversity in other blocks; and viewing them in succession, their building lines may be continuous or staggering (to adopt a word of the mechanical arts) as the interests of certain of the property owners may prompt against the interests of others.

Reasonable and appropriate regulations may be made to apply to all buildings within the corporate limits,<sup>94</sup> unless the law forbids, or is to be construed otherwise,<sup>95</sup>

The only discretion, we have seen, which exists in the Street Committee or in the Committee of Public Safety, is in the location of the line, between five and thirty feet. It is hard to understand how public comfort or convenience, much less public health, can be promoted by a line which may be so variously disposed.

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. One person having a two-thirds ownership of a block may have that power against a number having a less collective ownership. If it be said that in the instant case there is no such condition presented, we answer that there is control of the property of plaintiff in error by other owners of property exercised under the ordinance. This, as we have said, is the vice of the ordinance, and makes it, we think, an unreasonable exercise of the police power." *Eubank v. Richmond*, 226 U. S. 137, 141, 143, 144, 33 Sup. Ct. 76, 57, L. ed. 156, reversing 110 Va. 479, 67 N. E. 376, 19 Ann. Cas. 186. This case is distinguished in *Thomas Cusack Co. v. Chicago*, 242 U. S. 526, 53, 37 Sup. 190, 61 L. ed. 191, affirming

267 Ill. 344, 108 N. E. 340, 8 Ann. Cas. 1916, 488.

<sup>93</sup> Requiring new flats to maintain established frontage, held constitutional. *Halsell v. Ferguson* (Tex.), 202 S. W. 317.

<sup>94</sup> School buildings within city limits, subject to city building ordinances. *Pasadena School District v. Pasadena*, 166 Cal. 7, 134 Pac. 985, 47 L. R. A. (N. S.) 892 Ann. Cas. 1915B, 1039.

Ordinance requiring fire drills among employees to be conducted by employers of certain kinds of buildings, held void. *Chicago v. Pettibone*, 267 Ill. 573, 108 N. E. 698.

<sup>95</sup> *Salt Lake City v. Board of Education* (Utah), 175 Pac. 654, sustained, however, an ordinance requiring the placing of fire alarms and telephones in all completed school buildings.

The Board of Education of the City of St. Louis, Mo., a corporation distinct from the municipality, held not subject to city ordinances and regulations concerning the manner of constructing water-closets and vents therefrom in a school building, because the statute creating the Board of Education charged it with "the care of school buildings, in the city" and with the responsibility for the ventilation and sanitary condition thereof," and such authority under the Constitution was construed by the Court as exclusive. The conclusion is rather strained, and open to grave question. *St.*



concerning the manner of construction of the building,<sup>96</sup> and its several parts,<sup>97</sup> the materials to be used therein,<sup>98</sup> its height,<sup>99</sup> the submission to and approval by public authorities of plans and specifications,<sup>1</sup> changes of use of the buildings,<sup>2</sup> and steps to insure safety during erection, as the protection of excavations,<sup>3</sup> sidewalks, employes, travelers, etc.<sup>4</sup>

Such regulation may apply not only to the original construction but to all repairs and alterations thereafter to be made<sup>5</sup> in such buildings or in those existing when the regulations become effective.<sup>6</sup>

Louis Board of Education v. St. Louis, 267 Mo. 356, 184 S. W. 975.

<sup>96</sup> Reasonable regulations as to height, manner of construction and use of tenement houses, to provide health, safety and morality. State ex rel. v. Cunningham (Ohio), 119 N. E. 361.

<sup>97</sup> Ordinances may regulate construction of chimneys, flues and heating apparatus. Terrance v. Chapman, 196 Ala. 88, 71 So. 707. Section 949, post.

<sup>98</sup> Commonwealth v. Hayden, 211 Mass. 296, 97 N. E. 783.

<sup>99</sup> Section 949, post.

<sup>1</sup> City officer to approve plans, as condition to proceed. People ex rel. v. Miller, 165 N. Y. S. 602, 100 Misc. Rep. 318, Altschul v. Ludwig, 166 N. Y. S. 529.

<sup>2</sup> Changing use, as residence, to sanitarium, officer to issue certificate of approval before latter use. People ex rel. v. Miller, 166 N. Y. S. 370.

Use of building as garage to be authorized by city. Storer v. Downey, 215 Mass. 273, 102 N. E. 321.

<sup>3</sup> Bergen v. Morton Amusement Co., 159 N. Y. S. 935, 95 Misc. Rep. 647, affirmed 165 N. Y. S. 348, 178 App. Div. 400; Wear v.

Koehler, 153 N. Y. S. 773, affirming 150 N. Y. S. 654, 88 Misc. Rep. 109.

<sup>4</sup> Section 949, vol. 3, ante.

Ordinance required builder to place a roof over the sidewalk while erecting a building more than four stories high, held for protection of all lawfully in sidewalks including employee of subcontractor engaged in fire-proofing such building. Both owner who caused the erection of the building and the contractor who built it, are liable. The ordinance prescribed that at least one-third of the sidewalk near which building is being erected shall be kept open for traffic and that if more than four stories high, a roof shall be built over such sidewalk, held whatever part of sidewalk kept open shall be covered by roof. Ward v. Ely-Walker D. G. Co., 248 Mo. 348, 154 S. W. 478.

<sup>5</sup> "Prescribing general regulations for the erection of all buildings in the city," may include construction, alteration and repairs. People ex rel. v. Roberts, 153 N. Y. S. 143, 90 Misc. Rep. 439.

<sup>6</sup> Ordinance requiring stairways in buildings to be equipped with

### § 949. Same subject—permits—removal of buildings—height.

In buildings, sanitary plumbing,<sup>7</sup> sufficient fire escapes,<sup>8</sup> appropriate fire alarms,<sup>9</sup> and fire extinguishers,<sup>10</sup> and suitable ventilation may be required.<sup>11</sup>

When conditions justify an ordinance can compel the rat-proofing of all buildings and require foundations to be of brick or stone laid in cement or concrete in order, for example, to check the bubonic plague.<sup>12</sup>

handrails, held applicable to buildings at the date of its passage and those constructed thereafter. *De Wolf v. Marshall Field & Co.*, 201 Ill. App. 542.

Regulation as to construction and operation of theater. *Clarke v. Chicago*, 159 Ill. App. 20.

Power to regulate buildings to guard against fire and to prescribe building material, held not to include repairs of existing building. *Paris v. Hall*, 131 Ark. 104, 198 S. W. 705.

<sup>7</sup>*New York v. Alheidt*, 151 N. Y. S. 463, 98 Misc. Rep. 524; *New York v. Alheidt*, 167 N. Y. S. 1045, 180 App. Div. 434.

<sup>8</sup>*Mullins v. Nordlaw*, 170 Ky. 169, 185 S. W. 825.

Such regulations must not discriminate, but prescribe uniform regulations and a reasonable and fair classification of buildings. *Birmingham Ry. Light & Power Co. v. Malbrat (Ala.)*, 78 So. 224.

Fire escapes may be required, and regulations as to locks and bolts, and forbidding them on inside doors, etc. *Birmingham Ry. L. & P. Co. v. Keyser (Ala. 1919)*, 82 So. 151.

<sup>9</sup>*Chicago v. Pettibone*, 267 Ill. 573, 108 N. E. 698.

<sup>10</sup>*Browning v. Adamson*, 162 N. Y. S. 164, 175 App. Div. 526, affirmed 115 N. E. 1035.

Automatic sprinklers. *Chicago v. Washingtonian Home (Ill. 1919)*, 124 N. E. 416; *People ex rel. v. Miller*, 165 N. Y. S. 790, 100 Misc. Rep. 302, *Adamson v. Greenwood Cemetery*, 150 N. Y. S. 467, 164 App. Div. 832; *People v. Kaye*, 212 N. Y. 407, 106 N. E. 122, affirming 146 N. Y. S. 398, 160 App. Div. 644; *People ex rel. v. Miller*, 176 N. Y. S. 206.

In construction of buildings, e. g., for the retail sale of goods and to be equipped with fire extinguishing apparatus, as approved automatic sprinkler system. *Chicago v. Mandel Bros.*, 264 Ill. 206, 106 N. E. 181.

<sup>11</sup>“Reasonable building ordinances may be enacted and enforced designed to conserve health and safety, and to that end such ordinances may require that sanitary plumbing shall be installed, proper fire escapes provided, suitable ventilation had, and matters of that kind regulated.” *Buffalo v. Kellner*, 153 N. Y. S. 472, 476, 90 Misc. Rep. 407.

<sup>12</sup>*New Orleans v. Mangiarisina*, 139 La. 605, 71 So. 886.

For public safety inequalities in the floors of theaters and other public buildings may be forbidden,<sup>13</sup> handrails on stairways of retail and department stores required,<sup>14</sup> elevators prohibited from being operated by immature persons,<sup>15</sup> and reasonable regulations to prevent fires enacted and enforced.<sup>16</sup>

**Permits** as a condition to proceed with the erection, alteration and repairs of buildings may be required<sup>17</sup> by virtue of reasonable and uniform regulations,<sup>18</sup> which

<sup>13</sup> Forbidding use of steps in theaters without permission of designated officers, held not delegation of legislative power, as it was matter of detail. *Oakley v. Richards* (Mo. 1918), 204 S. W. 505.

<sup>14</sup> *De Wolf v. Marshall Field & Co.*, 201 Ill. App. 542.

<sup>15</sup> Regulating the use of elevators, prescribing age of operator at least 16 years, etc. *Modern Order of Praetorians v. Nelson*, (Tex. Civ. App.), 162 S. W. 17.

<sup>16</sup> Dumb-waiter shafts to be enclosed with suitable brick walls or other burnt-clay blocks, etc. *New York v. Foster*, 133 N. Y. S. 152, 148 App. Div. 258.

<sup>17</sup> *Detroit Building Commission v. Kunin*, 181 Mich. 604, 148 N. W. 207; *Oakley v. Richards* (Mo. 1918), 204 S. W. 505; *People ex rel. v. Moore*, 165 N. Y. S. 840, 179 App. Div. 121; *People ex rel. v. Roberts*, 153 N. Y. S. 143, 90 Misc. Rep. 439; *People ex rel. v. Miller*, 146 N. Y. S. 403, 161 App. Div. 138; *Hood v. Melrose*, 24 Cal. App. 355, 141 Pac. 396, *Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555, *Focke v. Heffron* (Tex. Civ. App.), 197 S. W. 1027; *Spann v. Dallas* (Tex. Civ. App.), 189 S.

W. 999; *Russell v. Fargo*, 28 N. D. 300, 148 N. W. 610.

Mandamus to require revocation of permit denied under facts of particular case. *State ex rel. v. Nash*, 134 Minn. 73, 158 N. W. 730.

Permit to erect factory in a residential district set apart; applicant must show that maintenance of factory will not disturb residents. *State v. Houghton* (Minn. 1919), 170 N. W. 853.

Under a building ordinance which classified business buildings into 16 classes, all but three of which were excluded from residence districts owner was entitled to a permit to complete a building in residential district which conformed to the ordinance and which might be used for a proper business purpose therein, though he did not know specific purpose for which it would be used. Mandamus to compel issuance of license granted. *Meyers v. Houghton*, 137 Minn. 481, 163 N. W. 754.

<sup>18</sup> *Commonwealth v. Hause*, 177 Ky. 829, 198 S. W. 218, following *Monticello v. Bates*, 169 Ky. 258, 183 S. W. 555; *Brown v. Stubbs*, 128 Md. 129, 97 Atl. 227; *Kilgour v. Gratto*, 224 Mass. 78, 112 N. E. 489.

"To sustain a building ordi-

avoid the delegation of legislative power,<sup>19</sup> or the conferring of arbitrary and unlimited discretion upon the acting officers.

The salutary rule is generally applied that the granting or withholding of a building permit is not a matter of discretion. So long as the applicant complies with the valid building laws of the state or ordinances of the city, he is entitled to his permit as a matter of right.<sup>20</sup>

The acting officer has no right to question the good faith of the applicant, as that he desires to use the building to be erected for some purpose forbidden by the law, e. g., for a garage.<sup>21</sup>

Nor can he determine legal questions, for example, the title to the land upon which the proposed building is to

nance, in the first place, it must be subject to a uniform rule of action, and cannot depend upon the arbitrary decision of the city authorities." *Mobridge v. Brown*, 39 S. D. 270, 272, 164 N. W. 94, quoting with approval part of § 949, vol. 3, ante.

<sup>19</sup> Ordinance requiring consent of resident property owners to erection of building to accompany application for permit. *Spann v. Dallas* (Tex. Civ. App.), 189 S. W. 999.

<sup>20</sup> To conduct a public garage. *Re McIntosh*, 211 N. Y. 265, 105 N. E. 414.

Permit cannot be refused to erect a building for dealing in vehicles, automobiles, etc. *People ex rel. v. Stroebel*, 209 N. Y. 434, 103 N. E. 735, reversing 141 N. Y. S. 1014, 156 App. Div. 457.

Officer issuing permit may cause one mode of construction and material to be used as prescribed by law, but he cannot refuse arbitrarily a permit when the plans and specifications substantially

comply with the law. *Lake Island Realty Co. v. McDermott*, 160 N. Y. S. 450, 95 Misc. Rep. 37.

"Authority to regulate the erection or use of buildings in a thickly settled community for the purpose of fire protection would not justify a so-called rule that no building should be erected without consent of certain officials. It would be exercising the power unrestrained by rules or regulations in the legislative sense." *Hanover v. Atkins* (N. H.), 99 Atl. 293, holding officer could not require in permit that building should not be used for a blacksmith shop.

<sup>21</sup> *Stubbs v. Scott*, 127 Md. 86, 95 Atl. 1060.

"The judgment and discretion that may be exercised by the city authorities are not to be arbitrarily exercised, but are to be centered upon the question whether the applicant for the permit plans to comply with the ordinances. If he does then he is entitled to the permit." *Mobridge v. Brown*, 39 S. D. 270, 272, 164 N. W. 94.

be constructed, but must be controlled by statements embodied in the application.<sup>22</sup>

If the permit is wrongfully refused the applicant may enforce his right by mandamus.<sup>23</sup>

**Height of buildings** in residence districts may be limited.<sup>24</sup>

### § 950. Regulation of theaters.

Power to enforce reasonable building regulations,<sup>25</sup> embraces, of course, building used for theaters. Reasonable regulations as to their construction, operation and provisions for closing are sanctioned under the police power.<sup>26</sup>

Permits for the erection of moving picture theaters may be required.<sup>27</sup>

### § 951. Regulating lumber yards.

Lumber yards may be forbidden in residential districts.<sup>28</sup>

### § 952. Gunpowder and explosives.

The adoption of ordinances and measures that are necessary for the protection of the public is within the reasonable discretion of the municipal authorities, and ordinarily courts will not inquire into the expediency of legislation of this character,<sup>29</sup> unless it is unreasonable

<sup>22</sup> Lake Island Realty Co. v. McDermott, 160 N. Y. S. 450, 95 Misc. Rep. 37.

<sup>23</sup> Buffalo v. Kellner, 153 N. Y. S. 472, 477, 90 Misc. Rep. 407; People ex rel. v. Maher, 141 N. Y. 337, 36 N. E. 396, matter of Walker, 146 N. Y. S. 519, 84 Misc. Rep. 118.

<sup>24</sup> Welch v. Swasey, 193 Mass. 364, 79 N. E. 745, 118 Am. St. Rep. 523, 25 L. R. A. (N. S.) 1160, affirmed in 214 U. S. 91, 29 Sup. Ct. 567, 53 L. ed. 923; Bebb v. Jor-

dan (Wash., 1920), 189 Pac. 553.

<sup>25</sup> Sections 948, 949, ante.

<sup>26</sup> Clark v. Chicago, 159 Ill. App. 20.

<sup>27</sup> Oakley v. Richards, 275 Mo. 266, 204 S. W. 505.

See § 958, post.

<sup>28</sup> Ex parte Montgomery, 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914A, 130.

<sup>29</sup> Charter authority to regulate the manufacture and keeping of gunpowder, and other dangerous and combustible articles is suffi-

and arbitrary, having no relation to the legitimate exercise of the police power and interferes with personal and property rights.<sup>30</sup>

Reasonable regulations, not oppressive or arbitrary, operating uniformly, for the keeping within the city oil, gasoline, gunpowder and the several kinds of explosive, inflammable, combustible and dangerous articles, promulgated in good faith, are therefore invariably sustained.<sup>31</sup>

Like regulation pertaining to the sale of firearms and fireworks, their use, or forbidding their use within the corporate limits, are authorized in the proper exercise of the police power.<sup>32</sup>

cient to authorize an ordinance prohibiting the manufacture of mattresses or any other article in which excelsior, hair or other combustible material is used, within 25 feet of certain classes of buildings (hotels, tenements, etc.) Pursuit of a highly inflammable business in a crowded city is not a vested right. *Newmann v. Hoboken*, 82 N. J. L. 275, 82 Atl. 511.

<sup>30</sup> Ordinance prohibiting without special permit, the keeping of boxes, barrels, or other inflammable material upon or in any place within the city held to be void, as unreasonable and arbitrary. "To just legislative interference with property rights in the interest of fire protection and prohibit the citizen, without special permit, from keeping upon or within his premises any particular class or kind of property, it should appear that the property itself either by reason of its character or the manner in which it is kept or used, is a menace to the public welfare." *State v. Wittles*, 118 Minn. 364, 136 N. W. 883.

<sup>31</sup> Ordinance prohibiting the keeping of gasoline or other ex-

plosive oil within 300 feet of any dwelling, storeroom or like structure, in quantity greater than 60 gallons was upheld. As to oil company which had once before moved its tanks to comply with such ordinance, held city was not estopped from passing an ordinance which required a second removal. *Pierce Oil Corp. v. Hope*, (Ark.), 191 S. W. 405.

Ordinance regulating the storage of fuel oil for private use and requiring a permit and prohibiting in certain districts its storage for purpose of distribution, held to be reasonable. *Union Oil Co. v. Portland*, 198 Fed. 441.

An ordinance prohibiting the use of metal hooks in the movement of explosives, it was held, did not prohibit their use for this purpose outside of the city, even though the city has authority to pass an ordinance for certain other specified purposes to apply outside of the municipal boundaries. *Gutowski v. Baltimore*, 127 Md. 502, 96 Atl. 630.

<sup>32</sup> Ordinance forbidding the sale of toy pistols in which powder can be exploded is a reasonable exer-

### § 953. Power to regulate operation of locomotives, trains and cars in streets.

Laws creating public service or state commissions, existing in a majority of the state, frequently give exclusive power to such commissions to regulate the service of railroads and street railroads and other public utilities operating in the city. Under such laws existing local regulations are thus superseded, and new ones forbidden.<sup>33</sup>

However, notwithstanding such law, certain police regulations are authorized by the municipality.

Local police regulations of trains engaged in interstate commerce cannot impose unreasonable restrictions or hamper their operation.<sup>34</sup>

### § 954. Same—enumeration of regulations.

Reasonable regulations of speed of trains,<sup>35</sup> main-

cise of police power. *Rome v. Foot*, 162 N. Y. S. 781, 175 App. Div. 459.

Under general welfare clause, city may by ordinance prohibiting under penalty the sale of fireworks within the city. *Killebrew v. Wrightsville*, 17 Ga. App. 809, 88 S. E. 590.

See § 895, ante.

Ordinance prohibiting use of firearms within the city limits, held not to be in conflict with statute declaring it lawful for any person to kill a dog caught in act of worrying, maiming or killing any sheep, lamb or other domestic animal. *State v. Wolff*, 173 Ia. 187, 155 N. W. 165.

<sup>33</sup> Ordinance regulating the operation of street cars to prevent over crowding and to secure their operation in accordance with specified schedules, is revoked by a state law, creating a public service commission and giving the

commission power to regulate street railways. *Seattle Electric Co. v. Seattle*, 78 Wash. 203, 138 Pac. 892.

<sup>34</sup> Ordinance limiting the speed of trains which pass through a city to 6 miles an hour, held to impose an unreasonable burden on interstate commerce as applied to interstate trains where it appears that the difficulties of operating such trains would be greatly increased by a low rate of speed, and that tracks were laid on private right of way not used by pedestrians and vehicles and that adequate protection would be secured by placing flagmen at the grade crossings. "Reasonableness of ordinance, while a question of law, is dependent upon particular facts in each case." *Lusk v. Dora*, 224 Fed. 650.

See § 729, ante; § 729, vol. 2, ante.

<sup>35</sup> Application. *Johnson v. Wa-*

tenance of street lights pursuant to grant of power,<sup>36</sup> requiring stools for motormen,<sup>37</sup> and flagmen at street crossings,<sup>38</sup> have been sustained.

### § 955. Same subject.

Traffic in street car transfer tickets may be prevented by restricting their use to the persons to whom issued.<sup>39</sup>

Without charter power an ordinance requiring a street car company to sprinkle the street space between its tracks is unauthorized.<sup>40</sup>

Whether a necessity exists for the separation of a railroad street crossing from the crossing for vehicles and pedestrians, by requiring the railroad tracks to be de-

bash Rd. Co., 259 Mo. 534, 168 S. W. 713.

<sup>36</sup> Ordinance requiring railroad to maintain street lights, enacted pursuant to special statute, sustained as a proper police regulation in the interest of the public welfare. *State ex rel. v. St. Louis, I. M. & S. Ry. Co.*, 138 La. 714, 70 So. 621.

A city cannot compel a railroad which had elevated its tracks pursuant to an ordinance to maintain lights in the streets, which were darkened due to the elevated tracks. *Chicago v. Pennsylvania Co.*, 252 Ill. 185, 96 N. E. 833.

Light, meaning of day-break. *Sullivan v. Chicago City Ry. Co.*, 167 Ill. App. 152.

<sup>37</sup> An ordinance requiring stools for motormen to be provided upon all street railway cars, held valid. *Silva v. Newport*, 150 Ky. 781, 150 S. W. 1024.

<sup>38</sup> *Red Wing v. Chicago, M. & St. P. Ry. Co.*, 72 Minn. 240, 75 N. W. 223, 71 Am. St. Rep. 482, denying power to enact an ordinance requiring a railroad com-

pany to keep a flagman at a street crossing, was repudiated, without express reference by *State ex rel. v. St. Paul, M. & M. Ry. Co.*, 98 Minn. 380, 108 N. W. 261, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047, where it was held that in the interest of public safety the city had power to compel railroads to bridge street crossings although no express provision was found in any of the enumerated subjects and although power was expressly granted to care for the safety of such crossings by requiring flagmen and gates. *State v. Sugarman*, 126 Minn. 477, 148 N. W. 466, 467, 468, 52 L. R. A. (N. S.) 999.

<sup>39</sup> *St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777, following *State v. Corbitt*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498, holding valid a law forbidding scalping in railway tickets in which, the court said, the principle is the same.

<sup>40</sup> *South Bend v. Chicago, etc., R. Co. (Ind.)*, 101 N. E. 628.



pressed below the surface of the street grade is a question for the public authorities, and where the municipality has exclusive control of its streets, the question in the first instance is within the sole jurisdiction of such local authorities. However, the city's plan must be reasonable and practicable.<sup>41</sup>

#### § 955a. Steam engines on streets.

An ordinance which makes it unlawful to operate steam engines over the streets except on railroad tracks or on a special permit, (as in case of engines used by contractor engaged in constructing or repairing streets) is a proper exercise of the police power, under authority to regulate the use of steam engines and to control the use of streets, etc., for the public protection. Streets, it is true, should be regarded as open to the public for all ordinary uses, but propelling a roller by steam through a street is not an ordinary use, and a restriction of such use is not only proper, but necessary.<sup>42</sup>

#### IV. OFFENSES AGAINST PUBLIC MORALS AND DECENCY.

#### § 956. Lewd conduct—bawdy houses—prostitution, etc.<sup>43</sup>

By virtue of general power and power as to all acts which can be made minor offenses, a municipality may

<sup>41</sup> *American Tobacco Co. v. St. Louis*, 247 Mo. 374, 431, 157 S. W. 502.

<sup>42</sup> *Municipal Paving Co. v. Donovan* (Tex. Civ. App.), 142 S. W. 644.

<sup>43</sup> May regulate prostitution, adultery, fornication. *Kentwood v. Fendlason*, 142 La. 902, 77 So. 785.

Ordinance may forbid under penalty "any woman of disreputable character" from loitering about the streets or stores of the city who cannot prove that she is on unavoidable business. *Neal*

*v. Dublin*, 20 Ga. App. 263, 92 S. W. 1021.

House kept by one female as her residence for prostitution may be a house of ill fame, within the usual designation. Here kept for sexual intercourse with any men who desired, etc. *Fisher v. Paragould*, 127 Ark. 268, 192 S. W. 219, following *State v. Young*, 96 Iowa 262, 65 N. W. 160, 59 Am. St. Rep. 370.

Keeping a "dive" has been defined as "a place where men or women loiter and idle, who are without means of support, loiter

by ordinance, it has been held, penalize sexual intercourse between a white person and a negro although there is no state law on the subject.<sup>44</sup>

An ordinance may declare it unlawful to maintain a bawdy house.<sup>45</sup>

And as such an establishment is in law a public nuisance it may be suppressed under the general welfare clause.<sup>46</sup>

Under power to suppress disorderly houses and houses of ill-fame and to prevent and restrain obscenity, lewdness or indecency, whether committed in a public or private place within the municipal area, an ordinance may make it an offense to be found in a disorderly and ill-governed house. The court expressed the opinion that the term "disorderly house" in itself is of evil meaning, since it is a place of resort for bad and evilly disposed

and idle away their time, and do not work, such place shall be known as a dive." *Smith v. Atlanta*, 22 Ga. App. 45, 95 S. E. 470.

<sup>44</sup> *Strauss v. State* (Tex. Cr. App.), 173 S. W. 663, quoting with approval part of § 895, vol. 3, ante (McQuillin, Mun. Ord., § 434); also § 891, vol. 3, ante (McQuillin, Mun. Ord., § 430).

It is "beyond the power of the city to make fornication or adultery of themselves—that is to say, disconnected with any circumstance of scandal or public disorder and as distinguished from the practice or business of prostitution—a crime." *Shreveport v. Price*, 142 La. 935, 946, 77 So. 883.

<sup>45</sup> *New Orleans v. White*, 143 La. 487, 78 So. 745.

Injunction to restrain use of building for bawdy house. *Spence*

*v. Fenchler* (Tex. Civ. App.), 151 S. W. 1094.

<sup>46</sup> "In this country prostitution has been looked upon at all times and everywhere as a great evil which it was the duty of every well ordered community to try to get rid of by every means in its power. One obvious and well recognized means has been to prevent it from setting up regular establishments where its shameless agents and ministers may carry on its business and lure its victims. This obvious means of combatting the evil it is not to be supposed any legislature would deliberately withhold from any municipality it was chartering. Again such establishments are in law nuisances per se which a municipality may under the general welfare clause suppress." *Shreveport v. Price*, 142 La. 936, 943, 77 So. 883.

characters for the purpose of illegal and immoral practices.<sup>47</sup>

Under power to regulate bawdy house, etc., houses of prostitution for whites may be separated from those for negroes and particular districts assigned to each, but a regulation forbidding prostitutes from living in any house outside of limits so prescribed was held void and in contravention of the fourteenth amendment of the United States Constitution.<sup>48</sup>

An ordinance prohibiting the renting of property to any woman or girl notoriously abandoned to lewdness, but allowing the renting of property for purposes of prostitution is void.<sup>49</sup>

Power by ordinance may be conferred upon the police to forbid employment of minors and the use of messenger call boxes in bawdy houses.<sup>50</sup>

#### § 957. Regulating the standing of stallions and bulls.

The keeping of stallions for breeding purposes is lawful and necessary and per se is not a nuisance, but it is a business, which, like many others, may be conducted in such a manner as to be a nuisance per se. Hence an ordinance may forbid such business from being conducted in such manner as will scandalize and disturb the peace of the inhabitants of the neighborhood and violate public decency.<sup>51</sup>

#### § 958. Regulating moving picture and variety shows.

Municipalities may regulate the moving picture business. Moving picture exhibits are designated in the category of amusements. They may be restricted to locations

<sup>47</sup> "We apprehend that one casually there on an errand of mercy or business need not fear a prosecution." *State ex rel. v. McDonald*, 121 Minn. 207, 211, 141 N. W. 110, 112.

<sup>48</sup> *New Orleans v. Miller*, 142 La. 163, 76 So. 596.

<sup>49</sup> *New Orleans v. Piazza*, 142 La. 167, 76 So. 598.

<sup>50</sup> *Andriewx v. Butte City*, 44 Mont. 557, 121 Pac. 291.

<sup>51</sup> *Tarkio v. Miller*, 167 Mo. App. 122, 151 S. W. 208.

in specified districts and a permit to conduct them may be required. The power to issue a permit may be conferred upon the police board. Under sufficient power they may also be required to pay a license.<sup>52</sup>

**§ 959. Gambling, gaming houses, lotteries, bowling alleys, billiard halls, etc.<sup>53</sup>**

Power conferred to suppress all kinds of gaming, playing at dice, cards and other games of chance, was held not limited to the suppression of the games specifically mentioned, agreeably to the maxim ejusdem generis, but embraced also slot machines employed by merchants to solicit trade. An ordinance may forbid the use of such machine for the purpose of gambling, it has been held, although the subject may be covered by statute.<sup>54</sup>

In Louisiana it has been held that a municipality cannot by ordinance penalize betting money on games, such as "draw poker," without legislative grant. Mere power to close gambling houses was held not sufficient. Undoubtedly municipal police power of such subject is dependent upon its charter and general laws.<sup>55</sup>

The general welfare clause, it has been held, does not authorize an ordinance forbidding merchants and dealers

<sup>52</sup> *Laurell v. Bush*, 17 Cal. App. 409, 119 Pac. 953.

Permit to erect moving picture theater may be required. *Oakley v. Richards* (Mo. 1918), 204 S. W. 505.

Ordinance and regulations must have uniform application. *Brown v. Stubbs*, 128 Md. 129, 97 Atl. 227; *Kilgour v. Gratto*, 224 Mass. 78, 112 N. E. 489.

See § 949.

Statute gave city authority to regulate and supervise moving picture theaters. *North Little Rock v. Rose* (Ark. 1918), 206 S. W. 449.

<sup>53</sup> Definitions of gambling, etc. *Moberly v. Deskin*, 169 Mo. App. 672, 676-680, 155 S. W. 842.

<sup>54</sup> *Salt Lake City v. Doran*, 42 Utah 401, 131 Pac. 636, 640, citing § 878, vol. 2, ante (*McQuillin*, Mun. Ord., § 500).

<sup>55</sup> *Baton Rouge v. Weis*, 141 La. 99, 74 So. 709, following *Marks-ville v. Worthy*, 123 La. 432, 49 So. 11, 131 Am. St. Rep. 353, and *Shreveport v. Maloney*, 107 La. 194, 31 So. 702, and distinguishing *Ruston v. Perkins*, 114 La. 851, 38 So. 583.

in merchandise of any kind from offering gifts to induce trade.<sup>56</sup>

Municipal corporations usually have power to regulate and license the keeping of poolrooms and pool tables, and billiard rooms and billiard tables for public use.<sup>57</sup>

Billiard and pool halls may be classified in a reasonable manner.<sup>58</sup>

Power to regulate merely such business does not always include power to suppress,<sup>59</sup> especially where it is not a nuisance per se,<sup>60</sup> but, of course, power to suppress may be conferred.<sup>61</sup>

<sup>56</sup> Thus an ordinance forbidding offering by any dealer in merchandise "any prize, gift or chance as a prize or gift to induce the sale of his goods or wares," held unauthorized under the general welfare clause. *Commercial Security Co. v. Lee* (Ga. 1918), 97 S. E. 516.

<sup>57</sup> *Ex parte Rowe*, 4 Ala. App. 254, 59 So. 69.

May regulate billiard halls. *Bryan v. Malvern*, 122 Ark. 379, 183 S. W. 957.

Billiard and pool rooms as nuisances. *Dardanelle v. Gillespie*, 116 Ark. 390, 172 S. W. 1036.

Regulating and licensing pool table kept for hire. Statute and ordinance kept for private purposes. *Ex parte Rowe*, 4 Ala. App. 254, 59 So. 69.

<sup>58</sup> A classification based on hotels having twenty-five rooms is reasonable. Forbidding those not connected with such hotels, is constitutional legislation. *Murphy v. California*, 225 U. S. 623, 32 Sup. Ct. 697, 65 L. ed. 1229, affirming 155 Cal. 322.

<sup>59</sup> Ordinance providing that pool and billiard halls should pay annual license of \$600, and operators

thereof should enter into bond in sum of \$1,000 conditioned upon their observing certain regulations, held void as intended to suppress a business not a nuisance per se; also void as a revenue measure. This is a business which may be regulated. *Bryan v. Malvern*, 122 Ark. 381, 183 S. W. 957.

See § 356, ante; § 356, vol. 1, ante.

County court may refuse license to pool rooms. *State ex rel. v. Adair County Co.*, 177 Mo. App. 12.

<sup>60</sup> Section 959, vol. 3, ante.

The city may regulate pool and billiard halls agreeably to and consistent with the state laws on the subject. An ordinance may require such halls to close from midnight until 5 o'clock A. M., upon week days and from midnight Saturday night to 5 A. M. Monday. If such ordinance does not constitute virtual prohibition it agrees fully with the state law and is reasonable. *Ex parte Brewer* (Tex. Cr. R.), 152 S. W. 1068.

<sup>61</sup> "Pool table" held to be included in the term billiard table, since pool table is a billiard table

A bowling alley, it has been held in Louisiana, cannot be declared a nuisance until after investigation it is found to be such. It is not a nuisance per se.<sup>62</sup>

### § 960. Regulating sale of intoxicating liquor.

The power to regulate the liquor traffic resides in the state.<sup>63</sup>

The authority of a municipality relating to the subject, therefore, depends upon its grant of power by the legislature or its charter, and the public policy of the particular jurisdiction.<sup>64</sup>

Under ample grant of power, a saloon district may be established by ordinance,<sup>65</sup> or the area for the sale of intoxicating liquor may be restricted or localized, even in the absence of power to prohibit.<sup>66</sup>

with pockets. Under power to regulate and suppress billiard tables is included power to regulate and suppress pool tables and an ordinance may declare such tables to be a public nuisance and forbid their operation for gain or gambling purposes. *Eros v. Powell*, 137 La. 342, 68 So. 632.

<sup>62</sup> *Shreveport v. Leiderkrantz Society*, 130 La. 802, 58 So. 578.

But see § 959, vol. 3, ante.

<sup>63</sup> Section 960, vol. 3, ante.

<sup>64</sup> Selling liquor illegally. Statutes authorize injunction. *Spence v. Fenchler* (Tex. Civ. App.), 151 S. W. 1094.

Ordinance against transporting contraband liquors. *Anderson v. Fant*, 96 S. C. 5, 79 S. E. 641.

May forbid sale or giving away of intoxicating liquor in theaters, etc. *Chicago v. Moore*, 170 Ill. App. 163.

<sup>65</sup> The power to establish such district was stated in the charter. The fact that the saloon district

contained more residences than business houses and that the part of the city not included contained more business houses than residences did not render the ordinance unreasonable. *Brownsville v. Fernandez* (Tex. Civ. App.), 202 S. W. 112, holding also that the absence of a penalty in the ordinance did not invalidate it. See § 710, ante; § 710, vol. 2, ante.

<sup>66</sup> The charter authorized the city "to license, tax and regulate retailers of liquor" and to "pass all ordinances necessary, for the health, convenience and safety of the citizens." Held, city may "by the direct and reasonable exercise of its police power in circumscribing the area within which intoxicating liquors may be sold in an election district, where sale is lawful under the state law, when such municipal action is not so arbitrary and unreasonable as to deny to any one due process of law, or the equal protection of the

An ordinance forbidding the delivery of intoxicating liquor to any person, without entering the name of the person in a book, with date, etc., was held void. The reason advanced was that "There is no law in this state which prohibits a person from receiving, keeping and using intoxicating liquor for private consumption, when such receiving, keeping and using are done in such a manner as not to interfere with the rights of others and there is no disturbance. No municipality has the power to enact an ordinance prohibiting such keeping, receiving and using of intoxicating liquor."<sup>67</sup>

### § 961. Public drunkenness.

Ordinance may forbid drunkenness on the streets, alleys and public places or within sight of such places.<sup>68</sup>

### § 963. Observance of the Sabbath.

As the state alone through the legislature may command the manner of Sunday observance,<sup>69</sup> local authorities are precluded from regulating the subject, without appropriate grant of power, either expressed or neces-

laws, and the regulation does not unlawfully effectuate a prohibition but simply localizes such sales in the election district." State ex rel. v. Ackerly (Fla.), 67 So. 232, the court declaring that the ruling was consistent with the holdings in *Malone v. Quincy*, 66 Fla. 52, 62 So. 922; *Howland v. State ex rel.*, 56 Fla. 422, 47 So. 963, 21 L. R. A. (N. S.) 192; *Mernaugh v. Orlando*, 41 Fla. 433, 27 So. 34; and *Ex parte Theisen*, 30 Fla. 529, 11 So. 901, 32 Am. St. Rep. 36.

<sup>67</sup> *Marion v. Criolo*, 278 Ill. 157, 115 N. E. 820; *Cortland v. Larson*, 273 Ill. 602, 113 N. E. 51, Ann. Cas. 1916E, 775.

<sup>68</sup> *Stoebr v. Payne*, 132 La. 213, 61 So. 206.

Drunkenness on streets. *Morris v. State*, 18 Ga. App. 684, 90 S. E. 361.

"It shall be unlawful for any person to be and appear on the streets \* \* \* in an intoxicated condition." *Jones v. Lanford*, 141 Ga. 646, 81 S. E. 885.

<sup>69</sup> *Neuendorff v. Duryea*, 69 N. Y. 557, 25 Am. Rep. 235; *People v. Dunford*, 207 N. Y. 17, 20, 100 N. E. 433; *People v. Moses*, 140 N. Y. 215, 35 N. E. 499.

sarily implied,<sup>70</sup> and unless such is the law and policy of the state.<sup>71</sup>

Municipalities frequently are given ample power to deal with the subject, and may require the cessation of specified kinds of business on Sunday,<sup>72</sup> and in so doing may make a reasonable classification of businesses.<sup>73</sup>

<sup>70</sup> Ordinance forbidding keeping open of barber shops on Sunday, held void for want of power. Power to pass such ordinance cannot be implied. *Marengo v. Rowland*, 263 Ill. 531, 105 N. E. 285.

Ordinance forbidding baseball games on Sunday where no fee was charged, held conflicts with state law forbidding work on Sunday. *Levering v. Williams* (Md. 1919), 106 Atl. 176.

<sup>71</sup> Sunday closing of picture show by fine and imprisonment, denied unless such is the law and policy of the state. *People ex rel. v. Lent*, 152 N. Y. S. 18, 166 App. Div. 551.

Sunday closing ordinance, held constitutional. *Clinton v. Wilson*, 257 Ill. 580, 594, 101 N. E. 192, citing § 963, vol. 3, ante.

<sup>72</sup> Ordinance regulating secular business on Sunday is within the police power of the city. *Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192, 194, citing Section 963, Vol. 3, ante; *Springfield v. Richter*, 257 Ill. 578, 101 N. E. 192.

City may prevent certain kinds of business on Sunday. *State v. Medlin*, 170 N. C. 682, 86 S. E. 597.

City may suppress amusements on Sunday. *Fennan v. Atlantic City*, 88 N. J. L. 435, 97 Atl. 150, affirmed in 90 N. J. L. 674, 101 Atl. 1054.

City may require billiard halls to close on Sunday. *Ex parte*

*Brewer* (Tex. Cr. R.), 152 S. W. 1068.

Ordinance may make it unlawful to keep open any store, stall, market shop or other place of business in the city on the Sabbath for the purpose of selling or vending any article of merchandise, soft drink or anything kept and sold in the market. *Loach v. La Fayette*, 19 Ga. App. 639, 91 S. E. 1057.

Forbidding keeping stores and business places open on the Sabbath for business, held distinct from statutory offense forbidding one from pursuing his business or ordinary calling on the Lord's Day. *Loach v. La Fayette*, 19 Ga. App. 639, 91 S. E. 1057.

<sup>73</sup> Sunday closing of certain kinds of business sustained. *Ex parte Sumida*, 177 Cal. 388, 170 Pac. 823.

Sunday closing of business, except drug store, held valid. *State v. Medlin*, 170 N. C. 682, 86 S. E. 597.

Ordinance may regulate hours of sale of groceries on Sunday. *St. Louis v. Bernard*, 249 Mo. 51, 57, 155 S. W. 394.

An ordinance may forbid the sale of articles of merchandise on Sundays and the fact that such ordinance forbids the sale of clothing, shoe leather and findings, hats or hardware only, held not invalid as discriminatory in favor of other articles of merchandise



### § 964. Regulating hours of business.

Ordinances prescribing hours for the opening and closing of designated kinds of business,<sup>74</sup> enacted in good faith, which are reasonable,<sup>75</sup> non-discriminatory (observing natural and fair classification),<sup>76</sup> conform to the laws and public policy of the state,<sup>77</sup> and emanate from sufficient power<sup>78</sup> are valid, constitutional and enforceable.

#### V. MARKETS, WEIGHTS AND MEASURES.

### § 965. Markets—establishment and regulation.

Power to establish,<sup>79</sup> discontinue<sup>80</sup> and regulate mar-

not specified, since the ordinance involved conformed precisely with the state law on the subject. *Sherman v. Paterson*, 82 N. J. L. 345, 82 Atl. 889.

<sup>74</sup> Section 964, vol. 3, ante.

<sup>75</sup> Ordinance prohibiting auction sales after 6 o'clock p. m., held unreasonable and in restraint of trade. *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053, approving *Hayes v. Appleton*, 24 Wis. 542.

Requiring store to close at 6:30 p. m., held unreasonable. *Ex parte Harrell* (Fla.), 79 So. 166.

<sup>76</sup> Hours of business, as opening and closing may be regulated, but discriminatory regulations or unreasonable classification, are void. *Chan Sing v. Astoria*, 79 Or. 411, 155 Pac. 378.

Ordinance regulating hours of business, e. g., dealers in soft drinks or bottled goods, to close at midnight and not open again until 5 o'clock a. m., held valid, not discriminatory and reasonable classification. *Churchill v. Albany*, 65 Or. 442, 133 Pac. 632.

<sup>77</sup> Where the state law places no limitation on the hours that pool halls may be kept open which

imposes a license, an ordinance cannot restrict such hours and require them to close at 9 o'clock p. m. *Ex parte Farley* (Tex. Cr. R.), 144 S. W. 530, following: *Arroyo v. State*, 69 S. W. 503; and *Fay v. State*, 44 Tex. Cr. R. 381, 71 S. W. 603.

<sup>78</sup> An ordinance requiring mercantile houses to close with few exceptions at 6:30 p. m., is not authorized under the general welfare clause and general power to conserve public health, morals, safety and general good order and peace of the community. The court declared the ordinance to be unwarranted governmental interference with the personal rights of the merchant class of the citizens of the town. The court further said that even assuming the power of the city to order and enforce reasonable regulations in the premises, the provision of the ordinance requiring stores to be closed at 6:30 p. m. is unreasonable. *Ex parte Harrell* (Fla.), 79 So. 166.

<sup>79</sup> Ordinance forbidding the use of the market square and streets adjoining by any person for the vending of articles or products

kets, provide rents, and licenses,<sup>81</sup> and permits, to occupy stands and stalls therein,<sup>82</sup> and to provide for inspection thereof, and prevent the sale of impure or unwholesome articles of food thereat,<sup>83</sup> is usually possessed by municipal corporations in full, heaped and rounded measure.

**§ 966. Confining sales and purchases to public markets  
—forbidding private markets.<sup>84</sup>**

unless same were grown or produced by person vending them, or any member of his family residing with him, upon property owned, rented or controlled by him is valid. Its purpose was not to confer special privilege on producing class but to afford citizens an opportunity to secure fresh farm products and to exclude stale products. *Bruce v. Gainesville* (Tex. Civ. App.), 183 S. W. 41.

<sup>80</sup> It is not obligatory upon a city to maintain a market house and a city may therefore discontinue the use for that purpose of property owned by it. *Marshall v. Meridian*, 103 Miss. 206, 60 So. 135.

<sup>81</sup> *Baltimore v. Wollman*, 123 Md. 310, 91 Atl. 339.

Ordinance providing for erection of market stalls on a certain street and licensing the use of such stalls for market purposes, held to be within the reasonable exercise of the police power. "In a large city a public market, if not an absolute necessity is a great public convenience." The use of the streets authorized by this ordinance is for a public purpose and is not allowed with the view of promoting any private interest. *State v. Burkett*, 119 Md. 609, 87 Atl. 514.

<sup>82</sup> Where city is given power to regulate stands in a public market, it may by ordinance require persons who desire to occupy such stands to secure a permit and pay a fee therefor. *Commonwealth v. Clay*, 224 Mass. 271, 112 N. E. 867.

<sup>83</sup> Does not violate constitution forbidding unreasonable searches and seizures. *Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18.

Adulteration of food. *New Orleans v. Toca*, 141 La. 551, 75 So. 238.

Power to make and enforce ordinances as to health, infections, diseases, etc., is authority to require meat of cattle, sheep and swine sold in the town to be inspected by an official inspector, under penalty. It is a reasonable exercise of the police power. *State v. Starkey*, 112 Me. 8, 90 Atl. 431.

<sup>84</sup> Power to regulate market sales of articles for food, etc., gives power to forbid by ordinance retailing meat from vehicles. *Hahn v. Newport*, 175 Ky. 185, 194 S. W. 114.

Excluding markets from certain districts to preserve them for residential purposes, held void. *State ex rel. v. New Orleans*, 142 La. 73, 76 So. 244.

Ordinance prohibiting establish-

**§ 968. Protecting fruit and food on sale—screening.<sup>85</sup>****§ 969. Milk inspection and adulteration.**

Ordinances regulating the sale of milk and prescribing the standard thereof, are uniformly sustained, provided they are reasonable.<sup>86</sup> Under sufficient grant of power, undoubtedly a city may by ordinance prescribe a standard of the quality of milk sold in the city, may regulate the care and feed of milk cows, the mode of handling and delivery of milk, etc. It may also require a permit and in the application therefor a statement as to the condition of the cows, etc. Care looking to the cleanliness of the dairy, the method of milking, the milk pails or cans used both in milking and in delivery may be regulated.<sup>87</sup>

Municipal legislation forbidding the adulteration of milk sold or offered for sale by adding water, so as to lower or depreciate or injuriously effect its strength, quality or purity, or adding coloring matter, such as annato, or otherwise adulterating it, or establishing a standard requiring it to contain a certain percentage of milk

ment of meat market within 6 blocks of the city market house, and excluded specified district from the operation of another ordinance which provided that the city council might grant to individual, the right to establish a meat market in any designated locality. The validity of the ordinances was not questioned. *Altgelt v. Gerbie* (Tex. Civ. App.), 149 S. W. 233.

<sup>85</sup> An ordinance was held valid which required meat exposed for sale to be screened. *Hawaii v. Hop Kee*, 21 Hawaii 206, Ann. Cas. 1915D, 1082.

<sup>86</sup> *State v. Kirkpatrick* (N. C. 1920), 103 S. E. 65; *Chicago v. Chicago & N. W. Ry. Co.*, 275 Ill. 30, 33, 40, 113 N. E. 849, citing Section 969, vol. 3, ante, stating

that "Notwithstanding divers scientific theories upon subjects of this nature the courts usually defer to the determination and decision of the proper municipal authorities as to the basis of police regulations, unless such basis is manifestly erroneous." *Koy v. Chicago*, 263 Ill. 122, 104 N. E. 1104, 1106.

<sup>87</sup> *Owensboro v. Evans*, 122 Ky. 831, 189 S. W. 1153.

Pasteurization of milk. *Koy v. Chicago*, 263 Ill. 122, 104 N. E. 1104.

May forbid the sale of milk unless kept in sealed bottles, and exempting farmers and dairymen, held not an unreasonable classification. *State v. Stokes* (Conn.), 98 Atl. 294.

solids, etc., has frequently been sustained, as valid and reasonable.<sup>88</sup> The adding of coloring matter, such as annato, to milk in order to give it the rich and golden color belonging to the milk of cows fed on green food is a deception and fraud upon the milk consuming public and an unfair advantage over honest competitors who refuse to resort to such deception, irrespective of whether such adulterant increases or lessens the wholesomeness of the milk. Ordinances forbidding the sale of milk so colored have been sustained as a valid and reasonable exercise of the police power.<sup>89</sup>

To obtain a license, it has been held, a milk dealer may be required to submit to a blood test to show whether he is a carrier of typhoid germs.<sup>90</sup>

### § 970. Weights and measures.<sup>91</sup>

"It is well established that ordinances regulating the character of weights to be used for cotton, coal and other bulky articles sold and delivered within the corporate limits of a municipality are strictly an exercise of the police power."<sup>92</sup>

The object of such ordinances is the prevention of fraud, and they will not be declared invalid unless their provisions are so arbitrary as to interfere unreasonably

<sup>88</sup> *St. Louis v. Ameln*, 235 Mo. 669, 139 S. W. 429; *St. Louis v. Kellman*, 235 Mo. 687, 139 S. W. 443, *St. Louis v. Meyer*, 235 Mo. 699, 139 S. W. 438; *St. Louis v. Krumpeler*, 235 Mo. 710, 139 S. W. 446; *St. Louis v. Scheer*, 235 Mo. 721, 139 S. W. 434; *St. Louis v. Schulte*, 235 Mo. 734, 139 S. W. 449; *St. Louis v. Jud*, 236 Mo. 1, 139 S. W. 441; *St. Louis v. Neihaus*, 236 Mo. 8, 139 S. W. 450.

An ordinance may fix a higher standard of food value in the milk sold and offered for sale within the city than that prescribed by statute, and also prescribe a

greater penalty for its violation. *Kansas City v. Henre*, 96 Kan. 794, 153 Pac. 548.

<sup>89</sup> *St. Louis v. Polinsky*, 190 Mo. 516, 523, 89 S. W. 625; *St. Louis v. Jud*, 236 Mo. 1, 5, 139 S. W. 441; *Commonwealth v. Schaffner*, 146 Mass. 512, 16 N. E. 280.

<sup>90</sup> *People ex rel. v. Hamilton*, 161 N. Y. S. 425, 97 Misc. Rep. 437.

<sup>91</sup> *State ex inf. v. Merchants Exchange*, 269 Mo. 346, 190 S. W. 903.

<sup>92</sup> *Cartersville v. McGinnis*, 142 Ga. 71, 82 S. E. 487, 490, approving Section 970, vol. 3, ante.

with the personal and property rights of those affected by their enforcement.<sup>93</sup>

An ordinance may prescribe the weight of a brick or cake of butter for commercial purposes, as one pound avoirdupois, and may also require to be marked on the package the gross and tare or net weight in pounds and fraction of a pound. Where goods are sold by weight or measure, an ordinance may make it unlawful to sell or deliver less than the amount or quantity contained or bargained for or named in the sale thereof.<sup>94</sup>

An ordinance may regulate the sale and weight of bread,<sup>95</sup> the size of the bottles or jars in which milk is sold,<sup>96</sup> and may forbid the sale of certain produce except in containers of a specified capacity.<sup>97</sup>

#### VI. MISCELLANEOUS REGULATIONS.

### § 971. Offenses affecting the public order and peace.

An ordinance may prohibit cursing, swearing and the use of boisterous and indecent language within the corporate limits.<sup>98</sup>

### § 972. Same—disturbing the peace.

The general welfare clause is ample authority to support a penal ordinance directed against disturbances of the peace.<sup>99</sup>

<sup>93</sup> Ordinance may supplement a state statute providing for the weighing of coal sold within the city, and make a reasonable charge therefor as a police measure but such ordinance must not conflict with the state law. *Brittingham and Hixon Lumber Co. v. Sparta*, 157 Wis. 345, 147 N. W. 635.

<sup>94</sup> *Spokane v. Arnold*, 73 Wash. 256, 131 Pac. 815.

<sup>95</sup> An ordinance may fix the standard of loaves of bread and forbid the sale of loaves of any other size. *Schmidinger v. Chi-*

*cago*, 226 U. S. 578, 33 Sup. Ct. 182, 57 L. ed. 364, Ann. Cas. 1914B, 284, affirming *Chicago v. Schmidinger*, 243 Ill. 167, 90 N. E. 369, 44 L. R. A. (N. S.) 632, 17 Ann. Cas. 614.

<sup>96</sup> *Chicago v. Bowman Dairy Co.*, 234 Ill. 294, 84 N. E. 913, 17 L. R. A. (N. S.) 684, 123 Am. St. Rep. 100.

<sup>97</sup> *Stegmann v. Weeke* (Mo. 1919), 214 S. W. 137, 139.

<sup>98</sup> *Stoechr v. Payne*, 132 La. 213, 61 So. 206.

<sup>99</sup> *St. Louis v. Spupsky*, 254 Mo.

So under such clause a city may enact an ordinance prescribing that no musical instruments shall be played between 11 p. m. and 7:30 a. m. excepting in churches, social entertainments in private residences and entertainments carried on in public buildings where an admission fee is charged therefor.<sup>1</sup>

The prohibition of the circulation of newspapers printed in German, it has been held, cannot be sustained on the ground that physical violence might be exerted to prevent such circulation, and thus tend to avoid a breach of the peace.<sup>2</sup>

### § 973. Same—carry concealed weapons.<sup>3</sup>

#### § 973a. Regulating sale of deadly weapons.

The sale of revolvers and other deadly weapons may be regulated by ordinance,<sup>4</sup> pawnbrokers prohibited from dealing in,<sup>5</sup> and the sale of toy pistols in which powder can be exploded forbidden.<sup>6</sup>

#### § 973b. Attempt at pocket picking.

Power "to protect the property of the corporation and its inhabitants," and power to adopt and enforce local police, sanitary and other similar regulations as are not in conflict with general state laws, it has been held in

309, 316, 317, 162 S. W. 155, 49 L. R. A. (N. S.) 919.

<sup>1</sup> Monett v. Campbell (Mo. App. 1918), 204 S. W. 32.

An ordinance forbidding the discharge of firearms within the city was sustained as not in conflict with a statute permitting the killing of any dog caught in the act of worrying, maiming or killing sheep, etc. State v. Wolff, 173 Iowa 187, 155 N. W. 165.

<sup>2</sup> New Yorker Staats-Zeitung v. Nolan (N. J. Eq.), 105 Atl. 72.

<sup>3</sup> City may regulate the carrying and disposition of concealed weapons. Biffer v. Chicago, 278 Ill. 562, 116 N. E. 182.

Forbidding carrying concealed weapons unless by policemen, etc. Seattle v. Oliver, 78 Wash. 586, 139 Pac. 626.

<sup>4</sup> Biffer v. Chicago, 278 Ill. 562, 116 N. E. 182.

<sup>5</sup> Elsner Bros. v. Hawkins, 113 Va. 47, 73 S. E. 479.

<sup>6</sup> Rome v. Foot, 162 N. Y. S. 781, 175 App. Div. 459.

Ohio, authorizes an ordinance providing that "any person who otherwise than by force and violence or by putting in fear, attempts to steal and take from the person of another anything of value, shall be guilty of a misdemeanor," etc.<sup>7</sup>

### § 975. Vagrancy.

Loitering without employment, etc., may be forbidden by ordinance. A suspicious person who cannot give a reasonable account of himself may be included as a vagrant.<sup>8</sup>

All persons in the city who have no visible means of living or lawful occupation of employment by which to earn a living; all healthy persons who shall be found begging as a means of support, all persons who habitually roam about the street without any lawful business; all idle or dissolute persons who live in or about houses of bad repute; all persons having no known occupation or business who shall be found wandering about the streets after the hour of 11 o'clock at night shall be deemed vagrants. An ordinance so declaring was sustained.<sup>9</sup>

A provision in an ordinance denouncing vagrancy was sustained, reciting that in order to escape conviction under the ordinance it shall not be sufficient for the accused to have upon his person or in his possession some money or other things of value; nor shall such money or other things of value be deemed or taken as a visible means of gaining a livelihood within the meaning of the ordinance. The court observed that "it merely establishes a rule of evidence that the mere fact that the accused has money

<sup>7</sup> Greenburg v. Cleveland (Ohio 1918), 120 N. E. 829.

Such ordinance is not beyond the power of the city. The offense defined is of a dual nature. "It is a distinct and separate crime from the crime of pocket picking, just as pocket picking is

a distinct and separate crime from the crime of larceny." State v. Whitten, 82 Ohio St. 174, 92 N. E. 79.

<sup>8</sup> Welch v. Cleveland (Ohio), 120 N. E. 206.

<sup>9</sup> Guidoni v. Wheeler, 230 Fed. 93, 144 C. C. A. 391.

or other things of value in his possession shall not be sufficient to prevent the conviction, and that the possession thereof shall not be deemed or taken as a visible means of gaining a livelihood." <sup>10</sup>

In Oregon a state law defining and punishing vagrancy was held not in conflict with an earlier municipal ordinance which defined the same offense imposing a lighter penalty, and did not repeal the ordinance. <sup>11</sup>

### § 977. Regulation of various occupations.

By virtue of ample grant of power municipal corporations may regulate by reasonable and uniform ordinances the following occupations: auctions and auctioneers, to eliminate fraud and protect the public from annoyance and imposition, and require licenses; <sup>12</sup> junk shops and junk dealers, applying drastic regulations, <sup>13</sup> although a statute may also regulate them; <sup>14</sup> laundries and wash houses, when such regulations have a reasonable relation to the conservation of the public health, morals, safety

<sup>10</sup> *Greenville v. Ward*, 94 S. C. 321, 77 S. W. 1021.

<sup>11</sup> *Portland v. Parker*, 69 Ore. 271, 138 Pac. 852.

<sup>12</sup> *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053, holding an ordinance prohibiting auction sales in the evening after six o'clock to be an unreasonable regulation, a discrimination in restraint of trade, beyond the limits of the police power to license and regulate, following *Hayes v. Appleton City*, 24 Wis. 542, and the limitations of the police power announced in *State v. Redmon*, 134 Wis. 89, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 126 Am. St. Rep. 1103, 15 Ann. Cas. 408 and approved in *Dougherty v. Thomas*, 174 Mich.

371, 140 N. W. 615, 45 L. R. A. (N. S.) 699, Ann. Cas. 1915A, 1163.

<sup>13</sup> *Sherman v. Atlanta*, 148 Ga. 1, 95 S. E. 698; *Ex parte Goldburg* (Tex. Cr. App. 1918), 200 S. W. 386.

An ordinance may prescribe the location of junk shops and provide that junk shops shall not be established in any block in which two-thirds of the buildings are residences or stores, without written consent of a majority of the property owners. In Illinois such ordinance was held reasonable. *Smolensky v. Chicago* (Ill.), 118 N. E. 410.

<sup>14</sup> *Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42.



or welfare;<sup>15</sup> dance halls;<sup>16</sup> plumbers,<sup>17</sup> and plumbing work;<sup>18</sup> public moving vans;<sup>19</sup> cattle dealers, inspec-

<sup>15</sup> *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714.

"It is of course, not to be questioned that the municipality under the power conferred upon it by the constitution and the statutes of the state, has the right to regulate the business of a laundry and the manner in which it shall be carried on in all respects as to which it may be said to in any wise invoke the public health, safety or welfare." *Yee Gee v. San Francisco*, 235 Fed. 757, 763.

An ordinance providing that "no person owning or employed in the public laundries or public wash houses \* \* \* shall wash, mangle, starch, iron, or do any other work on clothes between the hours of 6 o'clock P. M. and 7 o'clock A. M. nor upon any portion of that day known as Sunday" was held void. Ordinance forbidding the washing and ironing of clothes in public laundries or public wash houses between the hours of 6 o'clock P. M. and 7 o'clock A. M., applicable to the entire municipal area was declared void as having no just or reasonable relation to the ostensible purpose for which it was put forth as will sustain it, and an unlawful and unreasonable interference with a legitimate business. *Yee Gee v. San Francisco*, 235 Fed. 757, disagreeing with *Re Wong Wing*, 167 Cal. 109, 138, Pac. 695, 51 L. R. A. (N. S.) 361.

Inspection of laundries. *Ex parte Blois* (Cal. 1918), 176 Pac. 449.

Establishment of districts for.

*San Kee v. Wilde* (Cal. App. 1919), 183 Pac. 164.

Forbidden within 150 feet of a church. *Walcher v. First Presbyterian Church* (Okla. 1919), 184 Pac. 106.

<sup>16</sup> *Geyer v. Buck*, 175 N. Y. S. 613.

Ordinance regulating and requiring a public dance hall to secure a license was sustained. "The term 'government and good order of the city,' by itself is amply broad enough to cover the regulation of public places of amusement such as dance halls." *Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882.

<sup>17</sup> Undoubtedly power exists to make and enforce reasonable regulations relating to the business of plumbing. However, such regulations must be reasonable and establish a uniform rule applicable to all alike. *Vicksburg v. Mullane*, 106 Miss. 199, 63 So. 412.

<sup>18</sup> Municipalities "may enact all proper ordinances to provide and enforce sanitary regulations. Since it is important under present conditions to have the drainage and sewage in public buildings and private residences done with skill and care, we deem it within the power of the municipality to make all reasonable and appropriate rules for the regulation and supervision of plumbing work." *Vicksburg v. Mullane*, 106 Miss. 199, 63 So. 412, approving *Winkler v. Benzenberg*, 101 Wis. 172, 76 N. W. 345.

<sup>19</sup> Public moving van drivers and companies to keep full record of

tion;<sup>20</sup> private detective work;<sup>21</sup> bill posting;<sup>22</sup> private money loaning;<sup>23</sup> palmistry, card reading, astrology, fortune telling, etc. (it is otherwise if power is not possessed by the city),<sup>24</sup> and restaurants.<sup>25</sup>

Under the guise of the police power, the municipality may not regulate public service companies and public utilities as to facilities, service or rates.<sup>26</sup>

Nor will the police power justify the regulation of the game of golf.<sup>27</sup>

place from and to where they move persons, and each week file statement of every transaction, etc., with police, held valid. *Lawson v. Connolly*, 175 Mich. 375, 141 N. W. 623.

<sup>20</sup> Inspection law made it unlawful to drive or ship cattle from the parish without having them inspected by an inspector appointed by the president of the police jury. *State v. Overby* (La.), 76 So. 220.

<sup>21</sup> Under general power to pass ordinances to promote good order and to control police department, city may pass an ordinance regulating the business of private detective or detective agency, and requiring that persons who wish to carry on this business be recommended for a license by board of police commissioners. *Lehon v. Atlanta*, 16 Ga. App. 64, 84 S. E. 608.

<sup>22</sup> *Ex parte Savage*, 63 Tex. Cr. App. 285, 141 S. W. 244.

<sup>23</sup> Prohibiting private money lenders from charging usurious interest. *Columbia v. Phillips*, 101 S. C. 391, 85 S. E. 963.

May be regulated and licensed. *Salisbury v. Equitable Purchasing Co.*, 177 Ky. 348, 197 S. W. 813.

<sup>24</sup> Power to suppress disorderly

houses, gambling houses, lotteries "and all fraudulent devices and practices for the purpose of gaining or obtaining money or property," etc., held not to include devices by mediumship, palmistry, card reading, astrology, fortune telling, etc. Rule of strict construction applied and also rule that general words, following particular and specific words, only included things of the same kind, etc. *Chicago v. Ross*, 257 Ill. 76, 100 N. E. 159.

<sup>25</sup> May regulate by ordinance, the size of booths therein. *Ogden City v. Leo* (Utah), 182 Pac. 530.

<sup>26</sup> *York Water Co. v. York*, 250 Pa. 115, 95 Atl. 396.

<sup>27</sup> "The game of golf is a healthful and harmless recreation of the same class as lawn tennis and other like games, which do not attract crowds or tend to disorder or call for police supervision and regulation. It has never been known to affect in any injurious way the public health, safety or morals. The fact that the game has attractions which induce players to practice it does not change its character to an amusement or entertainment provided for the public. It is not a subject for the exercise of the

### § 978. Pawnbrokers.

Pawnbrokers may be regulated and licensed.<sup>28</sup>

"The business of pawnbrokers because of the facility it furnishes for the commission of crime, and for its concealment, is one which belongs to a class where the strictest police regulation may be imposed. This is shown by our legislation, both state and local on the subject, and by the adjudications of courts." <sup>29</sup>

Money loaners may be regulated and licensed, however, the amount exacted must be reasonable.<sup>30</sup>

### § 979. Protection of private property—trespassing.<sup>31</sup>

### § 980. Regulation of tenement houses, etc.

By virtue of ample grant of power an ordinance may regulate the height, mode of construction and use of tenement houses,<sup>32</sup> and require fire escapes to be provided therein.<sup>33</sup>

police power." *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825.

<sup>28</sup> *Provident Loan Society v. Denver* (Colo.), 172 Pac. 10, 12, quoting in part Section 1023, vol. 3, ante; *Ex parte v. Goldburg* (Tex. Cr. App. 1918), 200 S. W. 386.

<sup>29</sup> *Elsner Bros. v. Hawkins*, 113 Va. 47, 73 S. E. 479, sustaining regulation forbidding pawnbroker from dealing in deadly weapons.

<sup>30</sup> *Salisbury v. Equitable Purchasing Co.*, 177 Ky. 348, 197 S. W. 813.

Private money lenders may be forbidden from charging insurious interest. *Columbia v. Phillips*, 101 S. C. 391, 85 S. E. 963.

<sup>31</sup> A law designed to protect growing trees by the roadsides, and within road limits and forbidding under penalty the unlaw-

ful killing, removal of, or injury of growing trees, held not violated by the employees of an electric company cutting branches of trees on a borough street which might obstruct their work in stringing wires by virtue of authority of the borough council. *Commonwealth v. Miller*, 47 Pa. Super. Ct. 193.

See Sections 1327, 1328, post; Sections 1327, 1328, vol. 3, ante.

<sup>32</sup> *State ex rel. v. Cunningham* (Ohio), 119 N. E. 361.

<sup>33</sup> *People v. Krinka*, 177 N. Y. S. 846.

"Tenement houses" defined. *Tenement House Dept. v. Meyer-son*, 155 N. Y. S. 352, 92 Misc. Rep. 213. "Lodging houses" may be regulated. *St. Louis v. Murta* (Mo. 1920), 222 S. W. 430.

To be enforceable, however, such regulations must be reasonable and uniform in their operation.<sup>34</sup>

An ordinance requiring lights to burn in halls of tenement houses every night from sunset to sunrise, was declared unauthorized due to want of power.<sup>35</sup>

### § 981. Limiting day's work and limiting payment of laborers—eight hour laws.<sup>36</sup>

#### § 982a. Regulation of charities.

An ordinance which gave to a municipal charities commission sole authority to issue permits to solicit contributions for charitable purposes, without establishing any standard of requirements for their issuance was held unconstitutional, as an arbitrary and unreasonable exer-

<sup>34</sup> Forbidding owners of two-story buildings from leasing the attic floor to a person or persons living independently of those occupying the lower floors, held unreasonable and discriminatory, since regulation does not include 3 story building, etc. *State v. McCormick*, 120 Minn. 97, 138 N. W. 1032.

<sup>35</sup> *Stoessand v. Frank* (Ill.), 119 N. E. 300.

<sup>36</sup> By the Ohio Constitution not to exceed eight hours shall constitute a day's work, except in cases of extraordinary emergencies; and not to exceed 48 hours a week for workmen on any public work of the state or any political subdivision thereof. *Stange v. Cleveland* (Ohio), 114 N. E. 261.

Establishing the number of hours that will constitute a day's work for municipalities and other subdivisions of the state is within the competency of the legislature. An eight hour day for city employees, does not forbid special contracts

for longer day's service, as ten hours, and an employee who agrees thereto without objection, cannot recover additional pay on a quantum meruit because not compelled to work more than eight hours. *Woods v. Woburn*, 220 Mass. 416, 107 N. E. 985.

Limiting hours of working in laundries of employees and employers (forbidding washing, etc., between 6 p. m. and 7 a. m. each day, and on Sunday) held void as an unreasonable interference with the liberty of the citizen in the prosecution of his occupation, and as having no real or substantial relation to the purpose sought to be accomplished. *Yee Gee v. San Francisco*, 235 Fed. 757, 767.

**Wages.** Contract between city and contractor for street work requiring contractor to pay the current rate of wages to unskilled labor, held valid as it accorded with policy of state. *Norris v. Lawton* (Okl.), 148 Pac. 123.

cise of the police power. Reasonable regulations may be adopted, controlling the operation of charitable institutions dependent on public beneficence, but "a law or ordinance by or under which a lawful occupation, in itself, when properly conducted, in no wise injurious to persons, property or the public interest, may be absolutely prohibited at the dictation of an official body without other cause than its own will or desire is beyond legislative power, and to that extent void."<sup>37</sup>

**§ 985. Persons and property injured by vehicles—duties of driver.**

A statute regulating the operation of automobiles declaring that "any person operating a motor vehicle who, knowing that injury has been caused to a person or property, due to the culpability of said operator, or to accident, leaves the place of said injury or accident without stopping and giving his name, residence \* \* \* and operator's license number to the injured party, or to a police officer, or to \* \* \* the nearest police station, or judicial officer, shall be guilty of a felony," etc., was held not violative of the constitution providing that "no person shall be compelled to testify against himself in a criminal cause."<sup>38</sup>

<sup>37</sup> Ex parte Dart, 172 Cal. 47, 155 Pac. 63.

<sup>38</sup> "The statute is a simple police regulation. It does not make the accident a crime. If a crime is involved, it arises from some other statute. It does not attempt in terms to authorize the admission of the information as evidence in a criminal proceeding. The mere fact that the driver discloses his identity is no evidence of guilt, but rather of innocence. (State v. Davis, 108 Mo. 667.) On the contrary, flight is regarded as evidence of guilt. In the large majority of cases such accidents are

free from culpability. If this objection to the statute is valid, it may as well be urged against the other provisions, which require the owner and chauffeur to register their names and number, and to display the number of the vehicle in a conspicuous place thereon, thus giving evidence of identity, which is the obvious purpose of the provisions. (St. Louis v. Williams, 235 Mo. 503). We have several statutes which require persons to give information which would tend to support possible subsequent criminal charges, if introduced in evidence. Persons in

Statutes and ordinances of this character are uniformly sustained.<sup>39</sup>

charge are required to report accidents in mines and factories. Physicians must report deaths and their causes, giving their own names and addresses. Druggists must show their prescription lists. Dealers must deliver for inspection foods carried in stock. We held a law valid which required a pawnbroker to exhibit to an officer his book wherein were registered articles received by him, against his objection based on this same constitutional provision. We held this to be a mere police regulation, not invalid because there might be a possible criminal prosecution in which it might be attempted to use this evidence to show him to be a receiver of stolen goods. (*State v. Levin*, 128 Mo. 588). If the law which exacts this information is invalid because such information, although in itself no evidence of guilt, might possibly lead to a charge of crime against the informant, then all police regulations which involve identification may be questioned on the same ground. We are not aware of any constitutional provision designed to protect a

man's conduct from judicial inquiry, or aid him in fleeing from justice. But even if a constitutional right be involved, it is not necessary to invalidate the statute to secure its protection. If, in this particular case, the constitutional privilege justified the refusal to give the information exacted by the statute, that question can be raised in the defense to the pending prosecution. Whether it would avail we are not called upon to decide in this proceeding." Ex parte Kneedler, 243 Mo. 632, 639, 640, 147 S. W. 983, 40 L. R. A. (N. S.) 622, Ann. Cas. 1913C, 923, declining to follow *People v. Rosenheimer*, 128 N. Y. S. 1093, affirmed, 130 N. Y. S. 544, and regarding the dissenting opinion of Ingraham, P. J., as sustained by the better reasoning.

<sup>39</sup> *Woods v. State* (Ala. App.), 73 So. 129; *People v. Diller*, 24 Cal. App. 799, 142 Pac. 797; *People v. Rosenheimer*, 209 N. Y. 115, 102 N. E. 530, 46 L. R. A. (N. S.) 977, Ann. Cas. 1915A, 161; *People v. McLaughlin*, 165 N. Y. S. 545, 100 Misc. Rep. 340; *State v. Smith*, 29 R. I. 513, 72 Atl. 710.

## CHAPTER 26.

### LICENSE TAX AND ORDINANCES RELATING THERETO.

#### I. NATURE, SOURCE, CONSTRUCTION AND EXERCISE OF THE POWER TO LICENSE.

#### II. SUBJECTS AND OBJECTS OF LICENSE.

#### I. NATURE, SOURCE, CONSTRUCTION AND EXERCISE OF THE POWER TO LICENSE.

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| § 986. Municipal power to license and regulate trades, occupations, etc. | § 998. Delegation by municipality of power to license forbidden—uniform rule required. |
| § 987. Mode of delegation—how power construed.                           | § 1001. License fee or tax must be uniform — discrimination forbidden.                 |
| § 988. Same—enumeration followed by general words.                       | § 1002. Reasonableness of amount of license.   |
| § 989. Power “to regulate” as power to license.                          | § 1003. Elements of business as separate subject of license tax.                       |
| § 990. Power “to regulate” as power to prohibit.                         | § 1004. Application for license—granting and refusing.                                 |
| § 991. Distinction between license to regulate and tax to raise revenue. | § 1005. Same—how far discretionary—judicial control.                                   |
| § 992. License taxes distinguished from general taxes.                   | § 1007. Method of enforcement of payment of license.                                   |
| § 993. License tax as a contract.  | § 1008. Revocation of license or permit.   |
| § 995. Licensing power beyond corporate limits.                          |  |
| § 996. Power to license non-residents.                                   |  |

#### II. SUBJECTS AND OBJECTS OF LICENSE.

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| § 1010. Vehicle license — automobiles.          | § 1015. Licenses and permits for building and street work —plumbers. |
| § 1012a. Same—motor bus or jitney run for hire. | § 1018. License on peddlers, hucksters, hawkers, etc.                |
| § 1012b. Street railway license.                | § 1019. License on telegraph and telephone companies.                |
| § 1013. License on merchants—canvasser.         | § 1023. License on pawnbrokers.                                      |
| § 1014. Trading stamps.                         |  |

§ 1025. License on saloons and liquor selling.

§ 1028. License on miscellaneous trades, occupations, avocations, etc.

# I. NATURE, SOURCE, CONSTRUCTION AND EXERCISE OF THE POWER TO LICENSE.

## § 986. Municipal power to license and regulate trades, occupations, etc.

Apart from organic restrictions the legislature may authorize the levy of a license tax by a municipal corporation on all trades, occupations and professions carried on within the corporate limits.<sup>1</sup>

## § 987. Mode of delegation—how power construed.

As the power to levy a license tax is not inherent in the municipal corporation, the authority to do so must be expressly granted, or be a necessary incident to the powers conferred.<sup>2</sup>

Generally the rule of strict construction is applied, and hence, in case of doubt the power is denied.<sup>3</sup>

<sup>1</sup> *Com. v. Slocum*, 230 Mass. 180, 119 N. E. 687; *Pocomoke Guano Co. v. New Bern*, 158 N. C. 354, 74 S. E. 2; *Chicago v. Drogasawacz*, 256 Ill. 34, 99 N. E. 869.

City may tax an occupation licensed by the state. *Interstate Business Exch. Corp. v. Denver* (Colo. 1920), 190 Pac. 508.

The Kentucky constitution providing the legislature may authorize municipal corporations to license trades, occupations and professions, held sufficiently broad to include any business that may be maintained. *Weymann v. Newport*, 153 Ky. 487, 156 S. W. 109.

<sup>2</sup> *Greene v. Cook*, 219 Mass. 121, 106 N. E. 573; *Morristown-Madi-*

*son Auto Bus Co. v. Madison*, 85 N. J. L. 59, 88 Atl. 829.

"A city possesses no inherent power to license any occupation. That power must be expressly granted in its charter, or be a necessary incident to the powers so granted." *Chicago v. Drogasawacz*, 256 Ill. 34, 99 N. E. 869.

<sup>3</sup> *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825; *Higbee v. Burgin*, 197 Mo. App. 682; *Ketchikan v. Greenbaum*, 5 Alaska 396, 398.

*State ex rel. v. Sheridan*, 25 Wyo. 347, 170 Pac. 1, 1 A. L. R. 95, quoting with approval Section 987, vol. 3, ante, denying power to license for regulation of the occupation of laying sidewalks and



§ 988. Same—enumeration followed by general words.<sup>4</sup>

§ 989. Power “to regulate” as power to license.<sup>5</sup>

§ 990. Power “to regulate” as power to prohibit.

Power to regulate is not power to prohibit absolutely a legitimate business.<sup>6</sup>

§ 991. Distinction between license to regulate and tax to raise revenue.<sup>7</sup>

A license fee or tax comes within and is based upon the police power of the state to regulate or prohibit a particular business. It is intended to regulate and not

pavements and exacting a bond to protect patrons under general power to license any business and regulate the same by ordinance.

<sup>4</sup>*Fulton v. Craighead*, 164 Mo. App. 90, 147 S. W. 1128.

Authority to “suppress gaming and gambling houses, lotteries, and all fraudulent devices and practices, for the purpose of obtaining money or property,” held not to authorize an ordinance which prohibits the obtaining of money by fraudulent means, e. g., “spirit mediumship, palmistry, card reading or fortune telling of any kind.” Where general words follow specific words in a statute, the general words must be construed to include only things of the same kind as indicated by specific words. Doubt as to power is resolved against municipality. *Chicago v. Ross*, 257 Ill. 76, 100 N. E. 159.

<sup>5</sup>*Provo v. Provo Meat & Packing Co. (Utah)*, 165 Pac. 477, 479, quoting with approval part of Section 989, vol. 3, ante.

*Re Simmons*, 5 Okl. Cr. 399, 115 Pac. 380.

Authority to regulate market stands gives power to license and assess fee of \$50 per year. *Commonwealth v. Clay*, 224 Mass. 271, 112 N. E. 867.

Power “to provide for the inspection and regulation of stationary engines and boilers,” includes power to require the licensing of engines for such engines and boilers. *Milwaukee v. Filer and Stowell Co.*, 161 Wis. 426, 429, 154 N. W. 625, citing Section 989, vol. 3, ante.

<sup>6</sup>*Portland v. Western Union Tel. Co.*, 75 Or. 37, 146 Pac. 148.

See Section 356, ante.

<sup>7</sup>*Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883, 891, citing Section 991, vol. 3, ante.

Power to regulate a business—message business—gives authority as a police measure to license and exact bond. *Portland v. Western Union Tel. Co.*, 75 Or. 37, 146 Pac. 148.

to raise revenue. An occupation tax is primarily intended to raise revenue by that method of taxation.<sup>8</sup>

In the exercise of the police power for the purpose of regulation the authority of the municipality is limited to such a charge for a license as will bear some reasonable relation to the additional burdens imposed by the business or occupation licensed and the necessary expense involved in police supervision.<sup>9</sup>

Ordinances imposing a regulatory privilege tax on manufacturing plants enacted under the police power to conserve the general substantial public welfare of the immediate community where they have application and which are reasonably necessary to promote that end will generally be held to have been adopted in the proper exercise of the police power for the purpose of regulation and not for the purpose of taxation.<sup>10</sup>

#### § 992. License taxes distinguished from general taxes.<sup>11</sup>

#### § 993. License tax as a contract.

Licenses from the state or a municipality are ordinarily to be considered not as contracts, but as temporary permits to do what otherwise would be unlawful, and are

<sup>8</sup> *Provo City v. Provo Meat & Packing Co.* (Utah), 165 Pac. 477, 479, per Frick, C. J.

<sup>9</sup> *Metropolis Theatre Co. v. Chicago*, 246 Ill. 20, 92 N. E. 597.

"Since the game of golf cannot injuriously affect the public health, safety, morals, or the public order, and the license provided for by the ordinance is not to secure the observance of any law or ordinance affecting either, a fee of \$750 could not be justified for the purpose of regulation." *Condon v. Forest Park*, 278 Ill. 218, 115 N. E. 825.

Imposing a fee of \$600 to operate a billiard hall and requiring a bond of \$1,000, held revenue measure and void. *Bryan v. Malvern*, 122 Ark. 379, 183.

Ordinance imposing tax on vehicles, held a measure to raise revenue, not a police regulation. *Luckey v. Kansas City*, 169 Mo. App. 666, 671, 155 S. W. 873.

<sup>10</sup> *Standard Chemical & Oil Co. v. Troy* (Ala.), 77 So. 383, 386, citing § 989, 991.

<sup>11</sup> *Schwartz v. Gallup* (N. Mex.), 165 Pac. 345, 348, quoting with approval from § 992, vol. 3, ante.

not property in any constitutional sense,<sup>12</sup> and hence are always revokable,<sup>13</sup> for sufficient cause.<sup>14</sup>

**§ 995. Licensing power beyond corporate limits.<sup>15</sup>**

**§ 996. Power to license non-residents.**

License tax may be imposed on a non-resident individual or a transfer company hauling from points within the city to points without, and from points without to points within.<sup>16</sup>

**§ 998. Delegation by municipality of power to license forbidden—uniform rule required.**

The recent judicial decisions present various close applications of the elementary principle that the license regulation must prescribe a definite and uniform rule as to the class upon which the exaction is imposed, and thus avoid unreasonable discriminations; <sup>17</sup> also, numerous in-

<sup>12</sup> Public Service Commission v. Booth, 156 N. Y. S. 140, 170 App. Div. 590, affirming 155 N. Y. S. 568; State ex rel. v. Ross, 177 Mo. App. 223, 228, 162 S. W. 702.

<sup>13</sup> License for private hack stand may be revoked. Yellow Taxicab Co. v. Gaynor, 144 N. Y. S. 299, 159 App. Div. 893; Hotel Astor v. New York, 144 N. Y. S. 494, 159 App. Div. 888, affirming 143 N. Y. S. 279, 82 Misc. Rep. 94.

<sup>14</sup> Sections 993, 1008, vol. 3, ante; § 1008, post.

<sup>15</sup> Power to enforce a license on motor vehicles, held applicable only to business conducted wholly within city limits and not to transportation from any point in the city to another city. Morristown-Madison Auto Bus Co. v. Madison, 85 N. J. L. 59, 88 Atl. 829.

<sup>16</sup> Carterville v. Blystone, 160 Mo. App. 191, 141 S. W. 701; Jop-

lin Transfer & S. Co. v. Carterville, 160 Mo. App. 186, 141 S. W. 705.

<sup>17</sup> Salt Lake City v. Utah Light & Ry. Co., 45 Utah 50, 142 Pac. 1067.

An ordinance which enumerates in detail the conditions to be complied with to entitle an applicant to a license to operate a motor bus and requires the applicant to secure a certificate from the commissioner of public utilities before applying for a license, providing for appeal from unjust action on part of the commissioner, does not vest unreasonable and arbitrary power in such commissioner. Thielke v. Albee, 79 Or. 48, 153 Pac. 793.

"Any ordinance which invests in an officer or board arbitrary power to issue or withhold a license for any trade or profession, without regard to the qualification of the applicant is void." Port-

stances of the equally fundamental doctrine forbidding the delegation of discretionary power.<sup>18</sup>

An ordinance forbidding the conducting of certain kinds of business without permission of the council granted at a regular meeting thereof, which does not prescribe any rules or conditions with which the applicant must comply, or by which the council is to be governed in determining whether the permit will be granted or refused, does not establish a uniform regulation, but on the contrary, vests the council with an arbitrary discretion, which it may exercise in favor of one citizen and against another, although the circumstances may be practically the same.<sup>19</sup>

Conferring mere ministerial duties relating to the mode of issuing, determining the amount and collection of the license is not an unlawful delegation of power.<sup>20</sup>

An ordinance may vest authority in a board of exam-

land v. Traynor (Or. 1919), 183 Pac. 933, 935.

<sup>18</sup> Charter authority to license theaters and picture shows, vested in city council, cannot be delegated to the city clerk. *State ex rel. Labovich v. Redington*, 119 Minn. 402, 138 N. W. 430.

Ordinance of a board of health delegating to a health officer power to determine under what conditions a permit to an owner to remove dead animals will be granted, held void as delegation of power. *Schwarz Bros. Co. v. Jersey City Board of Health*, 84 N. J. L. 735, 87 Atl. 463, affirming 83 N. J. L. 81, 83 Atl. 762.

An ordinance imposing a license tax on certain enumerated occupations and on such other business as cannot in the opinion of the committee on finance, be reached by ad valorem system contains an improper delegation of legislative

authority to the finance committee. *Armour & Co. v. Richmond*, 118 Va. 217, 87 S. E. 609.

Where authority is given to the mayor and city council to raise revenue in part by licensing various occupations, an ordinance requiring that concerts or exhibitions not performed in licensed opera-houses shall take out a license to be fixed by the mayor is invalid. Authority being given to mayor and council, it cannot be delegated to the mayor alone. *Mathis v. State*, 11 Ga. App. 95, 74 S. E. 701.

<sup>19</sup> *Richmond v. House*, 177 Ky. 814, 817, 198 S. W. 218.

<sup>20</sup> Sections 1004, 1005, post; §§ 1004, 1005, vol. 3, ante.

Ordinance authorizing mayor to issue licenses, held not delegation of power. *Koettenger v. Paterson*, 90 N. J. L. 698, 101 Atl. 253.

iners to determine the qualifications of applicants for licenses, e. g., stationary engineers.<sup>21</sup>

Under a charter empowering the commissioner of public safety to impose restrictions in the interest of the public health, an ordinance which authorized health officers to grant licenses to sell milk, and left to such commissioner and the health officers the fixing of the requirements therefor, was held not an improper delegation of power.<sup>22</sup>

So an ordinance requiring that the operator of each motor bus shall submit his vehicle to the city automobile inspector once every week, and that if the inspector shall find the vehicle safe for use he shall issue a permit for its operation for one week, is valid, as it delegates to the inspector only ministerial or administrative authority.<sup>23</sup>

When a city has general statutory or charter authority to delegate to administrative boards, the power vested in it to grant and issue licenses, an ordinance providing in detail the requirements for a license to operate motor vehicles for hire and authorizing a police commission to issue licenses when applicants are found to be "suitable to conduct such business" and the vehicles are found to be "proper and safe," is valid.<sup>24</sup>

So an ordinance which designates the conditions upon which a permit for a license to operate a kinetoscope and

<sup>21</sup> *People v. Fournier*, 175 Mich. 364, 369, 141 N. W. 689, citing § 1028, vol. 3, ante (*McQuillin*, Mun. Ord., § 428), following *St. Louis v. Meyrose Lamp Manufacturing Co.*, 139 Mo. 560, 41 S. W. 244, 61 Am. St. Rep. 474.

Ordinance imposing duty on clerk to determine the amount of the license fee on the basis of the rate fixed from a sworn statement by the applicant of the amount of business done in the preceding quarter, held to be merely ministerial and not legislative. *Los Angeles Gas & Electric Corp. v.*

*Los Angeles*, 163 Cal. 621, 126 Pac. 594, following *Re Guerrero*, 69 Cal. 97, 10 Pac. 267.

<sup>22</sup> *People v. Hamilton*, 161 N. Y. S. 425, 97 Misc. Rep. 437.

<sup>23</sup> "It is the nearly unanimous rule that in ministerial matters such may be left to judgment and discretion of public officials in reference to matters resting peculiarly upon professional or expert knowledge or skill." *Booth v. Dallas* (Tex. Civ. App.), 179 S. W. 301.

<sup>24</sup> *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687.

moving picture shows shall be issued, and provides that such permit be secured from the police commissioners does not delegate legislative powers to such commissioners.<sup>25</sup>

So an ordinance regulating bakeries, specifying conditions which must be maintained is not void because it delegates to the commissioner of health the power to determine whether a license should be granted and to the mayor the power to revoke when the conditions are not complied with.<sup>26</sup>

**§ 1001. License fee or tax must be uniform—discrimination forbidden.<sup>27</sup>**

A license tax need not be imposed upon all trades, occupations, etc., carried on in the municipal area, but when imposed it must be uniform on the class designated.<sup>28</sup>

For this purpose reasonable classification may be adopted,<sup>29</sup> and the amount of the tax may be graduated upon a fair and equitable basis.<sup>30</sup>

The right to use public streets for private purposes of gain is not a vested right, but a privilege and subject to

<sup>25</sup> *Laurelle v. Bush*, 17 Cal. App. 409, 119 Pac. 953.

<sup>26</sup> *Chicago v. Drogasawacz*, 256 Ill. 34, 99 N. E. 869.

<sup>27</sup> Constitutional provision as to uniformity and equality, held not applicable to trades, occupations and professions. *Weyman v. Newport*, 153 Ky. 487, 156 S. W. 109.

<sup>28</sup> *Weyman v. Newport*, 153 Ky. 487, 156 S. W. 109.

"There shall not be a discrimination between persons in like situations and pursuing the same class of occupation." *Davies v. Hot Springs* (Ark. 1920), 217 S. W. 769.

<sup>29</sup> Public dance halls, requiring report of police, etc., valid. *Meh-*

*los v. Milwaukee*, 156 Wis. 591, 146 N. W. 882.

License uniform on plumbers. *Vicksburg v. Mullane*, 106 Miss. 199, 63 So. 412; *Winkler v. Benzenberg*, 101 Wis. 172, 76 N. W. 345.

<sup>30</sup> Under a charter requiring that all licenses shall be graduated according to the amount of business done, an ordinance licensing and regulating the operation of jitney busses, and regulating (graduating) the tax according to the seating capacity of the jitney bus, held reasonable. *Ex parte Counts*, 39 Nev. 61, 69, 153 Pac. 93. *Examine Bramman v. Alameda*, 162 Cal. 648, 124 Pac. 243; *Ex parte Li Protti*, 68 Cal. 635, 10 Pac. 113.

regulation and as such may be made to depend on citizenship. Thus an ordinance providing that no license shall be granted for any motor vehicle to be used for transportation of persons for hire except to a citizen of the United States was sustained.<sup>31</sup>

### § 1002. Reasonableness of amount of license.<sup>32</sup>

Ordinances imposing license taxes under the power to regulate are prima facie valid, and the unreasonableness of the exactions must be made clearly to appear, and they must be obviously and largely beyond what is needed for the purpose intended, to render such legislation void.<sup>33</sup>

The fact that the exaction may result in producing a revenue in excess of that required for regulations, does not in itself destroy the regulatory character of a police measure.<sup>34</sup>

<sup>31</sup> *Morin v. Nunan*, 91 N. J. L. 506, 103 Atl. 378.

<sup>32</sup> *Schwartz v. Gallup* (N. Mex.), 165 Pac. 345, citing § 1002, vol. 3, ante.

*Dramshop-State ex rel. v. Long*, 164 Mo. App. 658, 147 S. W. 1116.

License fees of \$10 per year for market stalls and \$48 per year for butchers, held not to be unreasonable or excessive. *Baltimore v. Wollman*, 123 Md. 310, 91 Atl. 339.

Ten dollars a day, held an unreasonable amount for itinerant peddlers or tradesmen who carry clothing, jewelry, pictures or any other kind of merchandise from house to house. *Kethikan v. Greenbaum*, 5 Alaska 396, 398.

Tax in excess of amount permitted by statute renders the ordinance void in toto. *State v. Prevo* (N. C. 1919), 101 S. E. 370.

<sup>33</sup> Where it did not plainly appear that the license fees imposed upon corporations using poles and

wires for the conduct of electricity would produce an income in excess of what would be required to pay expense of city's supervision, the ordinance imposing such fees was upheld as a valid and reasonable police measure. *Colorado Postal Tel. Co. v. Colorado Springs*, 61 Colo. 560, 158 Pac. 816.

Ordinance requiring the payment of a fee varying from \$1 to \$7, according to valuation of building, for the examination of plans and the issuance of a building permit, upheld as a reasonable fee for compensation of officials for services performed. *Russell v. Fargo*, 28 N. D. 300, 148 N. W. 610.

<sup>34</sup> Tax imposed on motor vehicles sufficient to cover the cost of issuing the license and appropriate police regulations, held valid. *Ex parte Holt* (Okl. 1918), 178 Pac. 260, 262, quoting with approval part of § 1002, vol. 3, ante.

Ordinance imposing a license

### § 1003. Elements of business as separate subjects of license tax.

To require a merchant to pay a license for the privilege of dealing in fresh meats in no way affects a city's right, it has been held, to impose an occupation tax upon his stock of merchandise, including his meats. "The license fee is imposed to defray the cost and expense of issuing the license and of inspection and general supervision. That is not double taxation in any sense. Neither is it dividing or splitting the business into separate parts or distinct elements."<sup>35</sup>

### § 1004. Application for license—granting and refusing.

In granting or refusing a license, administrative duties may be conferred upon the acting officer. Thus an ordinance to regulate and license dance halls may require that all applications be referred to the chief of police who shall investigate to determine whether prescribed regulations have been complied with and make report with recommendation as to whether license shall be issued.<sup>36</sup>

And a milk dealer as a condition to obtain a license to sell milk may be required to submit to a blood test to ascertain whether he is a carrier of typhoid germs.<sup>37</sup>

The character and suitability of the applicant, it has been held, may be submitted to a named officer for deter-

fee, on jitney bus operation, ranging from \$1.25 to \$3 per month according to seating capacity was upheld, as it did not appear that the fee was manifestly more than sufficient to meet cost of issuing license, inspection and incidental consequences that may subject public to expense as a result of the business licensed. *Huston v. Des Moines*, 176 Iowa 455, 475, 156 N. W. 883, citing § 991, vol. 3, ante.

<sup>35</sup> *Provo City v. Provo Meat &*

*Packing Co. (Utah)*, 165 Pac. 477, 480, distinguishing cases cited in first paragraph of § 1003, vol. 3, ante, stating that the license fee in the case before the court "is clearly distinguishable from the license taxes which were sought to be enforced in those cases," per Frick, C. J.

<sup>36</sup> *Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882.

<sup>37</sup> *People ex rel. v. Hamilton*, 161 N. Y. S. 425, 97 Misc. Rep. 437.



mination, on the theory that it is a matter of mere administration. Thus an ordinance to license junk shops which specified the amount of the license and other details in regard thereto and provided that application "shall be made to the mayor who may grant or refuse such license as to him may seem best for the good order of the city," was held not invalid as a delegation to the mayor of legislative power.<sup>38</sup>

**§ 1005. Same—how far discretionary—judicial control.**

Municipal authorities cannot grant licenses and privileges to certain individuals and arbitrarily deny them to others, under like conditions.<sup>39</sup>

Where the granting of the license is not a matter of personal right as in case of useful occupations, a broad discretion is usually conceded to be vested in the acting authorities.<sup>40</sup>

Where the required conditions to the granting of the license are found to exist, if refused, its granting may be compelled by mandamus.<sup>41</sup>

A city council issued an order for a building license for the construction of a garage on premises within 200 feet of a school and a church, contrary to an ordinance forbidding such business in such locality. Notwithstanding, the building was constructed with the consent of the school and church authorities and owners of property in the block. Here the doctrine of estoppel in pais was applied to prevent the city from refusing to issue a license for

<sup>38</sup> *Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42.

<sup>39</sup> *Kenney v. Dorchester* (Neb. July, 1917), 163 N. W. 762, quoting with approval § 1005, vol. 3, ante.

Ordinance requiring that persons who desire to operate automobile service station secure a permit from mayor was involved, but its validity was not passed upon. *Baltimore v. Scott*, 131 Md. 228, 101 Atl. 674.

<sup>40</sup> Pool room license. *State ex rel. v. Adair County Court*, 177 Mo. App. 12, 163 S. W. 269; *State ex rel. v. Long*, 164 Mo. App. 658, 147 S. W. 1116; *Kochtitzky v. Herbst*, 160 Mo. App. 443, 140 S. W. 925.

<sup>41</sup> Moving picture shows. *Laurelle v. Bush*, 17 Cal. App. 411, 119 Pac. 953, denying mandamus because the prescribed conditions had not been complied with.

the garage and mandamus was granted to compel its issuance, the court expressing the opinion that it appeared that the issuance of the license would not contravene any real purpose of the ordinance.<sup>42</sup>

### § 1007. Method of enforcement of payment of license.

Where an ordinance creating a license tax on street cars operated by a railway company fails to provide a remedy for the enforcement of its payment it can be recovered by a civil action at law. The general rule applicable is that where a statute gives a right and no remedy resort may be had to the usual remedy appropriate in the case. A penalty prescribed in an ordinance is not a substitute for a remedy. "1. A city may maintain an action as for debt where an ordinance imposes a license tax and provides no adequate procedure for the collection of same. 2. The payment of a penalty for a failure to take out a license does not discharge a claim for a license tax and is therefore, not an adequate remedy for the collection of such tax."<sup>43</sup>

If the law prescribes a civil action, a criminal prosecution cannot be invoked by the imposition of a fine and imprisonment for refusal to pay the license tax.<sup>44</sup>

Imposition of a fine or other punishment for following a business without first paying the license tax levied thereon is a proper method to compel payment.<sup>45</sup>

### § 1008. Revocation of license or permit.

A license or permit may be revoked for cause.<sup>46</sup>

The granting of a license to sell intoxicating liquor, for example, forms a part of the internal police system of the state, and hence the authority which granted the li-

<sup>42</sup> *People ex rel. Daddo v. Thompson*, 209 Ill. App. 570.

<sup>43</sup> *St. Louis v. United Railways Co.*, 263 Mo. 387, 452, 455, 174 S. W. 78.

<sup>44</sup> *Abita Springs v. Pons* (La. 1919), 83 So. 216.

<sup>45</sup> *Davies v. Hot Springs* (Ark. 1920), 217 S. W. 769, 771.

<sup>46</sup> Provisions of ordinance to regulate and license jitney busses, setting forth steps to be taken in securing a license are clearly within "domain of regulation." Pro-

cense always retains the power to revoke it, either for cause of forfeiture or upon a change of policy and legislation touching the subject.<sup>47</sup>

## II. SUBJECTS AND OBJECTS OF LICENSE.

### § 1010. Vehicle license—automobiles.

License fees for vehicles used in the streets to raise revenue are in the nature of a tax imposed by the taxing power of the city. The imposition of such tax may be referable to the taxing power, the police power or both; to the police power alone if the object is merely to regulate, and the amount received merely pays the expense of enforcing the regulations, and to the taxing power alone if its main object is revenue. Whether the fee in a given case is to be regarded as imposed for regulation or for revenue will depend upon the recitals of the ordinance and its proper construction.<sup>48</sup>

The power of the city to license automobiles, of course, depends upon the law of the particular jurisdiction. General motor-vehicle laws sometimes vest the power in the state and forbid local exactions.<sup>49</sup>

Notwithstanding state motor-vehicle laws, an automobile license may be imposed in some instances by the local authorities, depending on the construction of such laws.<sup>50</sup>

vision that a judge who tries a violation of any provision of the ordinance shall make recommendation to the city council as to whether or not violator's license should be revoked is not a delegation of authority to the judicial branch of government. *Huston v. Des Moines*, 176 Iowa 455, 156 N. W. 883.

No municipal liability arises by reason of a wrongful revocation of a license or permit. *Roerig v. Houghton* (Minn. 1919), 175 N. W. 542.

<sup>47</sup> *State ex rel. v. Ross*, 177 Mo. App. 223, 228, 162 S. W. 702.

<sup>48</sup> Section 991, ante; § 991, vol. 3, ante.

*Luckey v. Kansas City*, 169 Mo. App. 666, 670, 671, 155 S. W. 873, holding ordinance a revenue measure.

<sup>49</sup> Section 935, ante.

*Kelly v. James*, 37 S. D. 272, 157 N. W. 990.

<sup>50</sup> *State v. Scheidler*, 91 Conn. 234, 99 Atl. 492.

Constitutional reservation to cities to regulate and license. *People v. McGraw*, 184 Mich. 233, 150 N. W. 836; *Kalich v. Knapp*, 73 Or. 558, 145 Pac. 22.

Although state exacts license for

**§ 1012a. Same—motor bus or jitney run for hire.**

Motor busses or jitneys run for hire in the streets may be required to pay a reasonable license tax for the privilege,<sup>51</sup> and the amount thereof may be graded on seating

operation motor vehicle, city may also. *Ex parte Counts*, 39 Nev. 61, 71-73, 153 Pac. 93. See *Ex parte Siebenhauer*, 14 Nev. 365; *Com. v. Fenton*, 139 Mass. 195, 29 N. E. 653; *Brazier v. Philadelphia*, 215 Pa. 297, 64 Atl. 508, 7 Ann. Cas. 548; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781; *Ex parte Holt* (Okl. 1918), 178 Pac. 260.

Ordinance to license motor vehicles which was in conflict with state statute, held invalid. *Anderson v. Wentworth* (Fla.), 78 So. 265.

Ordinance requiring a license fee for use of an automobile, not a truck or commercial vehicle, held invalid as being in conflict with state law which expressly provides that owners of such automobiles who have paid fee and secured certificate from the state, shall not be required to obtain any other license. *Lincoln v. Dehner*, 268 Ill. 175, 108 N. E. 991.

Automobile license, not invalid as exacting an unauthorized occupation tax. *Ex parte Parr* (Tex. Cr. App. 1918), 200 S. W. 404.

Steering an automobile, not under power, being towed, is not operating an automobile, without a license. *Wolcott v. Revanet Selling Branch*, 162 N. Y. S. 496, 175 App. Div. 858.

<sup>51</sup> *Gill v. Dallas* (Tex. Civ. App. 1919), 209 S. W. 209; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781; *Ex parte Cardinal*, 170 Cal. 519, 150 Pac. 348; *State ex rel. v.*

*Howell*, 85 Wash. 294, 147 Pac. 1159; *Ex parte Parr* (Tex. Cr. App.), 200 S. W. 404.

Unreasonable license fee cannot be imposed. *Hazelton v. Atlanta*, 147 Ga. 207, 93 S. E. 202, affirming 144 Ga. 775, 87 S. E. 1043.

Ordinance defining public utility vehicles and prohibiting the operation of such vehicles except under license is not invalid by reason of discrimination. City has right to prohibit use of streets for prosecution of a private business. *Commins v. Jones*, 79 Or. 276, 155 Pac. 171.

When authority has been vested in the city to regulate the use of the streets and grant their use for certain kinds of business, an ordinance which regulates the operation of jitneys require bond, etc., does not interfere with any individual property right. *Le Blanc v. New Orleans*, 138 La. 243, 70 So. 212.

Under authority to regulate transportation of passengers and property by motor vehicles, city has authority to regulate and require permit and payment of license fee for operation of jitneys. *Jitney Bus Ass'n. v. Wilkes-Barre*, 256 Pa. 462, 100 Atl. 954, question as to reasonableness of bond required.

City may regulate and license jitneys, used for hire, although statute regulates and licenses all motor vehicles and automobiles in the state. *Ex parte Counts*, 39

Nev. 61, 153 Pac. 93, citing § 876, vol. 2, ante.

Ordinance requiring automobiles which carry passengers for hire over an advertised route (jitneys) to secure a special license and provide bond and imposing fee of \$20, held a valid exercise of its power as to vehicles, etc., operated for hire. Fee of \$20 held not to be an occupational tax, and not unreasonable. *Ex parte Sullivan* (Tex. Civ. App.), 178 S. W. 537.

Where ordinance is passed in virtue of express legislative power to license and regulate "jitneys" and motor vehicles doing business similar to street railways, and substantially follows powers granted, a court will sustain it, regardless of its opinion as to its reasonableness. Person attacking such an ordinance must show affirmatively that it is not expressly authorized by statute. *Huston v. Des Moines*, 176 Iowa 455, 478, 156 N. W. 883, citing § 724, vol. 2, ante.

Charter power to impose a license tax on and regulate hacks, hackney coaches, and "all vehicles used for hire" is sufficient to support an ordinance licensing and regulating the operation of jitney busses. Motor vehicles were in common use at the time of the adoption of above charter. *Ex parte Counts*, 39 Nev. 61, 66-69, 153 Pac. 93, distinguishing *Transportation Co. v. Tobin*, 19 App. D. C. 462.

Where there is a state statute making jitneys common carriers and providing that their operation in incorporated cities shall be unlawful without first obtaining a

license under ordinance from the city, and that no license shall be issued unless the operator has filed a bond with the county clerk, a jitney is altogether without right to do business in a city which has not passed an ordinance pursuant to the act. Under these circumstances the operation of a jitney in public streets, held to be a nuisance. *Memphis Street Ry. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 117, 179 S. W. 635, quoting with approval from § 925, vol. 3, ante.

Automobile of undertaker used for hire at funerals is engaged in the "occupation of carrying passengers for hire," and is subject to license tax imposed by ordinance on such class. *Spokane v. Knight* (Wash.), 172 Pac. 825.

Legislative authority in act passed in 1871 to license "hacks, cabs, omnibuses, and other vehicles for transportation of passengers for hire," was held not to include power to tax motor vehicle used for hire, as they are not ejusdem generis. The court said: "The language of the section of the act in question is very broad and unqualified, and if the electric vehicles, now used by defendant, had been known and in use at the time of the passage of the act, there would have been good ground for assuming the applicability of the terms of the act to them, and that their use would have been subject to license, although not specifically mentioned in the act. But it is a known fact, and is conceded, that these electric vehicles are of novel and recent invention as to practical

capacity.<sup>52</sup> Such classification being based on difference of earning facilities is entirely reasonable.

Motor busses and jitneys may be regulated<sup>53</sup> and licensed as a class,<sup>54</sup> and a higher license tax may be imposed on such vehicles than that imposed on persons operating taxicabs and other passenger conveyances run for hire.<sup>55</sup>

As a condition to obtaining a license to operate a reasonable indemnity or bond against injury to persons and property arising from negligent operation may be required.<sup>56</sup>

use, and that they were unknown to and certainly not within the contemplation of the authors of the act of the legislative assembly at the time of the passage of this act, as vehicles for the transportation of passengers." *Transportation Co. v. Tobin*, 19 App. D. C. 462, decided in 1902.

Where a state statute provides for registering and use of automobiles and licensing of operators and prohibits municipalities from regulating the use of automobiles an ordinance requiring owners of automobiles used for transportation of passengers for twenty cents or less to secure a license for such use and a license for the driver of such automobile is void. A license on business of transporting passengers and applying to all vehicles would be valid. *State v. Scheidler*, 91 Conn. 234, 99 Atl. 492.

<sup>52</sup> *Ex parte Counts*, 39 Nev. 61, 73, 153 Pac. 93; *Hazelton v. Atlantic*, 144 Ga. 775, 87 S. E. 1043.

<sup>53</sup> Section 935 A, ante.

<sup>54</sup> *Craddock v. San Antonio* (Tex. Civ. App.), 198 S. W. 634.

<sup>55</sup> *Hazelton v. Atlanta*, 144 Ga. 775, 87 S. E. 1043.

Ordinance imposing higher license fee on motor vehicles operating as "Jitneys" than on taxicabs and other rent cars, and requiring bond from operators of jitneys was sustained under authority to regulate and license automobiles, etc., it is not an unreasonable classification but is justified by the nature of the business done by "jitneys." *Auto Transit Co. v. Ft. Collins* (Tex. Civ. App.), 182 S. W. 685.

<sup>56</sup> Section 935 A, ante.

*Dickey v. Davis* (W. Va.), 85 S. E. 781, L. R. A. 1915F, 840, P. U. R. 1915E, 93; *Greene v. San Antonio* (Tex. Civ. App.), 178 S. W. 6; *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687; *Ex parte Counts*, 39 Nev. 61, 73, 153 Pac. 93, *Re Cardinal*, 170 Cal. 519, 150 Pac. 348; *Montgomery v. Orpheum Taxi Co.* (Ala. 1919), 82 So. 117.

Ordinance requiring operators of jitneys to furnish a bond signed by a surety company, in the sum of \$5,000 (same amount was required by street car operators) is valid; no discrimination though protection afforded is greater in case of jitneys. The requirement

Under ample power a license may be imposed on motor vehicles carrying passengers for hire which pass through the corporate limits as well as upon those which operate within the city.<sup>57</sup>

As the operation of vehicles for transportation of persons for hire on the public streets is a privilege, subject to control, the city may by ordinance provide that no license for this purpose shall be granted to an alien.<sup>58</sup>

### § 1012b. Street railway license.

Municipal corporations, under sufficient power, may impose by ordinance a tax on street cars operated by a railway company, e. g., a tax equal to one mill for each pay passenger carried. Such tax is not to be restricted as a police measure, and thus limiting the amount of the tax to a reasonable fee for the issuance of the license and the enforcement of the prescribed regulation. Such tax is a license tax and not a property or income tax. The fact that in addition an annual tax was imposed upon the railway company for the privilege of using the streets for the operation of cars therein, it was held did not in-

of bond tends to promote public safety. *Lutz v. New Orleans*, 235 Fed. 978, affirmed in 237 Fed. 1018, 150 C. C. A. 654.

Ordinance regulating and licensing jitney busses and requiring bond by the operators is valid exercise of power under general welfare clause and charter authority to license and regulate occupations and to require bonds from persons pursuing certain occupations to regulate automobiles, etc., and to regulate use of streets. *Dallas v. Gill* (Tex. Civ. App.), 199 S. W. 1144.

Under express statutory authority to regulate use of motor vehicles used for public hire, an ordinance imposing a license fee of \$20 per annum and requiring a

bond in the sum of \$2,500, and making other regulations in regard to operation, was held valid, as a reasonable classification. Requiring bond does not create a liability, but is a valid restriction concerning the exercise of police power. *Willis v. Fort Smith*, 121 Ark. 616, 182 S. W. 275.

Liability on bond. *Suiger v. Martin*, 96 Wash. 231, 164 Pac. 1105.

Bond required by statute. *Bartlett v. Lanyshier*, 94 Wash. 354, 162 Pac. 532.

<sup>57</sup> Nominal license charge of \$1, held to be a fee and not a tax on property. *Commonwealth v. Theberge*, 231 Mass. 386, 121 N. E. 30.

<sup>58</sup> *Morin v. Nunan*, 91 N. J. L. 506, 103 Atl. 378.

validate the license on the ground that it was double taxation. Uniformity of taxation exacted by the constitution does not include such license tax. Establishing a license tax upon all companies alike for the privilege of using street cars in the streets is not an exercise of the powers of taxation.<sup>59</sup>

### § 1013. License on merchants—canvasser.

A provision empowering a city "to regulate and license all business trades and avocation whatever," authorizes such city by ordinance to forbid "any person, firm or corporation from carrying on or engaging in any business in said city without having obtained and paid for a license," which includes a canvasser who goes from house to house soliciting and taking orders for goods by sample. The solicitor was carrying on and engaged in a business, and hence, it is immaterial whether a canvasser be considered a merchant or a peddler.<sup>60</sup>

### § 1014. Trading stamps.<sup>60a</sup>

### § 1015. Licenses and permits for building and street work—plumbers.<sup>61</sup>

By virtue of sufficient grant of power permits and licenses may be required to do plumbing work and carry on the business of plumbing.<sup>62</sup>

<sup>59</sup> *St. Louis v. United Railways Co.*, 263 Mo. 387, 174 S. W. 78.

<sup>60</sup> *Eldorado Springs v. Highfill*, 268 Mo. 501, 512, 188 S. W. 68.

<sup>60a</sup> An ordinance of Denver forbidding the issuance of trading stamps, profit-sharing coupons and gifts of like or kindred character in connection with the advertising and sale of goods was held void. *Denver v. United Cigar Stores* (Colo. 1920), 189 Pac. 848, following *Denver v. Frueauff*, 39 Colo. 20, 88 Pac. 389, 7 L. R. A. (N. S.)

1131, 12 Ann. Cas. 521, set out in note 34 to § 1014, vol. 3, ante.

<sup>61</sup> Section 1015, vol. 3, ante.

<sup>62</sup> *Vicksburg v. Mullane*, 106 Miss. 199, 63 So. 412; *Winkler v. Benzenberg*, 101 Wis. 172, 76 N. W. 345.

Charter did not name plumbing, held license tax of \$25 on business of plumbing was invalid. *Fulton v. Craighead*, 164 Mo. App. 90, 147 S. W. 1128.

**Apprentice.** Under an ordinance forbidding any person, except ap-



Of course, such law must provide a uniform rule and avoid unreasonable discriminations.<sup>63</sup>

Under statutory authority to regulate the materials and construction of all plumbing and sewerage and to require a permit to do plumbing work, it has been held a city may regulate the weight and grade of plumbing materials used. Where it does not plainly appear that the requirements of the ordinance have no direct or substantial relation to public health and welfare the court cannot set it aside.<sup>64</sup>

### § 1018. License on peddlers, hucksters, hawkers, etc.

Without power, expressed or implied, clearly a license cannot be imposed by the city on peddlers, hucksters, hawkers, etc., plying their trade within its limits. Thus under statutory limitation that no city shall levy or collect any tax or license fee from any farmer for the sale of any "produce" raised by him when sold from his wagon in such city, a license cannot be imposed on a farmer for selling from his wagon on the streets spare ribs and sausages made from hogs raised and butchered by him on his farm.<sup>65</sup>

And under a state law permitting hawkers and peddlers to sell ice and other specified commodities without a license, provided that such sales are not "made in vio-

prentices working for licensed plumbers, from engaging in the business of plumbing, without a license, a man thirty-two years of age, working under letters of apprenticeship for a licensed plumber who selected and directed his work, was held to be an apprentice. *St. Louis v. Bender*, 248 Mo. 113, 124, 154 S. W. 88, concurring opinion of Lamm J. discussing meaning of "apprentice."

<sup>63</sup> General law requiring cities with underground sewers to regulate plumbing trade and provide

that no license be granted to carry on plumbing business to individual who has not passed an examination or to firm unless one member thereof has passed examination is invalid because of discrimination between firms and individuals and city cannot be compelled to provide an ordinance to carry out its requirements. *Davis v. Holland* (Tex. Civ. App.), 168 S. W. 11.

<sup>64</sup> *Kleinhein v. Bentley*, 98 Kan. 431, 157 Pac. 1190.

<sup>65</sup> *Higbee v. Burgin*, 197 Mo. App. 682; 201 S. W. 558.

lation of an ordinance or by-laws of a city or town," it was held a city might regulate the sale of ice, but could not require a license for its sale by hawkers and peddlers.<sup>66</sup>

§ 1019. License on telegraph and telephone companies.<sup>67</sup>

§ 1023. License on pawnbrokers.<sup>68</sup>

§ 1025. License on saloons and liquor selling.<sup>69</sup>

§ 1028. License on miscellaneous trades, occupations, avocations, etc.

Under ample power the following may be licensed: auction houses,<sup>70</sup> auctioneers,<sup>71</sup> bakeries,<sup>72</sup> stationary engineers,<sup>73</sup> public dance halls,<sup>74</sup> pool and billiard halls,<sup>75</sup>

<sup>66</sup> *Greene v. Fitchburg*, 219 Mass. 121, 106 N. E. 573.

<sup>67</sup> *Neck City v. Griffith*, 184 Mo. App. 328, 168 S. W. 1137.

<sup>68</sup> *Provident Loan Soc. v. Denver* (Colo.), 172 Pac. 10, 12, quoting with approval from §1023, vol. 3, ante.

<sup>69</sup> *State ex rel. v. Ross*, 177 Mo. App. 223, 162 S. W. 702; *State ex rel. v. Hollrah*, 177 Mo. App. 670, 160 S. W. 578; *State ex rel. v. Long*, 164 Mo. App. 658, 147 S. W. 1116; *Tooele v. Hoffman*, 42 Utah 596, 134 Pac. 558.

Power to license or prohibit the sale of intoxicating liquors, in Oregon, by Constitutional amendment of Nov. 8, 1910, is vested exclusively in municipalities. *Branch v. Albee*, 71 Or. 188, 142 Pac. 598, 600.

<sup>70</sup> *Kansas City v. Keys*, 152 Mo. App. 507, 133 S. W. 660.

<sup>71</sup> Charter authority to license and regulate auctioneers will not give city authority to impose any

unreasonable restraint as the prohibiting of auction sales after 6 p. m. or before 8 a. m. *People v. Gibbs*, 186 Mich. 127, 152 N. W. 1053.

<sup>72</sup> *Chicago v. Drogasawacz*, 256 Ill. 34, 99 N. E. 869.

<sup>73</sup> *People v. Fournier*, 175 Mich. 364, 141 N. W. 689, citing § 1028, vol. 3, ante (*McQuillin*, Mun. Ord., § 428, p. 653); *Milwaukee v. Filer & Stowell Co.*, 161 Wis. 426, 429, 154 N. W. 625, citing § 989, vol. 3, ante.

The fact that one is employed by a school board to manage a boiler does not exempt him from examination and license, etc. *Kansas City v. Fee*, 174 Mo. App. 501, 160 S. W. 537.

<sup>74</sup> *Mehlos v. Milwaukee*, 156 Wis. 591, 146 N. W. 882.

<sup>75</sup> County has discretion to refuse. *State ex rel. v. Adair County Court*, 177 Mo. App. 12, 163 S. W. 279.

butchers,<sup>76</sup> food and soft drink establishments,<sup>77</sup> selling tobacco and cigarettes,<sup>78</sup> and selling revolvers and other deadly weapons.<sup>79</sup>

A license or occupation tax may be imposed on a company authorized to use the streets and distribute and sell electricity.<sup>80</sup>

Under authority to regulate a city may require a license for the use of market stalls in a public market.<sup>81</sup>

<sup>76</sup> Retail meat dealers which in particular law was held to include a butcher. *Provo City v. Provo Meat & Packing Co.* (Utah), 165 Pac. 477.

Farmer selling from his wagon in streets, spare ribs and sausages, not subject to butcher's license law under a statute exempting farm "produce." *Higbee v. Birgin*, 197 Mo. App. 682, 201 S. W. 558.

<sup>77</sup> *Portland v. Traynor* (Or.), 183 Pac. 933.

<sup>78</sup> *Alspaugh v. Cadwell* (Ga. App. 1919), 99 S. E. 707.

<sup>79</sup> License to sell revolvers and

other deadly weapons and requiring purchaser to have a permit from police. *Biffer v. Chicago*, 278 Ill. 562, 116 N. E. 182.

<sup>80</sup> *Salt Lake City v. Utah Light & Ry. Co.*, 45 Utah 50, 142 Pac. 1067.

<sup>81</sup> *Commonwealth v. Clay*, 224 Mass. 271, 112 N. E. 867.

Permit to sell milk may be required. *State v. Kirkpatrick* (N. C. 1920), 103 S. E. 65.

Permit to supply water for human consumption may be required by ordinance authorized by statute. *Hyman v. Dillon* (Fla. 1920), 84 So. 666.

## CHAPTER 27.

### ACTIONS TO ENFORCE POLICE ORDINANCES.

- I. THE COURT AND ITS JURISDICTION.
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# I. THE COURT AND ITS JURISDICTION.

## § 1029. Establishment and continuance of local courts.<sup>1</sup>

## § 1030. Jurisdiction of local courts.

Local courts with jurisdiction of cases arising under the municipal charter or ordinances, variously designated municipal, corporation, police, city, recorder's, magistrate's, mayor's, etc., courts, are authorized to exercise such jurisdiction only as is specified in the governing law. These courts are usually established by municipal charter, or legislative act, but some constitutions create them or provide for their creation.<sup>2</sup>

<sup>1</sup>City and municipal courts established by municipal charter, and sometimes called "City Courts." St. Louis Charter, Art. XII, adopted August 29, 1914.

"There is no substantial or material difference between the terms 'City Court' and 'Municipal Court' both of which are courts of the municipality in which they are established." People v. Olson, 245 Ill. 288, 92 N. E. 157, approved in Franklin v. Westfall, 273 Ill. 402, 112 N. E. 974.

<sup>2</sup>"City Courts" of St. Louis have jurisdiction of all cases arising under the charter or any ordinance, subject to appeal by the city or defendant. Charter, St. Louis, Art. XII, adopted August 29, 1914.

Prosecutions under penal ordinances in New Orleans are in the recorder's courts, the criminal district court and the supreme court. Questions involving civil and property rights may be heard by the

civil district court. Le Blanc v. New Orleans, 138 La. 243, 70 So. 212.

Municipal courts of Portland, Oregon, Ex parte Mack, 88 Or. 174, 171 Pac. 896.

Jurisdiction of actions and prosecutions for violations of ordinances, embraces both civil and criminal actions, and is given to mayors of cities and towns or to police courts. Ottumwa v. Scott, 158 Iowa 385, 139 N. W. 901.

Judge of municipal court may exercise jurisdiction of justice of the peace, may try for non-support of children, etc., criminal jurisdiction. Watke v. State, 166 Wis. 41, 163 N. W. 258.

Magistrate's court, city of New York, has summary jurisdiction of exposure for sale of any article in any public park or parkway without a permit. People v. Parelli, 158 N. Y. S. 644, 93 Misc. Rep. 692.

Jurisdiction for ordinance viola-

As they are inferior courts of special authority and limited powers, the jurisdiction must be exercised in strict conformity with the controlling law.<sup>3</sup>

**§ 1031. Territorial limits of jurisdiction.<sup>4</sup>**

**§ 1032. Who may act as judges, jurors and witnesses.**

Some laws authorized the assignment of justices of the peace or aldermen to try charges of violations of ordinance and local police regulations.<sup>5</sup>

**II. THE ACTION—ITS FORM, NATURE AND INSTITUTION.**

**§ 1033. How ordinances enforced—form of action.<sup>6</sup>**

tion, held exclusively in police judge. *State v. Hadley* (Wash. 1919), 177 Pac. 655.

<sup>3</sup> *Richard v. Null*, 194 Mo. App. 176, 180, 185 S. W. 250, holding that when mayor acts as police judge his jurisdiction is limited, and must be exercised in conformity with law.

Recorder's court of New Orleans, held had no jurisdiction of violation of ordinance of board of health, since the prosecution was in effect under a statute. *New Orleans v. Stein*, 137 La. 652, 69 So. 43.

Violations of ordinances of board of health, New Orleans, may be prosecuted only in state court, as for violation of the state statute. Violations of ordinances adopted by commission council may be prosecuted in local municipal courts. *New Orleans v. Sanford*, 137 La. 628, 69 So. 35.

Violation of town ordinance, held not a "crime" or "public offense" as used in statute relating to authority of a town council to name a justice of the peace of the township to act as police judge

to try such offenses. *State ex rel. v. Justice Court*, 45 Mont. 375, 123 Pac. 405.

Police justice to try all offenses for violations of city ordinances, although a given action may involve title to real property. *Richmond v. Sutherland*, 114 Va. 688, 77 S. E. 470.

Corporation courts, held to have power to punish for contempt. *Ex parte Hubbard*, 63 Tex. Cr. R. 516, 140 Pac. 451.

<sup>4</sup> For violating a building ordinance in New York City the action is to be instituted within the district of the court where the premises are located. *New York v. Greis*, 179 N. Y. S. 105.

<sup>5</sup> *State ex rel. v. Justice Court*, 45 Mont. 373, 123 Pac. 405; *Grant v. Williams*, 54 Mont. 246, 169 Pac. 286.

Alderman may preside as police judge whenever both the mayor or acting mayor are disqualified or from providential cause unable to preside. *Brunswick v. Sims*, 14 Ga. App. 315, 80 S. E. 730.

<sup>6</sup> *Tipton v. Tipton Light & Heat*

The method prescribed by the applicable law for the enforcement of the ordinance or local regulation must be observed, and such method is usually exclusive.<sup>7</sup>

If no form of action is provided an action for debt to recover the penalty named in the ordinance will lie.<sup>8</sup>

### § 1034. How far the proceedings are criminal or quasi-criminal.

The action to recover the penalty for a violation of an ordinance is generally regarded as civil in its nature.<sup>9</sup>

ing Co., 176 Iowa 224, 157 N. W. 844.

"In the absence of charter provisions prohibiting, inherent power exists in the municipality to declare its own procedure in the enforcement of its ordinances" Birmingham v. Brown, 13 Ala. App. 654, 69 So. 263, 267, Brown J. dissenting, citing § 1033, vol. 3, ante (McQuillin, Mun. Ord., § 303).

<sup>7</sup> New Orleans v. Stein, 137 La. 652, 69 So. 43; State ex rel. v. Dix, 159 Mo. App. 573, 576, 577, 141 S. W. 445, following State ex rel. v. Snyder, 139 Mo. 549, 554.

Violation of ordinance is to be enforced as law provides; enforcement and collection of penalty was expressly given by ordinance for its violation, and not equity, to require removal of buildings as an unlawful structure in violation of building ordinance as to location on lot. "Equitable relief of the character demanded is not one of strict right. Equity may be invoked in proper cases where there exists no adequate remedy at law. But can it be said under the circumstances of this case that the city is without adequate remedy

at law? Does not the penalty imposed meet all the reasonable requirements of the situation? Where the granting of the relief asked will operate to impose greater hardships and injustice than withholding it, and the ordinance in express terms provides the penalty, we are of the opinion the city should be remitted to the remedy therein provided." Buffalo v. Kellner, 153 N. Y. S. 472, 477, 90 Misc. Rep. 407.

<sup>8</sup> People v. Dummer, 274 Ill. 637, 113 N. E. 934.

See § 1007, ante.

<sup>9</sup> Chicago v. Baranor, 189 Ill. App. 25; New Athens v. Casper, 202 Ill. App. 555; Chicago v. Shreffler, 175 Ill. App. 547; Rome v. Foot, 162 N. Y. S. 781, 175 App. Div. 459; King City v. Duncan, 238 Mo. 513, 142 S. W. 246; Hannibal v. Dudley, 158 Mo. App. 261, 138 S. W. 552; Poplar Bluff v. Meadows, 187 Mo. App. 450, 456, 173 S. W. 11.

Violation not regarded as misdemeanor. Milwaukee v. Beatty, 149 Wis. 349, 135 N. W. 873; People v. Lookstein, 139 N. Y. S. 680, 76 Misc. Rep. 306.

Action to recover penalty is



Inasmuch as a proceeding in the name of a city to recover a penalty for the breach of an ordinance involved some of the ideas, terminology and machinery of the criminal law, such proceeding is a criminal one from some points of view, but it is also a civil proceeding from other view points. As aptly stated by a learned judge: "The best the law has been able to do is to call it civil or quasi-criminal in character."<sup>10</sup>

civil, not criminal. *Chicago v. Dunham Touring & Wrecking Co.*, 175 Ill. App. 549; *Chicago v. Knobel*, 232 Ill. 112, 83 N. E. 459; *Chicago v. Williams*, 254 Ill. 360, 98 N. E. 666, holding that a suit to recover a penalty for the violation of an ordinance was a civil action, "the rules applicable to criminal procedure have no application thereto."

Civil in determining the sufficiency of the complaint. *Koshkonong v. Boak*, 173 Mo. App. 310, 315, 158 S. W. 874; *East Prairie v. Green* (Mo. App.), 186 S. W. 952.

Civil, as relates in appellate procedure. *Kansas City v. Proudfit* (Mo. App.), 207 S. W. 845; *Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294 (Mo. App. 1915), 178 S. W. 226; *Caruthersville v. Palsgrove*, 155 Mo. App. 563, 135 S. W. 1032.

Prosecution for violation of ordinance, held statutory and quasi criminal relating to appeals. *Craig v. Birmingham*, 14 Ala. App. 630, 71 So. 983.

Violation of ordinance requiring railroad to spike tracks, in which the railroad company was fined \$400, held to be an action criminal in character relating to question of appeal under a particular

statute. *People v. Pacific Gas & Electric Company*, 168 Cal. 496, 143 Pac. 727.

Not criminal within the meaning of a statute allowing proof of a conviction to affect the credibility of a witness. *Meredith v. Whillock*, 173 Mo. App. 542, 158 S. W. 1061.

Civil as to arraignment and plea by defendant. *Columbia v. Samuels*, 164 Mo. App. 92, 147 S. W. 1132.

Criminal, when violation of ordinance involves evil intent requiring instruction on reasonable doubt. *Stanberry v. O'Neal*, 166 Mo. App. 709, 150 S. W. 1104.

Omission of suffix "jr." held material. "Under all of the authorities, at least the great weight of authorities, such proceedings under such circumstances are civil and not criminal in character." The offense related solely to the local regulation for the safety and welfare of the community. *Tucumcari v. Belmore*, 18 N. M. 331, 137 Pac. 585, 586, citing § 1034, vol. 3, ante.

<sup>10</sup> *St. Louis v. Amelin*, 235 Mo. 669, 678, 139 S. W. 429, per Lamm, J.

As to construction, rules of penal statutes are applied. Ex

### § 1035. Name in which action should be brought.<sup>11</sup>

### § 1036. Institution of proceedings—notice—appearance.

The mode of beginning the proceedings, whether by summons, warrant, arrest, affidavit, or complaint or in-

parte Lerner (Mo. 1920), 218 S. W. 331, 333.

Act of violating ordinance held quasi criminal offense, although the same act was made a misdemeanor by statute. A fine prescribed by the ordinance in such case is collectible by civil action. *Milwaukee v. Ruplinger*, 155 Wis. 391, 145 N. W. 42.

"Although such actions are civil in form and name in our state, they are specifically classified as criminal in nature." *Rome v. Foot*, 175 App. Div. 459, 464, 162 N. Y. S. 781.

Although the action is civil where it is for the violation of an ordinance, which is also an offense under statute, the defendant is entitled to the benefit of the guarantees that attend one accused of crime under the general law and therefore is entitled to the presumption of innocence and to have his guilt established beyond a reasonable doubt. *Grant City v. Simmons*, 167 Mo. App. 133, 151 S. W. 187.

Prosecution for violation of ordinance against disorderly conduct where proceedings were begun on complaint upon which a warrant of arrest was issued and where the ordinance provided either a fine or imprisonment or both, held proceedings "a quasi criminal proceeding" and not a

"civil action" relating to superintending control of supreme court. *Sheridan v. Cadle*, 24 Wyo. 293, 157 Pac. 892.

<sup>11</sup> *Re Simmons* (Okla. Cr. App.), 115 Pac. 380.

"Prosecutions" to be carried on in the name of the state as used in the Constitution, is not applicable to ordinance violations. *Birmingham v. Baranco*, 4 Ala. App. 279, 58 So. 944.

City and state cannot join as plaintiffs in an action for the violation of a statute and also an ordinance passed pursuant thereto. On motion, the trial judge may order an election. *Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853.

By constitution of California for violation of ordinance making it unlawful to sell intoxicating liquor, held an offense against public generally and process should run in the name of the People of the State of California. *Ex parte Clark*, 24 Cal. App. 389, 141 Pac. 831.

A statute may authorize offenses against municipal ordinances to be prosecuted in the name of the municipality, although the state constitution ordains that the style of process shall be "The state of —." *Salt Lake City v. Bernhagen* (Utah 1920), 189 Pac. 583, citing § 1035, vol. 3, ante.

formation, verified by a named officer or a private citizen, of course, is to be directed by the applicable local law.<sup>12</sup>

Two forms of proceedings for violation of city ordinances are sometimes provided: one civil in form authorizing a summons as the first process; the other, a warrant for the arrest of the offender based upon affidavit.<sup>13</sup>

<sup>12</sup> The method prescribed by charter should be observed. *Norris v. Thomson*, 15 Ga. App. 511, 83 S. E. 866.

Proceedings may be instituted by affidavit. This is due process of law. *New Orleans v. White (La.)*, 78 So. 745.

Summons or warrant of arrest, sufficient process, in action to recover penalty. *Chicago v. Moran*, 192 Ill. App. 57.

Sworn complaint to be filed before process is issued, unless the suit is prosecuted by and in the name of the public prosecution. *Chicago v. Tearney*, 187 Ill. App. 441.

City officer or private citizen may make complaint under statute. *Richland v. Null*, 194 Mo. App. 176, 183, 185 S. W. 250.

Judge may issue summons or warrant on information on oath. Fact that the information is in the form of an affidavit and imperfect because the jurat is not signed by the mayor does not affect the court's jurisdiction to proceed. *McConnell v. Booneville*, 123 Ark. 561, 186 S. W. 82.

Neither constable nor chief of police authorized to swear out a warrant. *Rockhill v. Worthy*, 104 S. C. 450, 89 S. E. 393.

<sup>13</sup> *Tucumcari v. Belmore*, 18 N. Mex. 331, 137 Pac. 585.

Process may be had by summons, warrant or by arrest on

view. *Chicago v. Moran*, 192 Ill. App. 57.

Summons, may be waived by appearance. *Chicago v. Baranov*, 189 Ill. App. 25.

Going to trial without demanding service of summons is waiver. *Douglas v. Kestler*, 14 Ga. App. 612, 81 S. E. 803.

A resident with family and established business accused of disorderly conduct should not be arrested, since service of summons will answer. "It is the policy of the law in Kentucky that warrants of arrest shall not be issued except in cases where the summons will not serve as well." *Schwartz v. Boswell*, 156 Ky. 103, 160 S. W. 748.

Failure to refer to written accusation specifically defining offense does not deny due process of law unless the charter or legislative act applicable so requires. *Porter v. Atlanta*, 18 Ga. App. 33, 88 S. E. 744, following *Pearson v. Wimbish*, 124 Ga. 701, 711, 52 S. E. 751, 4 Ann. Cas. 501.

By summons or warrant, or where defendant found in act of violating ordinance he may be arrested when brought before the police judge. He may then be retained until complaint can be prepared and warrant issued. *Rome v. Foot*, 175 App. Div. 459, 464, 162 N. Y. S. 781.

Unless there is something in the

**§ 1037. Sufficiency of summons or warrant.**

The warrant of arrest issued by a municipality should definitely charge a violation of a valid ordinance.<sup>14</sup>

**§ 1038. Arrest without warrant.<sup>15</sup>**

Statutes confer power on police officers to arrest without a warrant under specified circumstances.<sup>16</sup> A statute authorizing police officers in designated cities to "prevent crimes and arrest offenders," has been held to empower such police officer to arrest for a misdemeanor not committed in his presence, provided he has reasonable grounds to suspect that the offense has been committed.<sup>17</sup> It is fundamental that to make lawful an arrest for a misdemeanor not committed in his presence, the officer must have reasonable grounds to suspect that the offense has been committed. Obviously the existence of such reasonable grounds rests upon the facts in each particular case, and of necessity their force and sufficiency must be

charter to the contrary it is not necessary that the person accused of the violation of a municipal ordinance shall be furnished with a written accusation or statement of charges made against him. It is sufficient if he be informed of the charge and be given an opportunity to defend. *Porter v. Atlanta*, 18 Ga. App. 33, 88 S. E. 744, following *Wynne v. Atlanta*, 10 Ga. App. 818, 74 S. E. 286.

Although the filing of a written information is not expressly required, the defendant is entitled to an information clearly stating the exact crime with which he is charged. *People v. Bell*, 148 N. Y. S. 753.

<sup>14</sup> *Ex parte Davidson* (Fla.), 79 So. 727.

See Section 1044, post; Section 1044, vol. 3, ante.

<sup>15</sup> 1 A. L. R. 586, note; *Ex*

*parte Rhodes* (Ala. 1919), 79 So. 462, citing many cases.

<sup>16</sup> *People ex rel. Black v. McKay*, 151 N. Y. S. 501, 166 App. Div. 614.

Officer cannot arrest one for violating ordinances in his presence, e. g., speed ordinance, without law permitting. Such arrest constitutes an assault. *Chapman v. Selover*, 159 N. Y. S. 632, 172 App. Div. 858.

May arrest without warrant for violating law in presence of officer by authority of statute. *Mel-drum v. State*, 23 Wyo. 12, 146 Pac. 596.

<sup>17</sup> *State v. Boyd*, 108 Mo. App. 518, 524, 84 S. W. 191, impliedly approved in same case, 196 Mo. 52, 59, and subsequently approved in *Hanser v. Bieher*, 271 Mo. 326, 337, 197 S. W. 68.

determined by the officer before he acts, and it is clear that they must be sufficient to establish a substantial belief in his mind that an offense has been committed.<sup>18</sup> Accordingly, when the officer makes an arrest without a warrant, under a law authorizing him to do so, he may justify his act, though no offense has actually been perpetrated by the person arrested, by showing that he had reasonable cause to suspect such person of having committed an offense, but where an officer has no reasonable grounds to suspect the person of the commission of an offense the arrest is unjustifiable.<sup>19</sup>

<sup>18</sup> "The existence of such reasonable grounds rests upon the facts in each particular case and their force and sufficiency must be determined by the officer before he acts, otherwise there would be no limitation upon the power thus granted and human liberty would be subject to the whim and caprice of police officers or individuals and render possible arrests and detentions for trivial causes. While it is not necessary that an examination should disclose that an offense has really been committed, the facts upon which the arrest was based, to render the same lawful so far as concerns the officers, must be such as to afford at the time a substantial belief in his mind that an offense has been committed." *Hanser v. Bieber*, 271 Mo. 326, 337, 338, 197 S. W. 68.

<sup>19</sup> *Wehmeyer v. Mulvihill*, 150 Mo. App. 197, 206, 207, 130 S. W. 681, approved in *Hanser v. Bieber*, 271 Mo. 326, 338, 197 S. W. 68, where it is said that the arrest "must be based upon something more than the mere vaporings of an excited citizen complaining of fancied wrongs which the officer has the opportunity to

ascertain the true nature of before he arrests the accused."

"The construction given the statute is a salutary one. Any one at all familiar with civil conditions in cities, as contradistinguished from the country, realizes that greater power should be given police officers to preserve the peace and arrest offenders in cities than is given to peace officers elsewhere. The courts' interpretation of the statute, therefore, is no more than a recognition of this fact and arises, as have many of our laws defining crimes and regulating criminal procedure, out of the necessities of metropolitan life. Arising as the statute does out of necessity and impinging in its application on the liberty of the individual, the courts have been wisely wary so to limit its enforcement as to afford the least possible danger to the rights of the individual. Hence, the courts' proviso in its interpretation of the statute that the officer must have 'reasonable grounds to suspect that a crime has been committed' before an arrest is authorized." *Hanser v. Bieber*, 271 Mo. 326, 337, 197 S. W. 68.

## III. THE STATEMENT, COMPLAINT OR INFORMATION.

**§ 1040. Formal parts of complaint or information.<sup>20</sup>****§ 1042. Averment of power to pass ordinance.**

The complaint must make averments (it is sometimes held) of the authoritative ordination as a rule of conduct in the municipality of the ordinance.<sup>21</sup>

But authority to pass the ordinance alleged to have been violated need not appear on the face of the complaint.<sup>22</sup>

**§ 1044. Requisites of statement, complaint or information—substance.**

In a proceeding in the name of a city, to recover a penalty for violation of an ordinance the better rule is not to apply to the pleadings the strict rules applicable to criminal informations. They are accorded a sensible treatment more akin to pleadings in magistrate courts. Generally, it is sufficient to charge the offense in the language of the ordinance and with such certainty of time, place and manner as reasonably to notify defendant of

<sup>20</sup> A complaint is a technical term descriptive of proceedings before magistrates, a charge preferred that the person named therein has committed a specified offense. *Richland v. Null*, 194 Mo. App. 176, 180, 185 S. W. 250.

A verified complaint filed by a private citizen, charging violation of an ordinance, held sufficient—Ibid.

That complaint was not entitled as prescribed by law does not render it void. *Puyallup v. Crosby* (Wash.), 169 Pac. 322.

Signing complaint. *Christopher v. State*, 21 Ga. App. 244, 94 S. E. 72.

<sup>21</sup> *Benjamin v. Montgomery* (Ala. App.), 78 So. 167, following *Robenberg v. Selma*, 168 Ala. 195, 52 So. 742; *Miles v. Montgomery* (Ala. App. 1919), 81 So. 351.

Complaint charging failure to connect building with sewer main which does not charge there was or ever had been any ordinance prescribing the manner of connection is clearly insufficient. *Deadwood v. Coe*, 34 S. D. 517, 149 N. W. 359.

<sup>22</sup> *East Prairie v. Greer* (Mo. App.), 186 S. W. 952; *Koshkonong v. Boak*, 173 Mo. App. 310, 314, 158 S. W. 874.

the charge preferred, thereby enabling him to prepare his defense and subsequently to plead *res judicate* or (if criminal terminology is to be used) *antrefois* convict, or *autrefois* acquit.<sup>23</sup>

The complaint need not set out the ordinance in *haec verba*.<sup>24</sup>

Ordinarily it is sufficient to charge the offense in the substantial language of the ordinance or statute which defines and describes the elements of the offense.<sup>25</sup>

<sup>23</sup> St. Louis v. Ameln, 235 Mo. 669, 678, 679, 139 S. W. 429; Poplar Bluff v. Meadows, 187 Mo. App. 450, 455, 173 S. W. 1.

The warrant of arrest should definitely charge a violation of a valid ordinance. *Ex parte Davidson* (Fla. 1918), 79 So. 727.

Where no written complaint is required, a defective complaint does not affect a prosecution. *Chicago v. Moore*, 170 Ill. App. 163, 166; *Chicago v. Kinney*, 35 Ill. App. 57.

"An allegation of the violation of the ordinance of the city of C was an allegation of an offense within the city." *Columbia v. Phillips*, 101 S. C. 391, 85 S. E. 963.

A complaint which sets out the ordinance in full, avers a violation thereof, and states the date and acts constituting the breach is sufficient. *Little v. Attalla*, 4 Ala. App. 287, 58 So. 949, following *N. C. & St. L. Ry. Co. v. Alabama City*, 134 Ala. 414, 32 So. 731.

Offense need not be stated with same strictness as to form and substance as would be necessary in an indictment. *Porter v. Atlanta*, 18 Ga. App. 33, 88 S. E.

744; *Norris v. Thomson*, 15 Ga. App. 511, 83 S. E. 866.

The requirements of the offense shall be fully stated including essential averments as to the time and place of the commission of the offense. These should be sufficiently clear to put the defendant on notice and moreover should also show clearly the jurisdiction of the court. *Norris v. Thomson*, 15 Ga. App. 511, 83 S. E. 866.

The essential purpose of the accusation is to advise the defendant of the offense upon which he is to be tried, definitely enough to enable him to prepare for trial. *Arkansas City v. Roberts*, 89 Kan. 680, 132 Pac. 152.

Form, held not important. *Everett v. Simmons*, 86 Wash. 276, 150 Pac. 414.

Good pleading requires that the city by its complaint must bring the defendant within the terms of the ordinance it seeks to enforce. *Birmingham v. Anglin* (Ala. 1918), 625; *Tarrance v. Chapman*, 196 Ala. 93, 71 So. 707.

<sup>24</sup> *Wiggs v. State*, 5 Ala. App. 189, 59 So. 516.

<sup>25</sup> *State v. Broms* (Minn. 1918), 166 N. W. 771; *State v. Olson*, 115 Minn. 153, 131 N. W. 1084;

Nor is the complaint insufficient because a synonym of the words used in the law was employed instead of the words themselves.<sup>26</sup>

On the other hand, more exact requirements are often exacted. It is essential to aver, it is sometimes held, not only the facts constituting the violation of the ordinance, but the complaint must set out the provision of the ordinance or the substance thereof, and aver that the ordinance was duly adopted and ordained, prior to the commission of the offense, by the proper authority. The mere statement, as a legal conclusion, that the acts of the defendant were done "in violation of an ordinance," will not suffice, in the absence of a statement of the provisions of the ordinance or the substance thereof.<sup>27</sup>

The sufficiency of the complaint, it is quite generally held, is to be determined by the rules applicable to civil actions for debt.<sup>28</sup>

Whenever an ordinance or statute fixes a classification and creates an offense which can be committed only by persons within the class, it is necessary to allege that the accused person belongs to the class described.<sup>29</sup>

Thus a complaint against a licensed auctioneer as hav-

Louisiana v. Lang, 181 Mo. App. 670, 674, 164 S. W. 641.

Complaint in language of town by-law is sufficient. State v. Woolley, 88 Conn. 715, 92 Atl. 662.

Affidavit charging resisting an officer in the language of the ordinance, held sufficient. Robinson v. Malvern, 118 Ark. 423, 176 S. W. 675.

Sufficient finding offense is set forth substantially in the language of the ordinance. Chicago v. Shreffler, 175 Ill. App. 547.

<sup>26</sup> "This is a mere refinement of a technicality and is without merit." Eldorado Springs v. Highfill, 268 Mo. 501, 512, 513, 188 S. W. 68.

"An information is sufficient if it contains substantially the language of the statute. This is the general rule. It is not necessary to use the language of the statute." State v. Taylor, 167 Mo. App. 104, 108, 150 S. W. 1126.

<sup>27</sup> Miles v. Montgomery (Ala. App. 1919), 81 So. 351.

<sup>28</sup> East Prairie v. Gréer (Mo. App.), 186 S. W. 952; Koshkonong v. Boak, 173 Mo. App. 310, 315, 158 S. W. 874; Plattsburg v. Smarr (Mo. App. 1919), 216 S. W. 538.

<sup>29</sup> People v. Meisner, 178 Mich. 288, 144 N. W. 490, following Shannon v. People, 5 Mich. 71.



ing violated an ordinance as to hours of conducting sales, must charge that defendant was a licensed auctioneer, the only class that could violate the ordinance.<sup>30</sup>

**§ 1045. Form of complaint—verification—conclusion.<sup>31</sup>**

**§ 1046. Pleading ordinance violated—judicial notice.**

In the absence of a statute requiring state courts to take cognizance of municipal ordinances, such ordinances to be available must be specially pleaded.<sup>32</sup>

Courts of the municipality may take notice of ordinances.<sup>33</sup>

**§ 1047. Same—reference to ordinance violated required.**

In a proceeding to recover the penalty for breach of an ordinance, usually the statement, complaint or information alleges the section of the ordinance violated as a matter of certain identification.<sup>34</sup>

<sup>30</sup> *People v. Meisner*, 178 Mich. 288, 144 N. W. 490.

<sup>31</sup> "An allegation of the violation of the ordinance of the City of C was an allegation of an offense within the city." *Columbia v. Phillips*, 101 N. C. 391, 85 S. E. 963.

**Oral.** Statute expressly provides that no written information or pleadings are required in prosecutions for violations of by-laws or ordinances of a city or town. One may be prosecuted on an oral charge irrespective as to how he is brought before the mayor. *McConnell v. Booneville*, 123 Ark. 561, 186 S. W. 82.

**Signing.** Accusation to be signed by the prosecutor and the prosecuting officer, held assistant city solicitor may sign jointly with prosecutor. *Christopher v. State*, 21 Ga. App. 244, 94 S. E. 72.

**Conclusion.** Need not conclude

"against the peace and dignity of the city." *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 456, 457, 173 S. W. 11.

<sup>32</sup> *West v. Montgomery* (Ala. App. 1919), 81 So. 182.

<sup>33</sup> Section 849, ante; section 949, vol. 2, ante.

<sup>34</sup> Reference to ordinance violated by number, specific act of violation, held sufficient. *Chicago v. Baranov*, 189 Ill. App. 25.

Ordinance was described by number and acts of violation were specifically set forth, held sufficient. *Chicago v. Lesser*, 196 Ill. App. 37.

Complaint gave the title and number of the ordinance, and the section alleged to have been violated, held sufficient. *Bell v. Jonesboro*, 3 Ala. App. 652, 57 So. 138.

Complaint contains a sufficient reference to the ordinance when

However, where the ordinance is short and where the offense is plainly differentiated, a reference to the section fills no appreciable office, and in such case, omission of the section number does not render the complaint bad.<sup>35</sup>

An information specifying the violation of an ordinance entitled "an ordinance in revision of the general ordinances of the city of ———," being general ordinance Number —, does not sufficiently plead the ordinance, as it is a mere reference to the whole book of ordinances of the city, and not to the particular ordinance alleged to have been violated. Such defect cannot be cured by offering the ordinance itself in evidence at the trial.<sup>36</sup>

### § 1048. Negating exceptions.

If the exception or proviso is in the same clause or section which creates the offense and enters into and becomes a part of the description thereof, or is a material qualification of the language creating and defining the offense, the information or indictment must show by proper negative averments that the offense does not fall within the exception.<sup>37</sup>

it states the subject-matter and gives its number. *East Prairie v. Greer* (Mo. App.), 186 S. W. 952.

"It goes as of course that when a citizen is charged with the breach of a municipal regulation the complaint should put its fingers on the ordinance breached. Certainty in this regard is a *sine qua non*. A false call is worse than none at all. It deceives and misleads defendant. A law, moving with sober dignity, tolerates no tricks of that sort. Therefore, if there be a false call for the ordinance in the complaint, absent amendment, the prosecution is halted and must fall. So, too, if

the ordinance alleged to be breached has been superseded or repealed by a later ordinance there can be no breach, for the ordinance is null; hence there is nothing to break. Out of nothing, nothing comes." *St. Louis v. Meyer*, 235 Mo. 699, 705, 706, 139 S. W. 438.

<sup>35</sup> *St. Louis v. Ameln*, 235 Mo. 669, 679, 139 S. W. 429.

<sup>36</sup> *St. Louis v. Ringold*, 235 Mo. 472, 139 S. W. 186, following *Kansas City v. Whitman*, 70 Mo. App. 630.

<sup>37</sup> *Koshkonong v. Boak*, 173 Mo. App. 310, 315, 158 S. W. 874; *State v. Casto*, 231 Mo. 398, 408,

The rule is applied to prosecutions for violations of ordinances.<sup>38</sup>

But exceptions named in the ordinance need not be pleaded where not in the clause creating the offense. That is, where the exception is not incorporated in the definition of the offense it need not be negated in the complaint.<sup>39</sup>

### § 1049. Several offenses—joinder.

It is proper to join in the same complaint two or more causes of action, treating, of course, the action as civil; e. g., the violation of two distinct provisions of an ordinance. That is, the charge may be violation by (doing or omitting to do, etc.) in one count joined with another specifying the particular violation, etc.<sup>40</sup>

### § 1052. Sufficiency of complaint or statement in specific offense illustrated.

*Adulteration of milk by adding water.* In prosecution for the adulteration of milk by adding water, under an ordinance declaring that milk shall be deemed to be adulterated, if any substances have been mixed with it "so as to lower or depreciate or injuriously affect the strength, quality or purity" or "if any substances have been substituted wholly or in part," it was held that it was not necessary that such complaint should allege a fixed standard by which to judge strength and quality. In such case

132 S. W. 1115; State v. Renkard, 150 Mo. App. 570, 573, 131 S. W. 168.

<sup>38</sup> Tarkio v. Loyd, 109 Mo. App. 171, 82 S. W. 1127, distinguishing State v. Bockstruck, 136 Mo. 335, 351, 38 S. W. 317.

Complaint should negative the exception specified in the ordinance or follow the language of the ordinance or use words of similar import. Astoria v. Malone, 87 Or. 88, 169 Pac. 749.

<sup>39</sup> Kansas City v. Jordan, 99 Kan. 814, 163 Pac. 188, 192; State v. Thruman, 65 Kan. 90, 68 Pac. 1081; State v. Buis, 83 Kan. 273, 111 Pac. 189; State v. Belle Springs Creamery Co., 83 Kan. 389, 111 Pac. 474, L. R. A. 1915D, 515; Kansas City v. Garnier, 57 Kan. 412, 46 Pac. 707.

<sup>40</sup> Louisiana v. Lang, 181 Mo. App. 670, 674, 164 S. W. 641.

the court will take judicial notice of the law of nature that water is found to lower and depreciate the strength and quality of milk of any standard.<sup>41</sup>

*Auctioneer charged with failure to conduct sales between hours specified*; failure to charge that defendant was a licensed auctioneer—the only class who could violate the ordinance—renders the complaint obviously insufficient.<sup>42</sup>

*Bawdy house*. Name of persons frequenting, etc., need not be set out.<sup>43</sup>

*Building regulations—fire limits*. In charging violation of ordinance as to fire limits, the charge should be that the building was within the fire limits; an allegation that the building was within the city is insufficient.<sup>44</sup>

*Disturbing peace*. Disorderly conduct in public places; charge that defendant wrongfully and unlawfully aided and countenanced a disturbance and improper diversion in a public place, etc., to the disturbance of citizens is sufficient.<sup>45</sup>

Defendant “did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace.” Complaint was sustained as charging a single offense, as distinguished from a blanket complaint.<sup>46</sup>

*Failure to connect building with sewer main*; omission to state existence of ordinance prescribing manner of connection was held fatal.<sup>47</sup>

*Failure to obtain a license* where admission fee to entertainment—circus—is charged as required by ordinance. An information merely charging the giving of the circus, etc., wherein an admission fee was charged,

<sup>41</sup> St. Louis v. Ameln, 235 Mo. 669, 681, 139 S. W. 429.

<sup>42</sup> People v. Meisner, 178 Mich. 288, 144 N. W. 490.

<sup>43</sup> Poplar Bluff v. Meadows, 187 Mo. App. 450, 455, 173 S. W. 11.

<sup>44</sup> Ex parte Davidson (Fla. 1918), 79 So. 727.

<sup>45</sup> State v. Broms (Minn. 1918), 166 N. W. 771.

<sup>46</sup> Chicago v. Smith, 195 Ill. App. 349.

<sup>47</sup> Deadwood v. Coe, 34 S. D. 517, 149 N. W. 359.

etc., "without first having fully paid the license fee required," etc., is insufficient because the violation, or offense is failure to obtain a license.<sup>48</sup>

*Gambling.* Complaint is sufficient which sets out the ordinance and charges betting money on a game of cards.<sup>49</sup>

*Obscene language used;* complaint must allege that it was uttered in public and aver the time and place.<sup>50</sup>

Using indecent, lewd or immoral language "in any public place." As the essence of the offense is that it was committed in a public place, a complaint failing so to charge is fatally defective.<sup>51</sup>

*Selling liquor.* In charge of sale of liquor, it is not necessary to set out the ordinance in full.<sup>52</sup>

<sup>48</sup> *Kansas City v. Sells-Floto Show Co.* (Mo. App. 1919), 214 S. W. 269.

<sup>49</sup> *Little v. Attalla*, 4 Ala. App. 287, 58 So. 949.

*Gaming.* Rules of criminal procedure not applicable. *Chicago v. Williams*, 254 Ill. 360, 98 N. E. 669.

*Gambling, playing "poker."* *Everett v. Simmons*, 86 Wash. 276, 150 Pac. 414.

"To exhibit or expose certain devices in rooms barred or barricaded in such manner as to render them difficult of access by officers of the law." *Ah Poo v. Stevenson*, 83 Or. 340, 163 Pac. 822.

<sup>50</sup> *Peer v. Dixon*, 82 N. J. L. 366, 83 Atl. 180.

<sup>51</sup> *State v. Claire*, 121 Minn. 521, 140 N. W. 747, following *State v. Bates*, 96 Minn. 150, 104 N. W. 890.

<sup>52</sup> *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

*Keeping for sale intoxicating*

*liquors.* *Norris v. Thormson*, 15 Ga. App. 511, 82 S. E. 866.

Nuisance, failure to abate—indictment. *Canton Co. v. State*, 126 Md. 352, 95 Atl. 58.

Had in his possession more than one quart of whiskey, etc. *Benjamin v. Montgomery* (Ala. App.), 78 So. 167.

Loaning money at usurious interest. *Columbia v. Phillips*, 101 N. C. 391, 85 S. E. 963.

*Resisting an officer* of police in the discharge of his duties; form set out in the opinion sustained although the court observed it might have been made more elaborate and specific in its averments. *Arkansas City v. Roberts*, 89 Kan. 680, 132 Pac. 152.

*Resisting an officer.* *Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675.

*Regarding police officer.* *Chicago v. Shreffler*, 175 Ill. App. 547.

**§ 1054. Amendment of statement or information.**

Proper amendments of the statement or information are permitted, even on appeal.<sup>53</sup>

**§ 1055. How defective statement or information cured.<sup>54</sup>****IV. THE TRIAL—SUMMARY OR JURY—PROCEEDINGS.****§ 1056. Arraignment and plea.**

In actions for violations of ordinances no arraignment or plea is required as in criminal cases.<sup>55</sup>

A plea of guilty waives any defects not jurisdictional. Failure to allege in the information any crime is a jurisdictional defect, when the case must stand or fall on

<sup>53</sup> Amendment allowed. *Columbia v. Phillips*, 101 N. C. 391, 85 S. E. 963.

On appeal amendments, allowed by statute, e. g., insufficient affidavit in charge of disposing of whiskey in violation of an ordinance. *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

Amendments as a matter of substance allowed on appeal. *Salt Lake City v. Larsen*, 47 Utah 1, 151 Pac. 353.

New complaint may be filed on appeal charging the same offense. *Everett v. Cowles*, 97 Wash. 396, 166 Pac. 786.

Cannot on appeal file a new affidavit under a different ordinance denouncing a different offense, as this, in effect, is instituting a new case. *Buckhalt v. Enterprise*, 4 Ala. App. 293, 59 So. 226.

The action being civil the complaint may be amended when the motion for a new trial is pending. *Chicago v. Shreffler*, 175 Ill. App. 547,

<sup>54</sup> Defendant not demanding filing complaint or statement, held to have acquiesced in omissions. *Robertson v. Montgomery (Ala.)*, 77 So. 724.

On appeal the objection to the sufficiency of the complaint cannot be made for the first time. *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389.

One going to trial without objection to the insufficiency of the complaints constitutes a waiver thereof. *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

Law authorized move for rule to make complaint definite and certain; not motion to quash. *Chicago v. Williams*, 254 Ill. 360, 98 N. E. 666.

If insufficient defendant may move for rule for specific statement. *Chicago v. Baranov*, 189 Ill. App. 25.

<sup>55</sup> *Chicago v. Tearney*, 187 Ill. App. 441; *Columbia v. Samuels*, 164 Mo. App. 92, 147 S. W. 1132.

the information alone. The defendant cannot waive what relates to the jurisdiction of the court. Hence the plea of "guilty as charged" to the information which in fact charges no offense for violation of an ordinance does not constitute a plea of guilty to any offense whatever, and in addition, the payment of a fine to avoid going to jail is immaterial.<sup>56</sup>

### § 1057. Mode of conducting trial—civil or criminal.

Municipal court proceedings often follow the procedure in courts of justices of the peace.<sup>57</sup>

When justices of the peace act as police judges, which is often the case,<sup>58</sup> the proceedings applicable to the latter office must be followed;<sup>59</sup> however, the use of the title "J. P." is a mere irregularity.<sup>60</sup>

### § 1058. Pleading the defense.

Ordinances are presumed to be valid and reasonable, and when one seeks to avoid their provisions on the ground they are unreasonable the particular facts which render them unreasonable should be pleaded.<sup>61</sup>

### § 1059. Summary trial—origin.<sup>62</sup>

<sup>56</sup> *People v. Bell*, 148 N. Y. S. 753.

<sup>57</sup> *Ah Poo v. Stevenson*, 83 Or. 340, 163 Pac. 822.

<sup>58</sup> Section 1032, ante.

<sup>59</sup> *State ex rel. v. Justice Court*, 45 Mont. 375, 123 Pac. 405.

<sup>60</sup> *Grant v. Williams*, 54 Mont. 246, 169 Pac. 286.

<sup>61</sup> *State ex rel. v. Mo. Pac. Ry. Co.*, 262 Mo. 720, 735, 174 S. W. 73, citing Section 1058, vol. 3, ante (*McQuillin, Mun. Ord.*, Section 327).

<sup>62</sup> *Ah Poo v. Stevenson*, 83 Oregon 340, 347, 163 Pac. 822, 824, citing Sections 1059, 1060, vol. 3,

ante; *Re Simmons*, 5 Okla. Cr. App. 399, 115 Pac. 380.

Summary jurisdiction, e. g., forbidding exposure for sale of any article in public park or parkway, except by virtue of permit. *People v. Parelli*, 158 N. Y. S. 644, 93 Misc. Rep. 692.

Provision that the municipal judges shall dispose of ordinance violations in a "summary manner," obviously means without a jury. *St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777.

A municipality cannot confer upon police judges jurisdiction summarily to hear and determine

### § 1061. Constitutional right of trial by jury does not apply to municipal offenses.

It is competent, therefore, for the legislature to establish a tribunal for the trial of such offenses, without providing for jury trial. The declaration of the constitution that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate" does not apply.<sup>63</sup>

### § 1062. When jury trial is allowed.

Where imprisonment may be inflicted as a punishment in Ohio the accused is entitled to a jury trial, "regardless of whether the sentence imposes a term of imprisonment or not."<sup>64</sup>

### § 1063. Same—crimes—criminal prosecution.<sup>65</sup>

### § 1065. Same—misdemeanor.

The violation of an ordinance is usually not viewed as a misdemeanor unless its violation is expressly declared to be such.<sup>66</sup>

acts denominated by the general laws of the state "indictable misdemeanors" by the enactment of an ordinance prohibiting such acts and prescribing a punishment therefor. *State v. Fredrick*, 28 Idaho 709, 155 Pac. 977.

<sup>63</sup> *King City v. Duncan*, 238 Mo. 513, 519, 142 S. W. 246.

Constitutional guaranty of trial by jury does not extend to trial for petty offenses under the ordinances of a city. *St. Paul v. Robinson*, 129 Minn. 383, 152 N. W. 777.

<sup>64</sup> *Fremont v. Keating*, 96 Ohio St. 468, 471, 118 N. E. 114; *Simmons v. State*, 75 Ohio 346, 350, 351, 79 N. C. 555.

<sup>65</sup> Municipal offenses are not

"crimes" within the purview of the Georgia constitutional provision concerning the venue of suits. *Moore v. Winder*, 10 Ga. App. 384, 73 S. E. 529, 531; *Loeb v. Jennings*, 133 Ga. 796, 67 S. W. 101; *Pearson v. Wimbish*, 124 Ga. 701, 52 S. E. 751.

Under the constitution of Minnesota, it seems, the violation of an ordinance is a "crime," relating to the penalty of fine or imprisonment. *State ex rel. v. McDonald*, 121 Minn. 207, 141 N. W. 110, 121 Minn. 525, 141 N. W. 112.

<sup>66</sup> *People v. Lookstein*, 139 N. Y. S. 689, 78 Misc. Rep. 306; *Milwaukee v. Beatty*, 149 Wis. 349, 135 N. W. 873.



**§ 1067. Application for jury—conditions—selecting.**

It is ground for a new trial, it has been held, that a policeman who instituted the proceeding by swearing out the warrant participated in making up the jury list and drawing the jury.<sup>67</sup>

**§ 1068. Method of conducting jury trial.<sup>68</sup>****§ 1069. Technical rules of procedure disregarded—practice.<sup>69</sup>**

<sup>67</sup> "The court will always presume that an officer undertaking to enforce the criminal law acts from a sense of official duty and without personal motive; but the natural bias of one who institutes a prosecution is generally so considerable that it is not fair that he should participate in the selection of the jury." *Abbeville v. Gooseby*, 93 S. C. 370, 76 S. E. 977.

<sup>68</sup> **Instructions.** Mayor as judge may instruct the jury properly. *Spartanburg v. Willis*, 103 S. C. 331, 88 S. E. 16.

Municipal court judges may instruct jury. *Chicago v. Doe*, 195 Ill. App. 582.

Where the ordinance violation is also an offense under the public law of the state "a reasonable doubt" instruction should be given. *Grant City v. Simmons*, 167 Mo. App. 183, 151 S. W. 187; *Stanberry v. O'Neal*, 166 Mo. App. 709, 150 S. W. 1104.

Where the violation is punishable by imprisonment or hard labor, the same rule applies. *Glenn v. Prattville*, 12 Ala. App. 609, 67 So. 622, following *White v. Anniston*, 161 Ala. 662, 49 So. 1030; *Barron v. Anniston*, 157 Ala. 399, 48 So. 58.

Instruction as to preponderance of evidence on charge of disturbance of the peace where defendant claimed that he attempted to separate persons fighting. *Centralia v. Knash*, 183 Ill. App. 588.

Provisions of the ordinance involved may be given in oral charge to jury. *Chicago v. Doe*, 195 Ill. App. 582.

Request for instruction not supported by evidence should be refused. *Spartanburg v. Willis*, 103 S. C. 331, 88 S. E. 16.

<sup>69</sup> *Bell v. Jonesboro*, 3 Ala. App. 652, 57 So. 138; *Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853; *Chicago v. Doe*, 195 Ill. App. 582.

Discretion as to refusing or granting continuance is with police judge or magistrate. *McConnell v. Bonneville*, 123 Ark. 561, 186 S. W. 82; *Terry v. Greensboro*, 19 Ga. App. 470, 91 S. E. 879; *Poplar Bluff v. Meadows*, 187 Mo. App. 450, 173 S. E. 11.

Where the municipal court had jurisdiction of the subject matter and the parties it is immaterial that the arrest was without warrant, that the complaint was filed after the arrest, that the name of the accused was not properly signed to waiver of jury trial, and

### § 1070. Costs.

Costs may be taxed only by authority of statute.<sup>70</sup>

In actions by a municipality for violations of ordinances the general rule is the defendant's costs cannot, in the absence of law authorizing it, be taxed against the municipality.<sup>71</sup>

In Utah it is held that prosecutions conducted in the name of the municipality for violations of its ordinances are in their nature criminal and not civil actions, and that a different rule obtains in the taxation of costs in criminal and civil actions in which the municipality is a party. Hence a defendant acquitted of violating an ordinance

that the judgment recital was erroneous, in using "his" for "her," and the direction is to confine "him her." *Chicago v. Smith*, 159 Ill. App. 73.

On appeal the exercise of jurisdiction by inferior courts is not scrutinized with the same care as costs of general jurisdiction.

"It is not consistent with the administration of justice or reasonable that the proceedings of a court of such limited jurisdiction as the municipal court should be scrutinized with the same technicality as to the defendants as are those courts of general jurisdiction with power to sentence the defendant to imprisonment in the penitentiary for a long term." *Ah Poo v. Stevenson*, 83 Or. 340, 163 Pac. 822, 824, citing Sections 1059, 1060, vol. 3, ante.

"The mayor when trying a case in the municipal court is the exclusive judge of the credibility of witnesses." *Harvey v. Carrolton*, 18 Ga. App. 54, 88 S. E. 798; *Hooks v. Wrightville*, 16 Ga. App.

456, 85 S. E. 613; *Bledsoe v. Jackson*, 16 Ga. App. 479, 85 S. E. 676; *Berry v. Jackson*, 16 Ga. App. 479, 85 S. E. 683.

After the overruling of a motion for a charge of venue participation in the trial is a waiver of all errors of the court in passing on such motion. *Chicago v. Simonetti*, 203 Ill. App. 279; *Chicago v. Baller*, 203 Ill. App. 281.

<sup>70</sup> *Greenfield v. Farmer*, 195 Mo. App. 209, 211, 190 S. W. 406, quoting with approval paragraphs one and two of Section 1070, vol. 3, ante.

Sentence to "stand committed to the county farm until all costs are paid," held not authorized by law. *Webb v. Vicksburg*, 112 Miss. 53, 72 So. 852.

Cost of prohibition against justice of peace forbidding him from acting as police judge to try violation of an ordinance may be taxed against justice. *State ex rel. v. Justice Court*, 45 Mont. 375, 123 Pac. 405.

<sup>71</sup> Section 1070, vol. 3, ante.

is not entitled to judgment for costs against the municipality.<sup>72</sup>

Some municipal corporations, under ample charter power; fix by ordinance fees of officers in prosecutions for violations of ordinances which may be taxed and collected as costs in the case.<sup>73</sup>

#### V. EVIDENCE FOR THE CORPORATION.

### § 1071. Proof of ordinance.

As a condition precedent to judgment for the penalty exacted, of course, existence of the ordinance must appear.<sup>74</sup>

<sup>72</sup> *Nephi City v. Forrest*, 41 Utah 433, 126 Pac. 332, following *Salt Lake City v. Robinson*, 39 Utah 260, 116 Pac. 442, 35 L. R. A. (N. S.) 610.

Cannot tax costs against municipality in unsuccessful prosecution under ordinances. *Greenfield v. Farmer*, 195 Mo. App. 209, 190 S. W. 406.

<sup>73</sup> *Carterville v. Cardwell*, 152 Mo. App. 32, 38, 132 S. W. 745; *Kemp v. Monett*, 95 Mo. App. 462, 457, 69 S. W. 31; *Warrensburg v. Simpson*, 22 Mo. App. 695, 700.

<sup>74</sup> Ordinance must be proved in manner prescribed. *People v. Cronin*, 154 N. Y. S. 446, 91 Misc. Rep. 342.

Conviction, held unauthorized without proof of ordinance, as judicial notice thereof cannot be taken. *People v. Traina*, 155 N. Y. S. 1015, 92 Misc. Rep. 82.

"The crime, if one was committed, being purely a statutory one, it was incumbent on the people to show that a legal ordinance had been duly adopted and that all the requirements pertaining to

the enactment of village ordinances had been fully complied with." *People v. Chapman*, 152 N. Y. S. 204, 88 Misc. Rep. 469, charge of violating a speed ordinance.

The ordinance must be proved as courts will not take judicial notice of ordinances. *Bivins v. Montgomery*, 13 Ala. App. 641, 69 So. 224; *Furham v. Huntsville*, 54 Ala. 263; *Case v. Mobile*, 30 Ala. 538.

Ordinance must contain a penalty and show it made it unlawful to do business of the kind involved without a license. *Bivins v. Montgomery*, 13 Ala. App. 641, 69 So. 224.

Proof of power to pass a sanitary ordinance. *Hammond v. Baddeau*, 134 La. 871, 64 So. 803.

Estopped from denying existence of ordinance, when accused sets it forth as an exhibit to petition for certiorari. *Berry v. Milledgeville*, 17 Ga. App. 326, 86 S. E. 744, following *Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354, 5 Ann. Cas. 614.

Laws require designated courts to take judicial notice of ordinances.<sup>75</sup>

Usually local courts will take cognizance of ordinances in force within their respective jurisdictions.<sup>76</sup>

Proof of the ordinance, when required, should be made in the manner prescribed,<sup>77</sup> as set out in earlier chapters.<sup>78</sup> Proof that the ordinance was passed, approved and published prior to the offense is sufficient; it is not necessary to prove that it remained in effect for this presumption follows until the contrary is established by evidence, either direct or presumptive.<sup>79</sup>

### § 1072. Proof of offense.<sup>80</sup>

All the elements necessary to constitute the offense, of course, must be established by competent evidence;<sup>81</sup>

<sup>75</sup> Chicago v. Doe, 195 Ill. App. 582.

<sup>76</sup> In Georgia it is not necessary on a trial before the mayor or council of a city to introduce the town ordinance under which the accused is being tried, because judicial notice thereof will be taken. McDonald v. Ludowici, 17 Ga. App. 523, 87 S. E. 807.

Court of local jurisdiction may take cognizance of local ordinances in operation within the jurisdiction of the court. "This exception appears to be made in several jurisdictions upon the ground that such ordinances are the peculiar law of the particular forum, and for that reason a departure from the general rule requiring proof of such ordinances is justified." People v. Cronin, 154 N. Y. S. 446, 91 Misc. Rep. 342, citing Ex parte Davis, 115 Cal. 445, 447, 47 Pac. 258; Downing v. Miltonvale, 36 Kan. 740, 14 Pac. 281; Re Oliver, 21 S. C. 318, 323, 53 Am. Rep. 681. But the rule in New York State is otherwise. People

v. Traina, 155 N. Y. S. 1015, 92 Misc. Rep. 82, following People v. Cronin, supra.

<sup>77</sup> Proof of passage and publication, held sufficient. Bell v. Jonesboro, 3 Ala. App. 652, 57 So. 138.

Printed ordinance of a city purporting to be collated and published by authority are competent evidence that such ordinances have been duly passed. Poplar Bluff v. Meadows, 187 Mo. App. 450, 460, 172 S. W. 11.

<sup>78</sup> Chapter 23, vol. 2, ante; Chapter 23, ante.

<sup>79</sup> Lane v. Tuscaloosa, 12 Ala. App. 599, 67 So. 778.

<sup>80</sup> Proof of venue. Beatty v. Atlanta, 15 Ga. App. 515, 83 S. E. 885.

Time of commission. Feagin v. Andalusia, 12 Ala. App. 611, 67 So. 630.

Violation of a valid ordinance must be shown. State v. Prevo (N. C. 1919), 101 S. E. 370.

<sup>81</sup> St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

Failure to prove the offense will

and the evidence must conform to the allegations of the statement, information or complaint, for a clear cut variance obviously will preclude conviction, or recovery under the ordinance.<sup>82</sup>

Proof of the violation by a preponderance of the evidence, either direct or circumstantial, is sufficient.<sup>83</sup>

However, it is sometimes expressed that the violation must be proved by a clear preponderance of the evidence; a mere preponderance is not enough.<sup>84</sup>

But in a prosecution for an offense *malum in se*,<sup>85</sup> or where the ordinance violation is also an offense under a statute,<sup>86</sup> or where the violation is punishable by imprisonment or hard labor,<sup>87</sup> guilt must be established beyond a reasonable doubt, substantially the same as in a state prosecution for a crime or misdemeanor.<sup>88</sup>

result in reversal on appeal. *Chicago v. Murnell*, 159 Ill. App. 415.

In an action to recover the penalty provided for in a health ordinance, it was said: "The payment of a material forfeit may be imposed for failure or neglect to comply with its requirements. Its provisions, therefore, are to be strictly construed, and in an action to recover a forfeiture under it full and definite proof is required of all facts and proceedings necessary to show a case within its terms." *Saco v. Jordan*, 115 Me. 278, 98 Atl. 808; *Eveleth v. Gill*, 97 Me. 315, 54 Atl. 756.

Admissions by the attorney for defendant not in the nature of violations of the ordinance does not relieve the municipality from proving the charge, nor will it estop reliance on the defense of a fatal variance between the charge and the proof. *Neck City v. Griffith*, 184 Mo. App. 328, 333, 334, 168 S. W. 1137.

Ordinance against keeping liquor

for the purpose of unlawful sale the purpose of keeping is the chief ingredient of the offense. *Andrews v. Atlanta*, 15 Ga. App. 421, 83 S. E. 436.

<sup>82</sup> *Neck City v. Griffith*, 184 Mo. App. 328, 333, 168 S. W. 1137; *St. Louis v. Klausmeier*, 212 Mo. 724, 111 S. W. 507.

<sup>83</sup> *Portland v. Western Union Tel. Co.*, 75 Or. 37, 146 Pac. 148.

Circumstantial evidence. *Andrews v. Atlanta*, 15 Ga. App. 421, 83 S. E. 436; *Hanjaras v. Atlanta*, 6 Ga. App. 575, 65 S. E. 356.

<sup>84</sup> *Chicago v. Barrett Mfg. Co.*, 192 Ill. App. 460.

<sup>85</sup> *Stansberry v. O'Neal*, 166 Mo. App. 709, 713, 150 S. W. 1104.

<sup>86</sup> *Grant City v. Simmons*, 167 Mo. App. 183, 151 S. W. 187, following *King City v. Duncan*, 238 Mo. 513, 142 S. W. 246.

<sup>87</sup> *Glenn v. Prattville*, 12 Ala. App. 609, 67 So. 622.

<sup>88</sup> Keeping liquor for unlawful sale, the unlawful purpose of keeping must appear beyond a rea-

Without express authority the general rules of evidence or procedure cannot be changed by ordinance by a municipal corporation.<sup>89</sup>

### § 1073. Same—illustrative cases.<sup>90</sup>

*Violating ordinance regulating hack stands.* Testimony "that defendants were in their hacks at places not

sonable doubt. *Andrews v. Atlanta*, 15 Ga. App. 421, 83 S. E. 436; *Chester v. Atlanta*, 7 Ga. App. 597, 67 S. E. 688.

<sup>89</sup> *Cohen v. St. Louis Merchants Bridge Terminal Ry. Co.*, 193 Mo. App. 69, 75, 181 S. W. 1080, citing § 1072, vol. 3, ante.

Provision that certain acts shall be deemed "sufficient" evidence of fact which constitutes violation of the ordinance is void. *Noe v. Morristown*, 128 Tenn. 350, 161 S. W. 485.

Instead of "sufficient," "prima facie evidence" would have been good. *Noe v. Morristown*, 128 Tenn. 350, 161 S. W. 485, 488, following *Brinkley v. State*, 125 Tenn. 371, 384, 385, 143 S. W. 1120.

<sup>90</sup> **Breach of peace.** Refusal of passenger to have ticket punched under erroneous belief, etc., is not proof of. *Chicago v. Moser*, 203 Ill. App. 259.

Disturbance of the peace. *Centralia v. Knash*, 183 Ill. App. 588.

Breach of peace, failure to prove. *Chicago v. Geraghty*, 189 Ill. App. 90.

Breach of peace by socialist organizer. *State v. Broms*, 139 Minn. 402, 166 N. W. 770.

**Selling or keeping intoxicating liquor.** *Lane v. Tuscaloosa*, 12 Ala. App. 599, 67 So. 778.

Sale of alcohol. Proof by witness that he knew the liquor to be alcohol from its smell and taste allowed. Although diluted, sale constitutes a violation. *Feagin v. Andalusia*, 12 Ala. App. 611, 67 So. 630.

Closing of saloon, etc., between the hours of one o'clock and five o'clock A. M. *Chicago v. Tearney*, 187 Ill. App. 441.

Under ordinance prohibiting carrying on business of retail liquor dealer without a license, evidence proof of a single sale is not proof of violation. *Buckhalt v. Enterprise*, 4 Ala. App. 293, 59 So. 226.

However, offense of "keeping of whisky and intoxicating liquors on hand for sale," is proved by testimony of one sale. *Jefferson v. Pery*, 18 Ga. App. 689, 90 S. E. 365; *Seabrooks v. Macon*, 17 Ga. App. 348, 86 S. E. 781.

Court will take judicial notice that "gin" is intoxicating liquor. The fact that the word "bolo" is prefixed to the word "gin" will be taken to indicate particular variety of gin and not something other than gin. *Norris v. Thomson*, 15 Ga. App. 511, 83 S. E. 866.

**Failure to display a rate card** by one licensed to operate an automobile for hire; evidence that

designated as public hack stands," does not tend to show

defendant was not engaged in the business covered by the license is admissible. *Chicago v. Gall*, 195 Ill. App. 41.

**Disorderly house, keeping.** *Chicago v. Doe*, 195 Ill. App. 582.

**"Matters and things detrimental to health;"** must be proof that vapors and fumes of which complaint was made were observable beyond defendant's plant, and that they were deleterious to health. *Chicago v. Barrett Mfg. Co.*, 192 Ill. App. 460.

**Smoke ordinance violation.** Proof of a negative allegation peculiarly within the knowledge of defendant need not be made by the city, e. g., that defendant was not cleaning the fire box or building a fire therein when dense smoke was emitted. *Chicago v. Dunham Touring & Wrecking Company*, 161 Ill. App. 307.

Proof of discharge of dense smoke by statement of smoke inspector and introduction of photograph. *Ibid.*

**Vagrant.** Possession of money or property may be declared by the ordinance as a rule of evidence as not a visible means of gaining a living, as jury may weigh it according to circumstances, among other, the manner in which the money or property was obtained. *Greenville v. Ward*, 94 S. C. 321, 77 S. E. 1021.

**Distributing, etc., handbills, circulars, cards or other advertising matter on streets, etc., held not proved by furnishing circulars to another for distribution, under particular ordinance.** *People v. Look-*

*stein*, 139 N. Y. S. 680, 78 Misc. Rep. 306.

Under an ordinance making it unlawful to "throw, cast or distribute," the act of distribution is separate from the act of casting or throwing, and proof of enclosing circulars in newspapers sold on the streets, is proof of violation. *People v. Horwitz*, 140 N. Y. S. 437, 27 N. Y. Cr. 237.

**Allowing minor to frequent pool or billiard rooms kept "for hire."** Proof that room was kept for hire may be by circumstances. *Beatty v. Atlanta*, 15 Ga. App. 515, 83 S. E. 885.

**Uttering indecent words and making obscene gestures.** *Chicago v. Wright*, 195 Ill. App. 578.

**Resisting an officer.** *Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675.

**Keeping a "dive."** *Smith v. Atlanta*, 22 Ga. App. 45, 95 S. E. 470.

**Sale of cocaine to habitual user; not essential to prove that ordinance was knowingly and wilfully violated, as scienter is not an element, etc.** *Chicago v. Truax Greene & Co.*, 192 Ill. App. 524.

**Gambling, playing poker.** *Everett v. Simmons*, 86 Wash. 276, 150 Pac. 414.

Gaming, gambling and setting up gambling device. *Moberly v. Deskin*, 169 Mo. App. 672, 676, 155 S. W. 842.

**Forbidding any woman of disreputable character from loitering about the streets and stores, who cannot prove that she is on unavoidable business, held violation**

that they were standing with their hacks at a place which had not been designated as a public stand for hacks.<sup>91</sup>

not proved where defendant was on the streets attending to lawful business. *Neal v. Dublin*, 20 Ga. App. 263, 92 S. E. 1021.

**Stock of non-resident running at large** within city limits; proof that he knew his stock was so running at large and after such knowledge he allowed them so to run is sufficient to show violation of ordinance. *De Queen v. Fenton*, 100 Ark. 504, 140 S. W. 716, 718, following *Tutt v. Greenville*, 142 Ky. 536, 134 S. W. 890.

**Placing metal roofing on wooden building** within fire limits, held to be a violation of an ordinance forbidding substantial repairs, etc., unless of material specified. *State v. Lawing*, 164 N. C. 492, 80 S. E. 69.

**Speed limit**, violation by driver of automobile. *People v. Lloyd*, 178 Ill. App. 66.

Burden of proving **water closets to be nuisance** is on city; that is, the existence of offensive condition which makes life uncomfortable. *Chicago v. Atwood*, 269 Ill. 624, 110 N. E. 127.

**Auctioneer** violating ordinance as to **hours of conducting public auction sales**, etc., must prove defendant was an auctioneer. *People v. Meisner*, 178 Mich. 115, 144 N. W. 490.

**Erection of building within fire limits** forbidden by ordinance unless the outer wall were of brick, stone or concrete and disallowing repairs on existing buildings not so constructed as prescribed offense is proved by showing the

construction of a metal roof on a wooden building even though the building was thus rendered less dangerous. *State v. Lawing*, 164 N. C. 492, 80 S. E. 69.

Ordinance requiring handrails on stairways is proved violated by proving the handrail in question did not extend over the last three steps at the bottom of the stairway. *De Wolf v. Marshall Field & Co.*, 201 Ill. App. 542, 548.

**Alterations in buildings** made not in accordance with plans filed. *New York Tenement House Department v. Whitelaw*, 157 N. Y. S. 277, 93 Misc. Rep. 513.

**Plumbing regulations**. Proof of violation of particular plumbing regulations. *New York v. Alheidt*, 167 N. Y. S. 1045, 180 App. Div. 434.

Forbidding the use of a building in a town for the **keeping of stallions or jacks** for breeding purposes, where such use would disturb the peace, etc., of the surrounding neighborhood, etc. Proof that stallions were kept for breeding purposes in such a way and at such place in the town as to scandalize the immediate neighborhood, is sufficient proof of violation. *McNulty v. Miller*, 167 Mo. App. 134, 151 S. W. 208, distinguishing *Ex parte Robinson*, 30 Tex. App. 493, 17 S. W. 1057.

<sup>91</sup> *Morristown v. Murphy*, 82 N. J. L. 48, 81 Atl. 498.

Public hacks awaiting employment standing at any other place than at public hack stands. *Peo-*



Violation of an ordinance forbidding the *sale of toy pistols* in which powder can be exploded is not proved by showing a sale of a toy pistol for shooting paper caps composed of mercury, nitoglycerine and glass; and that no powder of any kind could be exploded in the pistol.<sup>92</sup>

*Using transfer of street car issued to another.* The payment of fare with such transfer constitutes a "use" within the meaning of an ordinance forbidding "use" of transfer by person to whom transfer was not directly issued.<sup>93</sup>

*Turning out chickens and ducks and guarding them while out* is not proof of violation of an ordinance making it unlawful for fowl to run at large within the city limits.<sup>94</sup>

#### § 1074. Proving the intent.<sup>95</sup>

#### § 1075. Liability of participants, keepers, subordinates, servants, etc.<sup>96</sup>

Under an ordinance providing that no person or corporation "owning or operating" a rendering plant shall so operate it as to create a nuisance, it was held that both the owner and operator were liable.<sup>97</sup>

ple v. May, 164 N. Y. S. 717, 98 Misc. Rep. 561.

**Vehicle willfully obstructing traffic.** People v. Zecolla, 157 N. Y. S. 373, 92 Misc. Rep. 625.

<sup>92</sup> Rome v. Foot, 162 N. Y. S. 781, 175 App. Div. 459.

<sup>93</sup> St. Paul v. Robinson, 129 Minn. 383, 152 N. W. 777.

<sup>94</sup> Merrill v. Van Buren, 125 Ark. 248, 188 S. W. 537.

<sup>95</sup> **Sale of cocaine to habitual user;** not essential to prove that the sale was knowingly and willfully made in violation of the ordinance. Chicago v. Truax Greene & Co., 192 Ill. App. 524.

<sup>96</sup> **Gambling, participant, keeper.** Everett v. Simmons, 86 Wash. 276, 150 Pac. 414.

Agent of foreign company conducting business without license. Carterville v. Gibson, 259 Md. 499, 168 S. W. 673.

Failure to install a gate on a passenger elevator in an apartment house. Held, where defendant by deed of trust transferred the legal title to a trustee, and he was merely the life beneficiary of the rents and profits of the premises in which the elevator car is situated, and the power of control of the premises was in the trustee, he is not liable. New York v. Norwood, 145 N. Y. S. 225, 83 Misc. Rep. 428.

<sup>97</sup> State v. Wooley, 88 Conn. 715, 92 Atl. 662.

Where an offense can be committed only by a specified class, e. g., licensed auctioneers, aiders and abettors cannot be charged as principals if they are outside the ordinance or statute designation.<sup>98</sup>

Violation of an ordinance forbidding the distribution of advertising matter on streets, public places, etc., not being a misdemeanor in the absence of a declaration to that effect, therefore the conviction of the accused as aiding and abetting in the violation of the ordinance was declared unlawful.<sup>99</sup>

Under an ordinance requiring a permit to construct a sidewalk, it was held in the particular case that the ordinance would not be so construed as to impose the penalty on a contractor for building the sidewalk for the owner where neither had a permit.<sup>1</sup>

#### § 1076. Liability of principal for acts of employees, servants, etc.

In many instances agents may violate license laws where their employer has failed to procure a license. Servants in unlicensed retail liquor establishments are familiar examples. However, in such cases servants, clerks or employees are included in the law, either in

<sup>98</sup> *People v. Meisner*, 178 Mich. 288, 144 N. W. 490, relying on *Shannon v. People*, 5 Mich. 71, 87, saying "this must be so in the nature of things if there were no authorities to support it."

<sup>99</sup> "In view of the fact that the present ordinance does not declare its violation a misdemeanor, and of the further significant fact that whenever a violation of the law is declared a misdemeanor in the charter, it is expressly mentioned as a misdemeanor, the conclusion follows that a violation of Section 408, of the ordinance of the city is not a misdemeanor, and therefore the conviction of

defendant as aiding and abetting in the violation of the said ordinance is without authority in law." *People v. Lookstein*, 139 N. Y. S. 680, 78 Misc. Rep. 306.

<sup>1</sup> *Elmira v. Johnson*, 136 N. Y. S. 471, 151 App. Div. 728, saying "The owner under whose authority the defendant constructed the work is probably liable for the penalty for having proceeded without a permit. The rule applicable to joint tort-feasors, however, cannot apply to subject his employee to the same penalty. Statutes prescribing penalties must be strictly construed."

express terms or by implication. Some laws are so worded, or are so construed as to exclude such persons.<sup>2</sup>

Thus a manager or clerk, it was held, was not liable for carrying on the business without a license under an ordinance requiring a person, firm or corporation as a proprietor of an auction house to take out a license.<sup>3</sup>

And under an ordinance requiring a telephone company to pay an occupation tax the servants, agents or employees of the company were held not liable on a charge of conducting the business, as the business was not *per se* unlawful.<sup>4</sup>

### § 1078. Variance.<sup>5</sup>

#### VI. DEFENSES.

### § 1079. Defenses enumerated.

These defenses may be set up: That the ordinance alleged to have been violated is not in existence as it was never legally enacted, or has not been proved;<sup>6</sup> that the ordinance is void because in conflict or inconsistent with the state law;<sup>7</sup> that the prosecution is barred by limitation;<sup>8</sup> that the ordinance is unreasonable;<sup>9</sup> that

<sup>2</sup> Section 1076, vol. 3, ante.

<sup>3</sup> *Kansas City v. Keys*, 152 Mo. App. 507, 509, 133 S. W. 660.

<sup>4</sup> *Neck City v. Griffith*, 184 Mo. App. 328, 333, 168 S. W. 1137.

<sup>5</sup> A clear cut variance between the charge and the evidence, held fatal. *Neck City v. Griffith*, 184 Mo. App. 328, 333, 168 S. W. 1137, following *St. Louis v. Klausmeier*, 212 Mo. 724, 111 S. W. 507.

<sup>6</sup> *Tennent v. Seattle*, 83 Wash. 108, 145 Pac. 83; *Houston, E. & W. T. Ry. Co. v. Cavanaugh* (Tex. Civ. App.), 173 S. W. 619.

Where *prima facie* case as to existence and validity of ordinance is made, burden on defendant to

rebut and overcome, etc. *Lane v. Tuscaloosa*, 12 Ala. App. 599, 67 So. 778.

<sup>7</sup> *Ramsey v. Atlanta*, 15 Ga. App. 345, 83 S. E. 148, holding ordinance valid and not in conflict with statute.

<sup>8</sup> Although the statute makes no provision as to limitation in prosecution for violations of ordinances and the ordinances themselves make no limitation, the policy of the law is to follow the statute on the subject and by analogy bar such prosecutions. *Birmingham v. Brown*, 13 Ala. App. 654, 69 So. 263.

"Unless the charter or ordi-

the elements of the offense have not been proved, or that the violation is not shown by the evidence.<sup>10</sup>

**§ 1080. Corporate existence cannot be questioned as a defense.<sup>11</sup>**

**§ 1082. Former acquittal or punishment.<sup>12</sup>**

**§ 1083. Estoppel as a defense.<sup>13</sup>**

The doctrine of estoppel does not apply where a city official has exceeded his authority in issuing a permit in violation of an ordinance. Thus where a building commissioner issued a permit for the erection of a garage and withdrew it after the owner had done certain preliminary work, the city is not estopped from preventing the construction where the owner is not entitled to the permit

nance of the municipal corporation provide that offenses against municipality must be prosecuted within a given time no lapse of time after the commission of the act declared by ordinance to be unlawful will bar a prosecution therefor where it appears with reasonable certainty that the act was committed after passage of the ordinance making it unlawful. Where it does not appear from the record that the ordinance of the municipality fixes a period of limitation, it will be assumed that they contain no such limitation." *Starling v. Dublin*, 17 Ga. App. 336, 86 S. E. 744, following *Ramsey v. Atlanta*, 15 Ga. App. 345, 83 S. E. 148.

<sup>9</sup> Presumed reasonable and valid, etc. Burden on defendant to prove ordinance unreasonable on its face. *Delta v. Charlesworth* (Colo. 1918), 170 Pac. 965; *People*

*v. Oak Park*, 266 Ill. 365, 107 N. E. 636.

Nor uniform. *State v. Bass*, 171 N. C. 780, 87 S. E. 972.

<sup>10</sup> *Buchanan v. State* (Ind.), 113 N. E. 726.

See § 1079, vol. 3, ante.

<sup>11</sup> Proof of regularity of incorporation or legal existence, etc. denied. *People v. Ellis*, 253 Ill. 369, 375, 97 N. E. 697.

<sup>12</sup> Discharge because prosecution under the ordinance was barred by limitation, held no defense to prosecution under the statute for same act because defendant was never in jeopardy. *Birmingham v. Brown*, 13 Ala. App. 654, 69 So. 263.

Formal acquittal because ordinance was void is no defense. *Wiggs v. State*, 5 Ala. App. 189, 59 So. 516.

<sup>13</sup> See Section 797, vol. 2, ante; Section 797, ante.

because of failure to obtain frontage consent as the law expressly required.<sup>14</sup>

Acquiescence in the violation of an ordinance will not estop a city from its enforcement because it can be repealed only in like manner as in its enactment.<sup>15</sup>

### § 1085. Defenses—miscellaneous.

One accused of having violated an ordinance can not question the title of office of the judge or magistrate trying the case.<sup>16</sup>

So the right of a city solicitor who drew the accusation to hold his office cannot be raised by plea in abatement. The guilt of the accused, and not the right to the office is the issue.<sup>17</sup>

An instruction that the jury should find the violation of the ordinance involved by a clear preponderance of the evidence is proper. It is not required, that the evidence should establish the violation beyond a reasonable doubt; a clear preponderance of the evidence is sufficient.<sup>18</sup>

However, as mentioned, in some cases the violation must be found beyond a reasonable doubt.<sup>19</sup>

In a charge of violation of an ordinance regulating the use of stables, the fact that the stable had been so used by defendant, prior to, and after the adoption of the

<sup>14</sup> *Wise v. Chicago*, 183 Ill. App. 215, 220.

<sup>15</sup> *Bates v. Monticello*, 173 Ky. 244, 190 S. W. 1074.

<sup>16</sup> "Nothing is better settled than an accused has no standing for contesting the legality of the appointment of the judge before whose court he is brought for trial. Where the court itself has a legal existence the judge is such *de facto* if not *de jure*." *New Orleans v. Magiarisiana*, 139 La. 605, 71 So. 886.

Cannot invoke defense that the mayor who was hearing the case was disqualified because he failed to take the oath of office as required by law. *Sumrall v. Polk*, 118 Miss. 687, 79 So. 847.

<sup>17</sup> *Christopher v. State*, 21 Ga. App. 244, 94 S. E. 72; *Bush v. State*, 10 Ga. App. 544, 73 S. E. 697.

<sup>18</sup> *Chicago v. Rowe*, 187 Ill. App. 175.

<sup>19</sup> Section 1072, ante; Section 1072, vol. 3, ante.

ordinance and subsequent to the amendment thereof, is no defense.<sup>20</sup>

### § 1086. Defenses—illustrative cases.<sup>21</sup>

Under an ordinance making it unlawful for the owner of property to maintain an outdoor vault or privy not connected with a sewer, as a defense the defendant may prove that the property was vacant at the date of the charge and that the vault thereon was not in use.<sup>22</sup>

Under an ordinance forbidding the sale of morphine or cocaine to any person addicted to the use of such drugs without an order from a regularly registered physician it is no defense that the clerk who made the sale had previously dealt with the purchaser as a practicing physician and had no personal knowledge of his habits, where the ordinance does not require that violations thereof shall be knowingly and wilfully made. Such proof may be admitted to determine the amount of the fine but not in proof of the intent or the ignorance of the clerk making the sale.<sup>23</sup>

One charged with disturbing the peace, under an ordinance making it an essential element that the act or language must be "calculated to provoke a breach of the peace," is entitled to defend on the ground that the

<sup>20</sup> *Spokane v. Lemon*, 73 Wash. 248, 131 Pac. 853.

<sup>21</sup> Charge failure to abate a nuisance on a piece of ground; defense that defendant had dedicated the ground involved to the city as a street and the city had accepted the same. *Canton Co. v. State*, 126 Md. 352, 95 Atl. 58.

On charge of disturbance of peace, defense that accused attempted to separate persons fighting. *Centralia v. Knash*, 183 Ill. App. 588.

Keeping open saloon after pre-

scribed closing hour; defense that restaurant run in connection with saloon and not saloon was open. *Chicago v. Tearney*, 187 Ill. App. 441.

<sup>22</sup> *Gault v. Ft. Collins*, 57 Colo. 324, 142 Pac. 171, 173.

<sup>23</sup> "One engaged in a business brought under police regulation assumes the hazards thereof and must be held to strict conformity with the requirements of the law or ordinances governing it." *Chicago v. Truax Greene & Co.*, 192 Ill. App. 524, 526.

language used was not of that character, and an instruction requiring such finding is proper.<sup>24</sup>

#### VII. THE JUDGMENT, RECORD AND EXECUTION.

### § 1087. The verdict.<sup>25</sup>

In a trial *de novo* on appeal before the mayor and council composed of nine members, in the absence of legal provision to the contrary, a conviction is valid on a vote of five affirmative votes against four negative votes. The council was not sitting as a jury but as a court.<sup>26</sup>

On appeal, although the prosecution for violation of an ordinance is civil in nature, and the constitution authorizes a three fourths verdict in civil cases, it has been held that the verdict of conviction must be unanimous.<sup>27</sup>

The verdict need not designate the particular count of the complaint under which the defendant was found guilty.<sup>28</sup>

A verdict of a general conviction under a composite charge embracing two separate and distinct ordinances, one of which is void, is invalid.<sup>29</sup>

### § 1088. The judgment.

The nature of the sentence or judgment is governed

<sup>24</sup> *St. Louis v. Slupsky*, 254 Mo. 309, 317, 318, 162 S. W. 155, 10 L. R. A. (N. S.) 919.

<sup>25</sup> Instruction as to form of verdict, held bad. *Brocton v. Wiese*, 204 Ill. App. 556.

Verdict containing immaterial findings. *Maercker v. Milwaukee*, 151 Wis. 324, 139 N. W. 199.

<sup>26</sup> *Flannigan v. Rome*, 10 Ga. App. 217, 72 S. E. 1099, saying "There are many differences between a court and jury; but one cardinal and very important differ-

ence is that unless the law expressly provides to the contrary, a jury can render no finding except by unanimous consent of all of its members, while, unless the law expressly provides to the contrary, a court adjudges and acts according to a vote of the majority."

<sup>27</sup> *King City v. Duncan*, 238 Mo. 513, 522, 142 S. W. 246.

<sup>28</sup> *Chicago v. Tearney*, 187 Ill. App. 441.

<sup>29</sup> *Douglas v. Kestler*, 14 Ga. App. 612, 81 S. E. 803.

by the applicable local law. Laws authorize a sentence of committal until the fine imposed is paid.<sup>30</sup>

Laws permit punishment by fine or imprisonment,<sup>31</sup> or hard labor on the public streets.<sup>32</sup>

Where however, the verdict of the jury imposes a fine only, usually the court has no power to impose an additional penalty of hard labor.<sup>33</sup>

Sometimes revocation of a license may constitute a part of the penalty.<sup>34</sup>

In an action against several defendants a judgment against each defendant severally is bad. The judgment should be against such defendants as are found guilty.<sup>35</sup>

<sup>30</sup> *Anderson v. Shackelford* (Fla.), 76 So. 343; *Arkansas City v. Roberts*, 89 Kan. 680, 132 Pac. 152, relying on *Re McCort*, 52 Kan. 18, 34 Pac. 456, and distinguishing *Re Van Tuyl*, 71 Kan. 659, 81 Pac. 181.

<sup>31</sup> Under constitution of Minnesota the violation of an ordinance is a "crime" and judgment may be fine or imprisonment. Imprisonment is not limited to coerce the payment of a fine. *State ex rel. v. McDonald*, 121 Minn. 207, 141 N. W. 110; 121 Minn. 525, 141 N. W. 112.

<sup>32</sup> In Alabama on appeal punishment by fine or imprisonment, or hard labor on the streets of the city is authorized to be imposed upon conviction on a trial de novo. *Cooper v. Gadsden*, 10 Ala. App. 609, 65 So. 715; *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725.

Fixing a fine is not a necessary prerequisite to a valid judgment in conformity with the verdict of the jury. *Feagin v. Andalusia*, 12 Ala. App. 611, 67 So. 630.

May impose sentence upon the public works of the city, not ex-

ceeding the legal limit, without giving defendant the privilege of paying a fine. *Andrews v. Atlanta*, 15 Ga. App. 421, 83 S. E. 436; *Jones v. Atlanta*, 14 Ga. App. 540, 82 N. E. 607; *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376; *Jones v. Lanford*, 141 Ga. 646, 81 S. E. 885.

After conviction by jury, sentence was six months hard labor on public streets and a fine of \$100.00, held authorized under ordinance justifying both or either of such punishments at the discretion of the court trying the case. *Cochran v. Anniston* (Ala. App.), 68 So. 544.

<sup>33</sup> *Goldberger v. Mobile* (Ala. App. 1919), 82 So. 635; *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725.

<sup>34</sup> Private money lender found guilty of violating an ordinance prohibiting exacting usurious interest may be fined or imprisoned and have his license revoked in addition. *Columbia v. Phillips*, 101 N. C. 391, 85 S. E. 963.

<sup>35</sup> *Brocton v. Wiese*, 204 Ill. App. 556.



Where the charter authorizes the imposition of alternate sentences only, and an ordinance authorizes a cumulative sentence for any or all offenses, it was held that so much of the sentence imposed under the ordinance as would come within the charter grant of authority can be legally enforced.<sup>36</sup>

If the ordinance prescribes a greater penalty than authorized, under some laws it may be reduced to the limit prescribed by virtue of statute.<sup>37</sup>

The fact that the ordinance prescribes a less penalty than a statute in violation of the statute is not good ground of complaint in Arkansas.<sup>38</sup>

One defendant who operates five different amusement devices on Sunday in violation of an ordinance, may be convicted separately for each violation.<sup>39</sup>

Where the violation of an ordinance providing for fire escapes in tenement house is clearly proved, the court ought not to direct judgment for defendant where it appears that he had filed plans for the improvement of the building and it would be harsh and beyond the contemplation of the law to impose the penalty. Of course, it is within the power of the court to suspend the penalty because in a given case it may seem unfair and inequitable to enforce the law.<sup>40</sup>

The sentence or judgment must be certain.<sup>41</sup>

<sup>36</sup> *Reddick v. Milledgeville*, 14 Ga. App. 461, 81 S. E. 384.

<sup>37</sup> *Little Rock v. Reinman*, 107 Ark. 174, 155 S. W. 105.

<sup>38</sup> *Robinson v. Malvern*, 118 Ark. 423, 176 S. W. 675.

<sup>39</sup> *Fennan v. Atlantic City*, 88 N. J. L. 435, 97 Atl. 150, affirmed 90 N. J. L. 674, 101 Atl. 1054.

<sup>40</sup> *New York Tenement House Dept. v. Meyerson*, 155 N. Y. S. 352, 92 Misc. Rep. 213.

<sup>41</sup> Under an ordinance authorizing a sentence in the alternative of work on the public streets or a fine, a sentence reciting "fine

\$50.00 or 60 days at hard labor on," held sentence was sufficiently certain, although not dated, and although not stating where the work was to be done since the ordinance controlled. *Clark v. Trippe*, 10 Ga. App. 467, 73 S. E. 687.

Judgment recital erroneous in using "his" for "her," held not fatal. *Chicago v. Smith*, 459 Ill. App. 73.

Entry of judgment by constitution of Illinois must be in the English language. A judgment entered in an abbreviated form which is unintelligible is violative of the

### § 1089. Record of conviction.

The record should contain the essential elements of a judgment, and be certain.<sup>42</sup>

The record of conviction, it has been held in New Jersey, must set out sufficient evidence to show that the offense charged in the complaint was committed.<sup>43</sup>

Thus in a conviction under an ordinance forbidding the use of obscene or profane language in public places the record should set out the obscene or profane words for the use of which defendant was found guilty, and also the time and place when and where the same were used. "The failure to do this is fatal to the validity of the conviction."<sup>44</sup>

## VIII. REVIEW.

### § 1091. Right of review.

The right of review of ordinance cases, of course, is controlled exclusively by local legislation.<sup>45</sup>

constitutional requirement. *Stein v. Meyers*, 253 Ill. 199, 97 N. E. 295; *Chicago v. Mitchell*, 256 Ill. 236, 99 N. E. 892.

Expression of doubt of defendant's guilt under the evidence on the part of the trial judge, held could not be utilized to impeach the judgment. *Perry v. Jackson*, 16 Ga. App. 479, 85 S. E. 683.

Judgment of conviction cannot be attacked collaterally, e. g., that an alderman was not competent to preside as police judge in a suit in assumpsit to recover the value of services against the city by one who performed labor in pursuance of sentence of conviction. *Brunswick v. Sims*, 14 Ga. App. 315, 80 S. E. 730.

Judgment entry nunc pro tunc. *Stein v. Meyers*, 253 Ill. 199, 97 N. E. 295.

<sup>42</sup> Judgment that defendant

"stand committed to house of correction until fine and costs worked out, at 50 cents per day," was held sufficient. *Chicago v. Colemann*, 254 Ill. 338, 98 N. E. 521.

<sup>43</sup> *Morristown v. Murphy*, 82 N. J. L. 48, 81 Atl. 498, following *Salter v. Bayonne*, 59 N. J. L. 128, 36 Atl. 667; *Massinger v. Millville*, 63 N. J. L. 123, 43 Atl. 443, and *Elizabeth v. Central R. R. Co.*, 66 N. J. L. 568, 49 Atl. 682.

<sup>44</sup> *Peer v. Dixon*, 82 N. J. L. 366, 83 Atl. 180.

<sup>45</sup> *Purveyar v. State* (Ala. App.), 75 So. 704; *Birmingham v. Fort*, 12 Ala. App. 632, 67 So. 734; *Brighton v. Miles*, 153 Ala. 673, 45 So. 160.

The fact that state has an appeal by statute does not necessarily give same right to municipalities. *Oklahoma City v. Tucker*, 11 Okl. Cr. 266, 145 Pac. 757.

The right of review in some appropriate form in a specified court or tribunal is usually prescribed, and is open to either party.<sup>46</sup>

## § 1092. Review by appeal.

Appeals from judgments in cases involving the violation of ordinances are generally permitted to either party.<sup>47</sup>

<sup>46</sup> After final judgment by appeal or writ of error. *Versailles v. Ross* (Mo. 1919), 208 S.W. 454.

Reasonableness of determination of officer as to whether further fire protection is required, held open to review by the courts. *People v. Kaye*, 212 N. Y. 407, 106 N. E. 122, affirming 146 N. Y. S. 398, 160 App. Div. 644.

Reviewable by certiorari on an application court specified may order all proceedings had to be certified to that court, and review the judgment, etc. *Patterson Board of Health v. Cohen*, 88 N. J. L. 369, 95 Atl. 609.

Cases appealable to Supreme Court on ground of constitutionality or legality of penalty imposed; jurisdiction extends only to the constitutionality or legality of the ordinance, and not to questions of guilt or innocence, or the regularity or legality of the proceedings in the trial court. *Hammond v. Badeau*, 137 La. 828, 69 So. 202.

Where one had lost his remedy by appeal he was permitted to invoke the supervisory power of the State Supreme Court to prevent the execution of an illegal sentence. *Abita Springs v. Pons* (La. 1919), 83 So. 216.

Petition for writ of review should set forth the specific er-

rors claimed to have been committed. *Ah Poo v. Stevenson*, 83 Or. 340, 163 Pac. 822.

<sup>47</sup> Alabama. *Bell v. Jonesboro*, 3 Ala. App. 652, 57 So. 138; *Birmingham v. Baranco*, 4 Ala. App. 279, 58 So. 944; *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574; *Puryear v. State* (Ala. App.), 75 So. 704.

Georgia. *Flannigan v. Rowe*, 10 Ga. App. 217, 72 S. E. 1099.

Idaho. *State v. Hosford*, 27 Idaho 185, 147 Pac. 286.

Kansas. *Arkansas City v. Roberts*, 89 Kan. 680, 132 Pac. 152.

Kentucky. *Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853; *Keiper v. Louisville*, 152 Ky. 691, 154 S. W. 18.

Louisiana. *Kentwood v. Fendla-son* (La.), 77 So. 785.

Michigan. *Crary v. Marquette Circuit Judge*, 197 Mich. 452, 163 N. W. 905, 166 N. W. 954.

Mississippi. *Thomas v. State*, 101 Miss. 74, 57 So. 364.

Oklahoma. *Oklahoma City v. Tucker*, 11 Okl. Cr. 266, 145 Pac. 757; *Abbott v. McAlester*, 6 Okl. Cr. 587, 120 Pac. 668.

Texas. *Taylor County v. Jarvis* (Tex. Com. App. 1919), 209 S. W. 405.

Utah. *Salt Lake City v. Larsen*, 47 Utah 1, 151 Pac. 353.

This right may be guaranteed by the constitution.<sup>48</sup> In the absence of constitutional limitation to the contrary it is competent for the legislature to establish the tribunal for the trial of violation of municipal ordinances, to allow or to deny an appeal from the judgment of such tribunal; and, having the power to allow an appeal, it also has the power to prescribe the procedure in the appellate court.<sup>49</sup>

### § 1093. Same—time and method of taking.

The time and method of taking and perfecting appeals in ordinance cases, being controlled exclusively by the applicable local laws, must be observed in substance as prescribed; <sup>50</sup> e. g., as to the form, nature, amount and approval of the bond; notice when required; bill of exceptions, if necessary; record or transcript, time of filing in the appellate court or tribunal, etc.<sup>51</sup>

Wisconsin. *Milwaukee v. Beatty*, 149 Wis. 349, 135 N. W. 873.

Wyoming. *Sheridan v. Cadle*, 24 Wyo. 293, 157 Pac. 892.

Allowed; court to which may be taken named. *Ragsdale v. Danville* 116 W. Va. 484, 82 S. E. 77; *Roney v. Florala*, 10 Ala. App. 370, 65 So. 91; *Board of Health v. Court of Common Pleas*, 83 N. J. L. 392, 85 Atl. 217; *Taylor County v. Jarvis* (Tex. Cr.) 209 S. W. 405; *Hickman v. State*, 79 Tex. Cr. 125, 183 S. W. 1190.

In Pennsylvania an appeal to Court of Quarter Sessions (but not to Court of Common Pleas) lies from summary conviction under a borough ordinance. *Mechanicsburg Borough v. Gray*, 61 Pa. Super Ct. 95.

<sup>48</sup> *Hammond v. Badeau*, 137 La. 58, 68 So. 213.

<sup>49</sup> *King City v. Duncan*, 238 Mo. 513, 520, 142 S. W. 246; *Tarkio v.*

*Loyd*, 109 Mo. App. 171, 82 S. W. 1127; *Cassville v. Jimerson*, 75 Mo. App. 426, S. W.; *Golden City v. Hall*, 68 Mo. App. 627, Ex parte *Harker*, 49 Cal. 465; *Re Ferrier*, 103 Ill. 367, 43 Am. Rep. 10.

Controlled by legislation. *Board of Health v. Court of Common Pleas*, 83 N. J. L. 392, 85 Atl. 217.

<sup>50</sup> *Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294.

<sup>51</sup> Appeal bond; informalities and deficiencies, held not to work prejudice. *Sullivan v. Henry*, 204 Ill. App. 595.

Nature, amount, etc., of bond, approval, *Piedmont v. Lee*, 13 Ala. App. 567, 68 So. 574.

Transcript, time of filing in appellate court. *Kentwood v. Fend-lason* (La.), 77 So. 785.

Sufficiency of bill of exceptions. *Chicago v. Moser*, 203 Ill. App. 259.

As a proceeding for violation of an ordinance is a civil action ordinarily on appeal the rules of procedure applicable to such actions govern, including the rules of court relating to the serving and filing of abstracts and briefs.<sup>52</sup>

### § 1094. Same—trial de novo on appeal.<sup>53</sup>

After appeal the case stands for trial de novo as if no judgment had ever been rendered.<sup>54</sup>

It is reversible error, it has been held in West Virginia, to enter judgment in favor of plaintiff without proof, because the burden is on plaintiff to prove the case.<sup>55</sup>

Restrictions relating to appeals in ordinance cases often appear in the controlling local laws.<sup>56</sup>

<sup>52</sup>“We think it may be fairly deducible from all of the authorities that prosecutions for violations of municipal ordinances are civil cases, governed by the procedure applicable thereto, except in such cases as that the jealous regard of personal liberty demands the application of the strict rules adhered to in trials in criminal cases. We perceive of no reason for applying any of the rules of criminal procedure in case of an appeal here and hold that the appeal to this court in a case of this kind the appellant must comply with our rules, enacted in virtue of the statute and for his failure to serve and file his abstract and brief his appeal should be dismissed.” *Marble Hill v. Caldwell*, 189 Mo. App. 286, 287, 288, 176 S. W. 294.

See § 1034 ante.

<sup>53</sup>*Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725; *Feagin v. Andalusia*, 12 Ala. App. 611, 67 So. 630; *Cooper v. Gadsden*, 10

Ala. App. 609, 65 So. 715; *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603.

One appealing may dismiss appeal. *Hammond v. Badeau*, 137 La. 58, 68 So. 213.

**Judgment permitted.** *Thomas v. Mobile* (Ala. 1919), 82 So. 110.

On appeal held verdict of jury was controlling under particular law, and judge could not impose additional punishment. *Hannibal v. Mobile* (Ala. App. 1919), 80 So. 629; *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725.

<sup>54</sup>*Elkins v. Michael*, 65 W. Va. 503, 64 S. E. 619.

<sup>55</sup>*Pickenpaugh v. Keenan*, 63 W. Va. 304, 60 S. E. 137.

The rule ought to be more strict in a criminal or quasi criminal case like the one at bar, e. g. prosecution for violations of an ordinance, selling malt liquor. *Rowlesburg v. Zelano*, 74 W. Va. 142, 81 S. E. 732.

<sup>56</sup>Ordinance restricting right of appeal from mayor to the council,

Certain objections, e. g., to the sufficiency of the complaint,<sup>57</sup> the method of cross-examination,<sup>58</sup> not taking down the testimony as required by law, or not obtaining a written report of the testimony to which the accused is entitled,<sup>59</sup> it is sometimes held, cannot be raised the first time on appeal. The doctrine of waiver, however, should not be applied, without restriction, to the sufficiency of the complaint or information.<sup>60</sup>

The complaint may be amended on appeal.<sup>61</sup>

Statutes provide that in case of an appeal from the judgment of a police, city or other inferior court having jurisdiction to try complaints of violations of municipal ordinances to a court having criminal jurisdiction the defendant in a trial *de novo* in such appellate court is entitled to the presumption of innocence, and can be convicted only on proof of guilt beyond a reasonable doubt and upon the unanimous verdict of the jury, notwithstanding offenses of this character are regarded as civil in nature and in civil cases the constitution provides

and permitting affirmance or reversal of judgment only, sustained. *Hicks v. Hazlehurst*, 14 Ga. App. 813, 82 S. E. 354.

Consideration of record, rulings, etc., of trial judge or magistrate. *Combs v. Carrollton*, 17 Ga. App. 328, 86 S. E. 738; *Bell v. Jonesboro*, 3 Ala. App. 652, 57 So. 138.

<sup>57</sup> *Borok v. Birmingham*, 191 Ala. 75, 67 So. 389; *McKinstry v. Tuscaloosa*, 172 Ala. 344, 54 So. 629; *Birmingham v. O'Hearn*, 149 Ala. 307, 42 So. 836, 13 Ann. Cas. 131; *Aderhold v. Anniston*, 99 Ala. 521, 12 So. 472; *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725.

By going to trial without objection accused waives insufficiency of complaint. *Turner v. Lineville*, 2 Ala. App. 454, 56 So. 603. Also of affidavit. *Worthington v. Jasper*, 197 Ala. 589, 73 So. 116.

<sup>58</sup> Objection as to method of cross-examination (by policeman who instituted the prosecution) cannot be raised the first time on appeal. *Frazier v. Atlanta*, 14 Ga. App. 109, 80 S. E. 209.

<sup>59</sup> Failure to object that the testimony was not being taken down as required by law, held constituted a waiver. *Abbeville v. Gooseby*, 93 S. C. 370, 76 S. E. 977, distinguishing *Greenville v. Latimer*, 80 S. C. 92, 61 S. E. 224.

Waiver of written report of the testimony at the trial, estops accused from making a point of failure to furnish, on appeal in the circuit court. *Spartanburg v. Willis*, 103 S. C. 331, 88 S. E. 16.

<sup>60</sup> See § 1101, *post*.

<sup>61</sup> Section 1054, *ante*.

for three-fourths verdict in trial of civil cases in courts of record.<sup>62</sup>

And on appeal if the offense under the ordinance is also an offense under a statute proof of violation of the ordinance must be established beyond a reasonable doubt.<sup>63</sup>

### § 1095. Review by certiorari.

Judgments for violation of ordinances are reviewable by certiorari in a few states by virtue of statute,<sup>64</sup> or constitution.<sup>65</sup>

"Certiorari lies, not to correct that which is void, but only that which is irregular or erroneous."<sup>66</sup>

In Georgia, a petition for certiorari will not be sanctioned unless it complies with all legal requirements, and shows material irregularities or errors. Prior to the issuance of the writ, conditions precedent, if any, (as giving bond, conditioned as prescribed and paying all costs or the filing of an affidavit of inability to provide bond) should be observed.<sup>67</sup>

<sup>62</sup> King City v. Duncan, 238 Mo. 513, 520, 522, 142 S. W. 246.

<sup>63</sup> Grant City v. Simmons, 167 Mo. App. 183, 190, 151 S. W. 187.

See § 1068, 1072, ante.

<sup>64</sup> Florida. Malone v. Quincy, 66 Fla. 52, 62 So. 922.

Georgia. McDonald v. Ludowici, 17 Ga. App. 523, 87 S. E. 807; Douglas v. Kestler, 14 Ga. App. 612, 81 S. E. 803.

New Jersey. Roarke v. Buckley, 86 N. J. L. 33, 90 Atl. 1019; Patterson Board of Health v. Cohen, 88 N. J. L. 369, 95 Atl. 609; Lassiter v. Atlantic City, 86 N. J. L. 87, 90 Atl. 675.

Wyoming. Sheridan v. Cadle, 24 Wyoming 293, 157 Pac. 892.

<sup>65</sup> Moore v. Winder, 10 Ga. App. 384, 73 S. E. 529; Douthit v. Blue

Ridge, 13 Ga. App. 645, 79 S. E. 744.

<sup>66</sup> Moore v. Thomas, 17 Ga. App. 285, 86 S. E. 641; Sawyer v. Blakeley, 2 Ga. App. 159, 161, 58 S. E. 399, 400.

See § 2508, post.

<sup>67</sup> Moon v. Jefferson City, 10 Ga. App. 572, 73 S. E. 854; Johns v. Tifton, 122 Ga. 734, 50 S. E. 941; McDonald v. Ludowici, 3 Ga. App. 654, 60 S. E. 337; Cannon v. Americus, 11 Ga. App. 69, 74 S. E. 701; Dixon v. Waynesboro, 10 Ga. App. 801, 74 S. E. 302; Carolis v. Atlanta, 13 Ga. App. 662, 79 S. E. 752; Kendrick v. Millen, 16 Ga. App. 273, 85 S. E. 264; Roberts v. Colquitt, 17 Ga. App. 557, 87 S. E. 816; Nobles v. Dublin, 18 Ga. 496, 89 S. E. 604; Langston v.

### § 1096. Record on certiorari.<sup>68</sup>

In Georgia if no bond is given and duly approved, or if the bond is given and approved, but is defective in its terms or the manner of its approval, or in default of bond, if there is no affidavit that the accused is unable to furnish bond, on hearing certiorari will be dismissed.<sup>69</sup> In that state the answer of the trial judge is the only source from which knowledge of the facts of the case and the rulings made therein can be derived.<sup>70</sup>

If such answer states that the trial judge cannot remember the facts, nor what occurred at the trial, the certiorari must be overruled.<sup>71</sup>

The writ of certiorari lies for the correction of errors committed by inferior judicatories in ruling upon questions made before them; and if upon the hearing a ques-

Hazelhurst, 18 Ga. App. 308, 89 S. E. 375; Mitchell v. Thomasville, 18 Ga. App. 781, 90 S. E. 721; Fairfax v. Atlanta, 18 Ga. App. 785, 90 S. E. 721; Toliver v. Wrightville, 17 Ga. App. 345, 86 S. E. 823; Peek v. Atlanta, 19 Ga. App. 141, 91 S. E. 231; Detmering v. Fayetteville, 19 Ga. App. 747, 92 S. E. 230.

Sufficiency of petition for. Harvey v. Carrollton, 18 Ga. App. 54, 88 S. E. 798; Reddick v. Milledgeville, 14 Ga. App. 461, 81 S. E. 384; Powell v. Dublin (Ga. App. 1919), 100 S. E. 777.

Sufficiency of petition for in assignment of error. Carswell v. Waynesboro, 16 Ga. App. 483, 85 S. E. 676.

Dismissal of, for failure to observe requirements relating to the writ. Humphries v. Valley, 14 Ga. App. 815, 82 S. E. 357.

Petition for certiorari should set out substance of the ordinance involved that the court may de-

termine the offense with which the accused is charged. Judicial notice of the ordinance will not be taken. Grubbs v. Quitman, 16 Ga. App. 503, 85 S. E. 678; McDermott v. Savannah, 18 Ga. App. 308, 89 S. E. 348, following Savannah v. Jordan, 142 Ga. 414, 83 S. E. 109.

<sup>68</sup> Mattox v. Glennville, 16 Ga. App. 568, 85 S. E. 765, holding judge may rule on certiorari at any time without notice, etc.

<sup>69</sup> Flynn v. East Point, 18 Ga. App. 729, 90 S. E. 372; Scott v. Camilla, 7 Ga. App. 689, 67 S. E. 846; Moon v. Jefferson, 10 Ga. App. 572, 73 S. E. 854; Condon v. Jesup, 5 Ga. App. 100, 62 S. E. 677.

<sup>70</sup> Gilmore v. Georgian Co., 17 Ga. App. 737, 88 S. E. 416, following Buckner v. State, 115 Ga. 238, 41 S. E. 583.

<sup>71</sup> Gilmore v. Georgian Co., 17 Ga. App. 737, 88 S. E. 416, following Colbert v. State, 118 Ga. 302, 305, 45 S. E. 403.



tion is for the first time raised which was not ruled upon by the court whose judgment is under review such question will not be considered.<sup>72</sup>

A municipal ordinance authorizing a penalty in excess of that allowed by statute, if otherwise valid, will not be set aside in toto on certiorari; and where the attack does not go to the conviction but is directed against the ordinance only the certiorari will be dismissed.<sup>73</sup>

If upon the hearing no substantial errors appear to have been committed by the trial judge or magistrate, and the evidence is sufficient to show a violation of the ordinance, the writ will be dismissed.<sup>74</sup>

### § 1097. Writ of error.<sup>75</sup>

### § 1098. Habeas corpus.

Habeas corpus is appropriate as a remedy to secure release where a person is held in custody on a warrant of arrest when (1) the charge has no basis in a valid

<sup>72</sup> McDonald v. Ludowici, 17 Ga. App. 523, 87 S. E. 807, (following Meeks v. Guckenheimer, 102 Ga. 710, 713, 29 S. E. 486, 487) and holding that the disqualification of the mayor pro tem to vote with the council at the hearing could not be raised upon the hearing of the certiorari.

The disqualification of a member of the council cannot be raised for the first time on the hearing of the certiorari. Knight v. Jesup, 17 Ga. App. 557, 87 S. E. 814.

<sup>73</sup> Ninth Street Imp. Co. v. Ocean City (N. J. L.), 103 Atl. 186.

<sup>74</sup> Jones v. Carrollton, 13 Ga. App. 631, 79 S. E. 583; Berry v. Milledgeville, 17 Ga. App. 326, 86 S. E. 744; McDonald v. Ludowici, 17 Ga. App. 523, 87 S. E. 807; Harvey v. Carrollton, 18 Ga. App.

54, 88 S. E. 798; Collins v. Milledgeville, 17 Ga. App. 817, 88 S. E. 716; Mattox v. Glennville, 16 Ga. App. 568, 85 S. E. 765.

<sup>75</sup> "If the case is such as could be reviewed upon appeal we can see no good reason for saying that it could not be reviewed upon a writ of error." St. Louis v. Bender, 248 Mo. 113, 117, 154 S. W. 88.

The fact that no exceptions were made to the judgment does not preclude a review of error assigned as to sufficiency of the evidence. Nor will the absence from the record of the ordinance involved, because the appellate court will assume there was an ordinance as mentioned in the complaint, and that the act charged was a violation of the ordinance. Chicago v. Baker, 199 Ill. App. 323.

law or ordinance, or (2) wholly fails to state an offense under the law, or (3) the court is without jurisdiction of the matter.<sup>76</sup> As a matter of law it must appear that the ordinance is void, when its validity is the sole question involved, otherwise the writ will be dismissed.<sup>77</sup>

**§ 1100. Prohibition.<sup>78</sup>**

**§ 1101. Sufficiency of record for review.**

The mandatory requirements of the applicable local law as written, construed and applied, relating to perfecting the appeal, the preparation of the record, the manner of preserving the questions therein for review, its sufficiency, and the nature of the judgment of the reviewing court, resulting from the record as presented, of course, are controlling. As the methods of appeal in civil and criminal cases are usually quite different, the first question to be determined is the nature of the action for the violation of the ordinance involved. The general rule is that such actions are civil, at least not criminal, touching the manner of taking and perfecting the record for appeal;<sup>79</sup> however, they are sometimes,

<sup>76</sup> Ex parte Davidson (Fla.), 79 So. 727.

Motives of the members of the legislative body in enacting the ordinance involved, forbidding certain kinds of business on Sunday, cannot be inquired into on habeas corpus. Ex parte Sumida (Cal.), 170 Pac. 823.

See §§ 703, 704, ante; §§ 703, 704, vol. 2, ante.

<sup>77</sup> Guidoni v. Wheeler, 5 Alaska 229, 231, approving § 1098, vol. 3, ante.

<sup>78</sup> Validity of ordinance involved may be tested by defendant by statutory writ of prohibition. Louisville v. Coalter, 171 Ky. 633, 188 S. W. 853.

<sup>79</sup> Treated as civil when relates solely to local regulation for welfare of community, and involves no crime or offense under statute. Tucumcari v. Belmore, 18 N. Mex. 331, 137 Pac. 585, citing § 1030, vol. 3, ante.

Appeal from violation of an ordinance creating an offense not punishable by statute must be perfected as in civil cases. In the absence of a motion for a new trial filed within the specified time, only the record proper is for review. Marble Hill v. Caldwell (Mo. App.), 178 S. W. 226.

Record should show that the steps prescribed as to the time of filing and serving abstracts, con-

viewed as criminal.<sup>80</sup> The judicial utterances and decisions are not in entire harmony on this question.

But this point, of course, is to be ascertained by the law of the given jurisdiction.<sup>81</sup>

Whether in the matter of review the case is to be regarded as civil or criminal in its essential features, obviously the record should present clearly the precise question or questions for decision by the appellate court. In this respect the record should be definite and certain.<sup>82</sup>

Failure of the record to specify plainly the points for review, will result in a dismissal of the appeal,<sup>83</sup> affirmance of the judgment,<sup>84</sup> or certain presumptions,<sup>85</sup> which

tents of same and the time of serving briefs, relating to civil actions, have been observed, otherwise the appeal will be dismissed. *Marble Hill v. Caldwell*, 189 Mo. App. 286, 176 S. W. 294, following *Caruthersville v. Palsgrove*, 155 Mo. App. 564, 134 S. E. 1032.

Time of filing bill of exceptions. *Grant City v. Simmons*, 167 Mo. App. 183, 151 S. W. 187.

<sup>80</sup> Criminal case where violation is by fine or imprisonment, as relates to time of tendering and signing the bill of exceptions. *Webb v. Ellijay*, 15 Ga. App. 642, 83 S. E. 1099; *Barnett v. Athens*, 109 Ga. 166, 34 S. E. 322.

<sup>81</sup> *Nephi City v. Forrest*, 41 Utah 433, 126 Pac. 332.

See § 1034, ante; § 1034, vol. 3, ante.

<sup>82</sup> Record should present questions for review. *Glenn v. Prattville*, 14 Ala. App. 621, 71 So. 75.

Statement showing all matters passed upon by trial judge. *Chicago v. Moran*, 192 Ill. App. 57.

For example, refusing change of venue. *Chicago v. Simonetti*, 203 Ill. App. 279; *Chicago v. Boller*,

203 Ill. App. 281; *Chicago v. Bisso*, 204 Ill. App. 162.

Record as to proceedings before trial court is binding on appellate court. *Chicago v. Simonetti*, 203 Ill. App. 279; *Chicago v. Boller*, 203 Ill. App. 281.

A demurrer to an information seeking to charge an offense in violation of a municipal ordinance is held to be a pleading and a part of the record proper. *St. Louis v. Ringold*, 235 Mo. 472, 475, 139 S. W. 186.

<sup>83</sup> Appeal by municipality required to present a question of law for review, and failing, appeal will be dismissed. *Jackson v. Harland*, 112 Miss. 41, 72 So. 850.

Record failed to show conviction before the recorder on appeal from the circuit court. As the latter court had no original jurisdiction in case of ordinance violation, the appeal was dismissed in the appellate court. *Hill v. Prattville*, 12 Ala. App. 606, 67 So. 619; *Roney v. Florala*, 10 Ala. App. 370, 65 So. 91.

<sup>84</sup> Record must assign errors, otherwise the judgment will be

may or may not touch the real merits of the controversy. Generally questions not presented in the record for review will not be considered.<sup>86</sup>

Sometimes, however, the court may raise the point *sua sponte* when not raised by counsel.<sup>87</sup>

Usually questions not raised in and passed upon by the trial court will not be considered in a review upon the record.<sup>88</sup>

This doctrine has even been applied to the sufficiency of the affidavit charging a violation of the ordinance.<sup>89</sup>

affirmed. *Creel v. Jasper* (Ala. App. 1915), 69 So. 239; *Stadt v. Birmingham*, 14 Ala. App. 667, 70 So. 973; *Craig v. Birmingham*, 14 Ala. App. 630, 71 So. 983.

The record should show clearly the points made and the action thereon. Failure in this respect, and in view of the presumption that the judgment is correct will preclude review. *St. Louis v. Young*, 248 Mo. 346, 154 S. W. 87, stating the abstract "commingles in an undistinguishable mass matter of exceptions with record proper and matter contained in record entries without any earmark to guide us in telling where one begins or the other leaves off."

<sup>85</sup> Where evidence is not preserved in the record presumption is that it was sufficient to sustain conviction. *Chicago v. Smith*, 203 Ill. App. 202. Presumption that judgment was correct. *St. Louis v. Young*, 248 Mo. 346, 154 S. W. 87.

<sup>86</sup> Action of trial court in limiting number of witnesses. *Chicago v. Allen*, 191 Ill. App. 189.

Assignments of error not urged in brief and argument will be treated as abandoned. *Nobles v.*

*Dublin*, 18 Ga. App. 498, 89 S. E. 604.

<sup>87</sup> *St. Louis v. Young*, 248 Mo. 346, 348, 154 S. W. 87.

<sup>88</sup> Point as to erroneous dismissal of complaint will not be review where not made in trial court. *Koshkonong v. Boak*, 173 Mo. App. 310, 158 S. W. 874.

Rulings on improper remarks of counsel. *Chicago v. Craig*, 172 Ill. App. 126, 131.

Remark by court that he would take judicial notice of particular thing not objected to, etc., not reviewed. *Chicago v. Moran*, 192 Ill. App. 57.

Unless the question was raised at the trial and decided by the court adversely to defendant the reviewing court will not decide whether an ordinance is in violation of a law of Congress regulating commerce among the states, or whether in conflict with a statute or regulations of an administrative department of the government adopted in pursuance thereto. *St. Louis v. Niehaus*, 236 Mo. 8, 139 S. W. 450; *St. Louis v. Meyer*, 235 Mo. 699, 709, 139 S. W. 438.

<sup>89</sup> Section 1094, ante.

If not raised before mayor suffi-

However, the sound and well established doctrine is, an objection to the statement, information or complaint that it charges no offense known to the law, like an objection to a petition or complaint in a civil suit that it states no cause of action, can be made at any stage of the proceeding, even for the first time in the court of last resort.<sup>90</sup>

As the general rule is that state and appellate courts will not take judicial notice of municipal ordinances,<sup>91</sup> where any question in the appeal relates to the validity, construction or application of the ordinance involved, or any ordinance bearing thereon such ordinance or ordinances, or an abstract of the relevant provisions thereof, must be contained in the record, in the mode prescribed,<sup>92</sup> otherwise they will not be considered.<sup>93</sup>

ciency of affidavit charging the violation of the ordinance cannot be raised on appeal. *Clark v. Uniontown*, 4 Ala. App. 264, 58 So. 725; *Worthington v. Jasper*, 197 Ala. 589, 73 So. 116.

<sup>90</sup> *St. Louis v. Ringold*, 235 Mo. 472, 475, 139 S. W. 186.

See § 1056 ante.

<sup>91</sup> *Chicago v. Quinn*, 192 Ill. App. 419.

<sup>92</sup> *Chicago v. Lesser*, 196 Ill. App. 37; *Chicago v. Tearney*, 187 Ill. App. 441; *St. Louis v. Young*, 248 Mo. 346, 154 S. W. 87.

Court construes and applies the ordinance as found in the record though omission is obvious. *Buckhalt v. Enterprise*, 4 Ala. App. 293, 59 So. 226.

<sup>93</sup> Where validity of ordinance involved is in question ordinance should appear in record, either in bill of exceptions or in the transcript, otherwise there is nothing to review. Judicial notice of, is not taken. *Owensboro v. McFall*, 152 Ky. 628, 153 S. W. 969; *Chi-*

*cago v. Richardson*, 197 Ill. App. 594.

Absence of ordinance in record, finding for defendant will be sustained. *Chicago v. Smith*, 194 Ill. App. 305.

Ordinance being in record reviewing court will decline to determine whether the conviction of a violation of the ordinance is sustained by the evidence. *Collins v. Dalton*, 12 Ga. App. 119, 76 S. E. 1053.

Ordinance must be in record—Court declined to consider what purported to be a copy of the ordinance attached to brief of counsel. *Starling v. Dublin*, 17 Ga. App. 336, 86 S. E. 742.

“One who seeks to review a judgment of a municipal court which is predicated upon an alleged municipal ordinance must in the record present the ordinance so as to enable the reviewing court intelligently to pass upon the question.” *Jefferson v. Perry*, 18 Ga. App. 689, 90 S. E. 365; *Howell v.*

On appeal the exercise of jurisdiction by inferior courts is not scrutinized with the same care as courts of general jurisdiction, since this is not consistent with the due administration of justice or reasonable.<sup>94</sup>

Courts will not reverse for mere technical or harmless errors, errors short of prejudicing the substantial constitutional or legal rights of the accused.<sup>95</sup>

On matters of conclusion from the evidence the reviewing court defers largely to the trial judge, especially in case of conflict. Hence, where there is substantial evidence of sufficient probative force to sustain a finding of violation of the ordinance the appellate court will not disturb the judgment, although the evidence relied upon by the trial judge or magistrate may not be given much credit;<sup>96</sup> and although the evidence in proof of

State, 13 Ga. App. 74, 76, 78 S. E. 859.

On writ of error, where the ordinance is not included in the statement of facts or in the stenographic report of the evidence the validity of the judgment cannot be considered. *Chicago v. Smith*, 194 Ill. App. 305.

Where the ordinance is not in the record, presumption is that trial court was justified in finding defendant guilty of its violation. *Chicago v. Jones*, 203 Ill. App. 203; *Chicago v. Bisso*, 204 Ill. App. 162, 164; *Chicago v. Noonan*, 204 Ill. App. 195.

<sup>94</sup> *Ah Poo v. Stevenson*, 83 Or. 340, 163 Pac. 822, 824, citing § 1059, 1060, vol. 3, ante.

<sup>95</sup> *Louisville v. Coalter*, 171 Ky. 633, 188 S. W. 853; *Chicago v. Truax, Greene & Co.*, 192 Ill. App. 524, 528.

Part of judgment erroneous only will be reversed, as where a fine is properly imposed, and a sentence of hard labor is erroneously assessed

in the judgment. *Goldberger v. Mobile* (Ala. App. 1919), 82 So. 635.

<sup>96</sup> *People v. Milne*, 149 N. Y. S. 283, 86 Misc. Rep. 417; *Chicago v. Bisso*, 204 Ill. App. 162, 164; *Chicago v. Noonan*, 204 Ill. App. 195; *Chicago v. Allen*, 191 Ill. App. 189; *Chicago v. Richardson*, 197 Ill. App. 594.

Evidence supported judgment. *Starling v. Dublin*, 17 Ga. App. 336, 86 S. E. 742; *Harvey v. Carrollton*, 18 Ga. App. 54, 88 S. E. 798; *Nobles v. Dublin*, 18 Ga. App. 498, 89 S. E. 604, 605.

Evidence found insufficient to sustain charge of loitering, etc., *Chicago v. Baker*, 199 Ill. App. 323.

Where the recorder and circuit judge concurred in their findings of fact, the reviewing court will not disturb that finding where there is any testimony to sustain it. *Greenville v. Green*, 93 S. C. 573, 77 S. E. 718; *State v. Powell*, 91 S. C. 5, 73 S. E. 1017; *Matthews*

the offense is weak and unsatisfactory where nevertheless it is sufficient to support the inference of violation of the ordinance.<sup>97</sup>

Ordinarily the penalty fixed by the jury will not be disturbed where they have been instructed properly.<sup>98</sup>

Where the circumstances justify the reviewing court will reverse with directions to enter the proper judgment upon the finding of facts.<sup>99</sup>

And where the magistrate imposed an improper sentence the cause will be reminded that the proper sentence may be pronounced.<sup>1</sup>

In one case failure to show at the trial power to pass the sanitary ordinance involved, (which proof was held essential) resulted in remanding the case, to permit the municipality to show this fact.<sup>2</sup>

v. Industrial Lumber Co., 91 S. C. 568, 75 S. E. 171.

<sup>97</sup> Ramsey v. Atlanta, 15 Ga. App. 345, 83 S. E. 148.

If the evidence apparently authorizes the judgment the reviewing court will allow it to stand. Collins v. Dalton, 12 Ga. App. 119, 76 S. E. 1053.

<sup>98</sup> Ramsey v. Hayes, 199 Ill. App. 161.

<sup>99</sup> Chicago v. Coleman, 254 Ill. 339, 98 N. E. 521.

<sup>1</sup> Webb v. Vicksburg, 112 Miss. 53, 72 So. 852.

<sup>2</sup> Hammond v. Baddeau, 134 La. 871, 64 So. 803.

## CHAPTER 28.

### CORPORATE PROPERTY.

#### I. CONTROL OVER, TITLE TO, AND POWER TO ACQUIRE.

#### II. HOLDING PROPERTY AS TRUSTEE.

#### III. PLEDGE, MORTGAGE, SALE, LEASE OR OTHER DISPOSAL OF PROPERTY.

#### IV. PUBLIC PARKS AND SQUARES.

#### V. ADVERSE POSSESSION, ESTOPPEL, AND LIENS AGAINST.

##### I. CONTROL OVER, TITLE TO, AND POWER TO ACQUIRE.

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|---|--|
| § 1105. Power to acquire property in general.                   | § 1116. Power to acquire, erect and repair buildings.      |
| § 1108. Same—real property beyond corporate limits.             | § 1117. Same—power to erect convention and assembly halls. |
| § 1112. Title to land under water and rights as riparian owner. | § 1118. How property may be acquired.                      |
| § 1114. Purpose for which property may be acquired.             | § 1119. Same—gifts and bequests.                           |
| § 1115. Same—illustrations of corporate purposes.               | § 1124. Who may question purchase by municipality.         |
|   | § 1127. Change of use of property.                         |

##### II. HOLDING PROPERTY AS TRUSTEE.

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| § 1128. Municipal capacity to hold property in trust and to administer trusts. | § 1130. Trust for benefit of the poor.  |
| § 1129. Purpose of trust as a corporate purpose in general.                    | § 1131. Trust for hospitals.            |
|  | § 1132. Trust for library.              |
|  | § 1133. Trust for educational purposes. |

##### III. PLEDGE, MORTGAGE, SALE, LEASE OR OTHER DISPOSAL OF PROPERTY.

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| § 1140. Right to dispose of property in general.     | § 1145. Power to lease or permit use of corporate property.                 |
| § 1141. Same—property devoted to public use.         | § 1146. Power to transfer, donate or dedicate property for particular uses. |
| § 1142. Same—property donated for specific purposes. | § 1147. Procedure to sell, conditions precedent, and conveyance.            |



## IV. PUBLIC PARKS AND SQUARES.

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| § 1154. Power to acquire and establish parks.             | § 1156. Management, regulation of, permits and leases. |
| § 1155. Use and control subject to restrictions in grant. | § 1157. Same—regulation of use of park.                |

## V. ADVERSE POSSESSION, ESTOPPEL, AND LIENS AGAINST.

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| § 1158. Loss of title to corporate property by adverse possession. | § 1162. Property as subject to taxation. |
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## I. CONTROL OVER, TITLE TO, AND POWER TO ACQUIRE.

**§ 1105. Power to acquire property in general.<sup>1</sup>**

General authority to issue bonds, to raise money, to construct and equip school buildings will sustain a contract to purchase a site for a school building.<sup>2</sup>

**§ 1108. Same—real property beyond corporate limits.<sup>3</sup>****§ 1112. Title to land under water and rights as riparian owner.<sup>4</sup>****§ 1114. Purpose for which property may be acquired.<sup>5</sup>**

It is within the province of the legislature to declare

<sup>1</sup>Quitman v. Jelks and McLeod, 139 Ga. 238, 77 S. E. 76, citing § 1115, 1154, Vol. 3, ante.

<sup>2</sup>Van Arsdale v. Justice, 133 N. J. S. 661, 75 Misc. Rep. 495.

<sup>3</sup>Express authority to purchase outside city limits for public park. Quitmann v. Jelks & McLeod, 139 Ga. 238, 77 S. E. 76, citing §§ 1114, 1154, vol. 3, ante.

Land for dumping ground may be acquired beyond corporate limits. Gibson v. Massena, 178 N. Y. S. 850.

<sup>4</sup>Under its charter the city of greater New York is entitled to lands which are generally under

water and has authority to grant temporary permits to use and occupy such lands. An owner of land adjoining such tidelands' is not entitled to use same for sidewalk purposes without a permit. Siebel v. Pleayl, 172 N. Y. S. 798.

<sup>5</sup>City given specific authority by charter to purchase, sell or lease lighting plant or system. California-Oregon Power Co. v. Medford, 226 Fed. 957.

May purchase site for a municipal auditorium. Wilkerson v. Lexington (Ky. 1920), 222 S. W. 74, 78.

what is a municipal purpose; and a duly enacted statute designating a municipal purpose is subject only to the provisions and principles of organic law.<sup>6</sup>

Under a general law authorizing real and personal estates to be conveyed to the corporation of any city or village to be held in trust for purposes of education, diffusion of knowledge or relief of distress, a city may accept a devise and bequest of a home and furnishings to be used as a hospital.<sup>7</sup>

The purpose of the city in acquiring property can not be invoked to limit or qualify the estate granted. Thus where land was purchased in fee simple and had been used for a public market, it may thereafter be used by the city to maintain thereon a garage for police automobiles.<sup>8</sup>

### § 1115. Same—illustrations of corporate purposes.

Lands may be acquired by the city for the purpose of a public park,<sup>9</sup> library,<sup>10</sup> or a dumping ground by a municipal department.<sup>11</sup>

### § 1116. Power to acquire, erect and repair buildings.

Where the trustees of a city and county hall are given "the care and management" of such hall, they are vested

<sup>6</sup> *Tampa v. Prince*, 63 Fla. 387, 58 So. 542, holding a library is a municipal purpose.

<sup>7</sup> *Re Hemstreet's Will*, 167 N. Y. S. 1016, 101 Misc. Rep. 340.

<sup>8</sup> *Neil v. Kansas City*, 194 Mo. App. 282, 188 S. W. 919, denying an injunction to prevent such use at instance of a resident taxpayer.

<sup>9</sup> Under charter authority to purchase, hold possess, etc., "any estate or estates, real, and of whatever kind, and within or without the city for corporate purposes," a city may acquire land for a public park outside of the city limits. *Quitman v. Jelks & McLeod*, 139

Ga. 238, 77 S. E. 76, citing §§ 1115, 1154, vol. 3, ante.

<sup>10</sup> *Tampa v. Prince*, 62 Fla. 387, 58 So. 542.

<sup>11</sup> Construction of a covered dump, on certain land held by city to be used by street department, held could not be enjoined as it was within the purposes for which the land was designated to be used and the structure was not a nuisance per se or likely to become such. *Riverdale Realty Co. v. New York*, 153 N. J. S. 742, 168 App. Div. 103. Dumping ground beyond municipal area, *Gibson v. Massena*, 178 N. Y. S. 850.

with authority to make necessary alterations to meet the needs of the county and city in the use of the hall.<sup>12</sup>

**§ 1117. Same—power to erect convention and assembly halls.<sup>13</sup>**

**§ 1118. How property may be acquired.**

The mode prescribed for the acquisition of property must be observed.<sup>14</sup>

<sup>12</sup> *Buffalo v. Zittel*, 162 N. Y. S. 234.

A contract between a park department and library by which a building was to be erected in a public park and used by both exceeds authority of both parties. Park commissioners are to exercise exclusive control of parks and library directors are to have exclusive control of buildings constructed and used for library purpose. *Boseley v. Oak Park District*, 275 Ill. 92, 113 N. E. 984.

There is no injury to tax payers by the expenditure of public money for the protection and conservation of public property. Injunction to restrain ultra vires action of municipal corporation or officials will be denied unless it appears that tax payer would be injured by acts complained of. Held, board of estimate had no authority to move a building owned by city to a site in a public park not approved of by park commissioners. *Wilhaus v. Baltimore*, 128 Md. 140, 97 Atl. 140.

<sup>13</sup> *Egan v. San Francisco*, 165 Cal. 576, 133 Pac. 294.

<sup>14</sup> When it is provided by statute that private property for the making of any local improvement must be acquired by condemnation pro-

ceeding, a contract for the purchase of land for water and sewer system improvements is invalid and its performance may be enjoined by tax payers. *Head v. Wood River*, 194 Ill. App. 104.

Where a council cannot contract for personalty at one purchase in excess of \$500, unless authorized by a majority vote of the qualified voters of city, and goods are delivered under contract in excess of this amount no liability is created against city. *Perry Water, Light & Ice Co. v. Perry*, 29 Okl. 593, 120 Pac. 582.

A contract made by council for personal property, exceeding \$1,000 in value and not ratified by the electorate as required was held void under charter restrictions. As the agreement for the purchase of property in question was invalid but not illegal, the seller was held to be entitled to recover the property. *General Electric Co. v. Ft. Deposit*, 174 Ala. 179, 56 So. 802.

Where there is a delivery of a deed to real estate to the mayor who had not direct or implied authority to perform any act essential to the vesting in the city of the title to real estate, and the council took no action by vote or otherwise to accept the deed, an accept-

A city, it has been held, may acquire title to land by prescription, notwithstanding the fact that during the period of prescription the land was devoted to uses not within its municipal powers, e. g., used through tenants as a glue factory.<sup>15</sup>

**§ 1119. Same—gifts and bequests.<sup>16</sup>**

**§ 1124. Who may question purchase by municipality.<sup>17</sup>**

**§ 1127. Change of use of property.**

A part of lands purchased for a market house and so used may be used temporarily as a police garage.<sup>18</sup>

ance could not be presumed, (although city had previously voted to buy the real estate in question) but an acceptance by the council was necessary to make good delivery. *Pitkin's Adms. v. Montpelier*, 85 Vt. 467, 82 Atl. 671.

Where city had power to purchase private property for corporate purposes and did not have the power of eminent domain, a contract for an easement for the construction of a highway for the consideration that the grantor be reimbursed by the city for all assessments for grading, paving, etc., of the highway, was held to be valid. Distinction pointed out between an exemption from taxes, and an agreement to refund assessments as the purchase price of an easement. *Washington Power Co. v. Spokane*, 89 Wash. 149, 154 Pac. 329.

<sup>15</sup> *Beckett v. Petaluma*, 171 Cal. 309, 153 Pac. 20. See *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 66 So. 237.

Municipality cannot claim ease-

ment (for street purposes) in land to which it had previously surrendered all claim without reservation as to streets. *Oakland v. Oakland Water Front Co.*, 162 Cal. 675, 124 Pac. 251.

<sup>16</sup> City may accept property by devise and bequest. *Re Hemstreet's Will*, 167 N. J. S. 1016, 101 Misc. Rep. 340; *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 66 So. 237.

<sup>17</sup> Questions as to whether property in possession of city is used for purpose within its powers can only be raised by state. *Beckett v. Petaluma*, 171 Cal. 309, 153 Pac. 20, 22, citing §1124, vol. 3, ante. See *Hjelm v. St. Cloud*, 134 Minn. 343, 345, 159 N. W. 833, citing § 1124, vol. 3, ante.

<sup>18</sup> "Purpose of the city has in making the purchase could not be invoked to limit or qualify the estate granted which was a fee simple estate." *Neil v. Kansas City Board of Public Works*, 194 Mo. App. 282, 188 S. W. 919.

## II. HOLDING PROPERTY AS TRUSTEE.

**§ 1128. Municipal capacity to hold property in trust and to administer trusts.**

A municipality may take and administer a trust and where the objects of the trust are indefinitely stated, it will be limited by operation of law to any and all proper purposes of the municipality.<sup>19</sup>

**§ 1129. Purpose of trust as a corporate purpose in general.**

A park is a corporate purpose.<sup>20</sup>

**§ 1130. Trust for benefit of the poor.<sup>21</sup>****§ 1131. Trust for hospitals.<sup>22</sup>****§ 1132. Trust for library.<sup>23</sup>****§ 1133. Trust for educational purposes.<sup>24</sup>**

<sup>19</sup> Re Crampton's Will, 88 Vt. 435, 92 Atl. 814.

<sup>20</sup> The appointment of city of Houston, Texas, as trustee of property to be used as a park for colored people was upheld. Woods v. Bell (Tex. Civ. App.), 195 S. W. 902.

<sup>21</sup> Where city has charter power to purchase land for municipal purposes, it may receive a gift or grant of property which is adapted to the public use of caring for the poor. A grantor of property to a municipal corporation cannot after he has received the full consideration for the transfer, recover back the property on the ground that the acquisition of the property was unauthorized. Hjelm v. St. Cloud, 134 Minn. 343, 345, 159 N. W. 833, citing § 1124, vol. 3, ante.

<sup>22</sup> Buchanan v. Kennard, 234 Mo. 117, 136 S. W. 415, 37 L. R. A. (N. S.) 993, Ann. Cas. 1912D, 50.

Trust for hospital, valid, city may operate as trustee. Power to accept a testamentary gift, in trust for a hospital exists if by statute the city has power to accept public trusts on the conditions offered. Dykeman v. Jenkins, 179 Ind. 549, 101 N. E. 1013, Ann. Cas. 1915D, 1011.

A city may accept legacy of property—house and furnishings—to be used as a hospital. Re Hemstreet's Will, 167 N. J. S. 1016, 101 Misc. Rep. 340.

<sup>23</sup> City may take in trust for library. Hendley's Trustees v. Winchester, 111 Va. 360, 373, 70 S. E. 131.

<sup>24</sup> Municipal corporations may accept bequests of property to be

### III. PLEDGE, MORTGAGE, SALE, LEASE OR OTHER DISPOSAL OF PROPERTY.

#### § 1140. Right to dispose of property in general.<sup>25</sup>

The general rule is recognized that by observing all existing legal requirements and restrictions, a municipality may sell or otherwise dispose of its property, in good faith,<sup>26</sup> upon adequate consideration.<sup>27</sup>

held in trust for educational purposes. *New Orleans v. Salmen Brick & Lumber Co.*, 135 La. 828, 66 So. 237.

<sup>25</sup> Authority given to city commissioner to sell land belonging to the city included the right to grant an easement in adjoining land owned by the city. *Main v. Hagerstown*, 132 Md. 336, 104 Atl. 410.

Act of trustees of money for library purposes in making personal loan, held ultra vires and trustees were personally liable to city therefor. City cannot donate public property to private use. *Tedder v. Walker*, 145 Ga. 768, 89 S. E. 840.

City cannot dispose of land situate without its limits as incorporated and which it does not own. *Roibal v. Giron* (Tex. Civ. App.), 158 S. W. 798.

<sup>26</sup> City may sell property (horse) owned by it and purchaser obtains good title if transaction is without fraud. *Rockland v. Anderson*, 110 Me. 272, 85 Atl. 1066, 43 L. R. A. (N. S.), 1137.

Under charter authority to own, buy, sell, lease and contract for property, etc., with the restriction that no contract could be entered into or franchise granted for a longer period than ten years, it

was held, the city could not make a contract to sell its electric lighting plant and give a lighting franchise for 25 years without a charter amendment. *California-Oregon Power Co. v. Medford*, 226 Fed. 957.

<sup>27</sup> A cause of action belonging to a city is property which it may dispose of for an adequate consideration. *Saudek v. Milwaukee*, 163 Wis. 112, 157 N. W. 579.

But a city has no power to dispose of property of corporation without consideration, e. g. it cannot release a contractor from payment of fixed damages from failure to perform contract with city by certain date. *Ludlow Valve Co. v. Chicago*, 181 Ill. App. 388.

A city council cannot dispose of the city's property without compensation, even when directed to do so by majority of the tax payers of the city. *Carpenter v. Wise*, 155 N. Y. S. 996, 92 Misc. Rep. 246, affirmed in 159 N. Y. S. 1104.

City may transfer property to library board to be used as a library site and to revert to city when no longer so used and these requirements constitute an "adequate consideration other than money" as required to make such a transfer valid. Power to library

Dedication of property for a specified public use which is not accepted by the public will not prevent the city from otherwise disposing of such property.<sup>28</sup>

**§ 1141. Same—property devoted to public use.**

Property which is not appropriated or devoted to a public use, it has been held, may be disposed of by a city without special statutory authority, e. g., an incompleting city hall.<sup>29</sup>

Authority to build a new city hall, it has also been held, impliedly gives a city power to dispose of its old city hall.<sup>30</sup>

But streets, alleys, squares and like property held by the city as trustee for the public for strictly corporate purposes, of course, may not be sold or disposed of,<sup>31</sup>

board to accept such a transfer is within its authority to lease or purchase a site for a library building. It need not acquire fee simple title. *Cleveland v. Public Library Board of Cleveland*, 94 Ohio 311, 114 N. E. 247.

<sup>28</sup> Where an ordinance created a board to administer a museum and land on which it was located but did not convey title to the property to such board, the board cannot question action of city in disposing of property in question. *Philadelphia Museum v. University of Pennsylvania*, 251 Pa. 125, 96 Atl. 126.

<sup>29</sup> *Palmer v. Albuquerque*, 19 N. M. 285, 295, 142 Pac. 929, 932, quoting from § 1141, vol. 3, ante, holding that an incompleting city hall was property of a private nature which might be disposed of as the public welfare demanded.

<sup>30</sup> *Marshall v. Meridian*, 103 Miss. 206, 60 So. 135.

<sup>31</sup> City cannot grant use of its

streets to a railway company to the exclusion of the public, nor will default by city in a condemnation proceeding by the company give such company such right. *State v. Superior Court of Jefferson City*, 91 Wash. 454, 157 Pac. 1097.

Property dedicated to public use, as park, is inalienable and no adverse title by prescription can be acquired thereto. *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 1095, 60 So. 695, citing § 1158, vol. 3, ante.

Property acquired by local assessments in an improvement district and taken over by the municipality is held in trust for the property owners of the district and city cannot part with title to same. *Augusta v. Smith*, 117 Ark. 93, 174 S. W. 543.

Where property was deeded to a city with the condition that it be used for market purposes, acts of administrative officers in directing its use for other purpose with-

in the absence of charter or statutory authority;<sup>32</sup> however, property held by the city in its proprietary capacity, usually may be sold, e. g., a lighting plant.<sup>33</sup>

The general rule is often thus broadly stated: That property held for a public purpose cannot be alienated, assessed for taxes, sold for nonpayment, nor can prescriptive right thereto be established.<sup>34</sup>

### § 1142. Same—property donated for specific purposes.

A municipality cannot dispose of land in which there are private property rights in the nature of easements touching its use, i. e., that it be used as a park.<sup>35</sup>

And it has been held that a city cannot dispose of property which it has previously dedicated to a public use as a park and museum and which has been so used by the public.<sup>36</sup>

### § 1145. Power to lease or permit use of corporate property.

In leasing and permitting the use of corporate prop-

erty without sanction of city council, will not deprive city of title thereto. *Stauton v. Pittsburgh*, 257 Pa. 361, 101 Atl. 882, certiorari denied, 245 U. S. 651, 38 Sup. Ct. 11, 62 L. ed.

Property dedicated for streets cannot be sold. *Haberly v. Treadgold*, 67 Or. 425, 136 Pac. 334.

<sup>32</sup> Under charter authority to sell a public park of which it holds the fee-simple title a city may sell to any grantee it chooses for a good and sufficient consideration. *Sharp v. Guthrie*, 49 Okl. 213, 152 Pac. 403, reversing 145 Pac. 764.

Under authority to sell market house property, city may also dispose of sidewalks around market place which are not a part of or used as public street except for access to market. *Raleigh v. Durey*, 163 N. C. 154, 79 S. E. 434.

<sup>33</sup> *McDonald v. Price*, 45 Utah, 464, 146 Pac. 550.

Charter provision that city shall not dispose of waterworks except with approval of electorate, does not prevent it from acting by ordinance to sell abandoned pipes once used as part of water system. *Gainesville v. Dunlap*, 147 Ga. 344, 94 S. E. 247, citing § 1141, vol. 3, ante.

<sup>34</sup> *New Orleans v. Salmen Brick & Lumber Co.*, 135 La. 828, 838, 66 So. 237, quoting from § 1158, vol. 3, ante. On rehearing, held that property in question which was held in trust for educational purposes was not property dedicated to a public use, such that it could not be acquired by prescription.

<sup>35</sup> *Bozarth v. Egg Harbor*, 89 N. J. Eq. 26, 103 Atl. 405.

<sup>36</sup> *Trustees of Philadelphia Mu-*



erty which is usually authorized,<sup>37</sup> the public interest, it is true, is to be kept steadily in view. Unconditional private uses are not always favored,<sup>38</sup> however, judicial approval of the use and the conditions thereof, will depend, of course, upon the grant of power to the municipality,<sup>39</sup> the nature of the particular transaction considered mainly from the stand point of public require-

seum v. University of Pennsylvania, 251 Pa. 115, 96 Atl. 123.

<sup>37</sup> City may lease property which was not shown to be dedicated to public use, to a railroad company for the consideration that the company would make the city its deep water terminus. Norfolk v. Southern R. Co., 117 Va. 101, 83 S. E. 1085.

City may erect a dump for street department on land reserved for docks, wharves or commercial purposes. Riverdale Realty Co. v. New York, 153 N. Y. S. 742, 168 App. Div. 103.

Trustees, elected to manage and control certain property held by municipality as private property, may lease such property for period of time extending beyond their terms of office, if such leases are made in good faith. Bachia v. Estates of Havemeyer Point, 136 N. Y. S. 435, 77 Misc. Rep. 362.

See § 1254 post; § 1254, vol. 3, ante.

<sup>38</sup> Municipality cannot without specific legislative authority, lease part of a public wharf unconditionally to be used for a private business. Juneau Ferry & Navigation Co. v. Morgan, 236 Fed. 204, 206, 149 C. C. A. 394, citing § 1145, vol. 3, ante.

Power to improve water front, held not to include authority to

lease for private uses, lands not covered by improvements and which belonged to state, as a consideration for water front improvements for public use to be made by such private parties. People v. Banning Co., 166 Cal. 630, 138 Pac. 100.

Lease of property by city for private use with privilege of subletting part thereof for saloon purposes remains in force, and is not affected by adoption by the city of an ordinance making it unlawful to use any part of such property for saloon purposes, and city is not required to abate the rent. City was acting in two different capacities. Warm Spring Co. v. Salt Lake City, 50 Utah 58, 165 Pac. 788.

<sup>39</sup> Under authority to grant temporary permits for use of wharf property, city may give permit for private use of a sidewalk over tide lands. Siebel v. Pleayl, 172 N. Y. S. 798.

Under authority to lease wharf property, commissioner may lease privilege of selling newspapers, etc., at ferry terminal and may reject a bid for such privilege which he deem not for best interests of city. New York v. Union News Co., 222 N. Y. S. 263, 118 N. E. 635.

Construction of statute providing

ments,<sup>40</sup> especially the need of the property involved for public purposes.<sup>41</sup>

**§ 1146. Power to transfer, donate or dedicate property for particular uses.**

Where property is held in trust for the benefit of the public a transfer of such property to be used for the purpose of a public library and to revert to the city when no longer so used is not in violation of the trust.<sup>42</sup>

Under a city charter providing that all parks owned by the city are to be inalienable and that no part thereof shall be used for other than park purposes, the city cannot divert part of a city park for street and sidewalk purposes which have no connection with its use and enjoyment as a park.<sup>43</sup>

the method to be used in annual rental for tunnel constructed by city—must follow method provided. *Boston v. Boston Elevated Railway*, 215 Mass. 41, 102 N. E. 79.

<sup>40</sup> Construction of lease and sublease of wharf property. *Delaware L. & W. R. Co. v. Sound Transportation Co.*, 238 Fed. 313, 151 C. C. A. 329.

City acting as a private corporation may make an agreement, as part of the consideration for the payment of a certain rental that the property leased shall be exempt from taxes—The substance of the transaction is not a tax exemption, but a contract by a municipality as a private corporation that for an agreed price it would pay the tax it imposed as a branch of the government. *Hampton Beach Imp. Co. v. Hampton*, 77 N. H. 373, 92 Atl. 549, L. R. A. 1915C, 698.

Lease by city of an undeveloped portion of a public park to an educational and quasi-municipal insti-

tution which was to establish thereon a horticultural garden, which would be open at times to the public, held valid. *International Garden Club v. Hennessy*, 172 N. Y. S. 8.

Lease with covenants for future renewal, wherein a subsequent ordinance and legislative acts were involved, which were held not to affect the contract. *Burns v. New York*, 213 N. Y. 516, 108 N. E. 77, reversing 143 N. Y. S. 952, 158 App. Div. 729.

<sup>41</sup> City may lease an auditorium of a building no longer used for municipal purposes for use as a picture show house. *Anderson v. Montevideo*, 137 Minn. 179, 162 N. W. 1073.

<sup>42</sup> *Cleveland v. Public Library Board*, 94 Ohio 311, 114 N. E. 247, stating a city may dispose of property for which it has no municipal use for a valuable consideration.

<sup>43</sup> *El Paso Union Passenger Depot Co. v. Look* (Tex. Civ.

**§ 1147. Procedure to sell, conditions precedent, and conveyance.**

The legislature may prescribe the method by which the power to sell or lease or otherwise dispose of property shall be exercised,<sup>44</sup> although the city has power to lease or sell, and the method so provided must be substantially followed.<sup>45</sup>

So the method prescribed by charter,<sup>46</sup> or ordinance is in like manner to be observed.<sup>47</sup>

Although a city exceeded its authority in executing a deed of certain lands, after thirty years enjoyment of the benefits of the transaction, it was held to be equitably estopped from repudiating it.<sup>48</sup>

App.), 201 S. W. 714; *Mulvey v. Wangenheim*, 23 Cal. App. 268, 137 Pac. 1106.

<sup>44</sup> Legislative enactments providing that city may acquire fee instead of merely an easement when it appropriates property for a particular purpose and authorizing city to sell, lease, etc., such lands to railroads for depot purposes, upheld and held to permit city to perfect title to land already held under appropriation. *White v. Cleveland*, 33 Ohio Cir. R. 317, affirmed 87 Ohio St. 482, 102 N. E. 1135.

<sup>45</sup> *McDonald v. Price*, 45 Utah, 464, 469, 146 Pac. 550, citing § 1180, vol. 3, ante.

<sup>46</sup> Grant of land by city is invalid if not made in manner prescribed by charter. *Cimpher v. Oakland*, 162 Cal. 87, 121 Pac. 374.

Where charter provides that sales of real estate must be authorized by  $\frac{2}{3}$  of council and made at public auction, after notice, a private sale is not permissible. *Carpenter v. Wise*, 155 N. Y. S.

996, 92 Misc. Rep. 246, affirmed in 159 N. Y. S. 1104.

Where a city council has sole power to sell, lease, dispose of, etc., property owned by the city, acts of administrative officers directing property to be used for purposes contrary to the condition contained in the deed of such property to the city, will not deprive the city of title thereto. *Moss v. Pittsburgh*, 203 Fed. 247, 121 C. C. A. 445, affirming 178 Fed. 605.

<sup>47</sup> Failure of city official to comply with provisions of ordinance regulating forfeiture on account of default in payment of interest notes given for purchase of lands from city, prevents forfeiture. *Laredo v. Salinas* (Tex. Civ. App.), 191 S. W. 190.

Question of sale of lighting and power plant may be submitted to electors. *Allen v. Reidville* (N. C. 1919), 101 S. E. 267.

<sup>48</sup> *New York C. & H. R. R. Co. v. Buffalo*, 147 N. Y. S. 209, 85 Misc. Rep. 78.

## IV. PUBLIC PARKS AND SQUARES.

**§ 1154. Power to acquire and establish parks.<sup>49</sup>****§ 1155. Use and control subject to restrictions in grant.**

Where lands are conveyed to a municipality for park purposes, the city holds the same in trust for such purpose and cannot convey the lands to be used as a site for a university.<sup>50</sup> Conditions in the grant that the lands shall be used solely for the health and recreation of the public and shall be inalienable, do not preclude the city from renting to individuals the privilege of providing refreshments and other amusement conveniences not inconsistent with the terms of the grant.<sup>51</sup>

**§ 1156. Management, regulation of, permits and leases.<sup>52</sup>**

<sup>49</sup> Power to acquire realty and personalty for a public park and its improvement. *Guild v. Newark*, 87 N. J. Eq. 38, 99 Atl. 120.

Under charter authority to provide parks and to acquire real estate for that purpose, a city may purchase land for a park at a tax sale. *North Muskegon v. Rodgers*, 188 Mich. 93, 154 N. W. 71.

Board of Aldermen could not by resolution change a public street to a park and thereby make such street subject to an ordinance prohibiting any person from exposing any article for sale in any park except by permit. *People v. Parelli*, 158 N. Y. S. 644, 93 Misc. Rep. 692.

Land acquired for a park is a corporate purpose. *Quitman v. Jelks & McLeod*, 139 Ga. 238, 77 S. W. 76, citing Section 1154, vol. 3, ante.

<sup>50</sup> *Sharp v. Guthrie* (Okl.), 145 Pac. 764, holding that the interest of tax payers in parks is

that of cestui que trust and he may sue to enjoin delivery of deed.

<sup>51</sup> *Bailey v. Topeka*, 97 Kans. 327, 154 Pac. 1014.

<sup>52</sup> Where city charter gives to park commissioners control of the parks and the erection and maintenance of buildings thereon, and power to accept gifts of property for park purposes, an ordinance accepting a gift of a building to be erected in a park and appointing special commissioners to supervise erection and maintenance is void. *O'Melveny v. Griffith*, 178 Cal. 1, 171 Pac. 934.

Park board having power to employ superintendents and engineers, may use their discretion in employing an engineer, although city engineer was required by ordinance to perform duties of engineer for the board. *Bloomsfield v. Bay City*, 192 Mich. 483, 158 N. W. 1043.

Charter prohibition against per-

**§ 1157. Same—regulation of use of park.<sup>53</sup>****V. ADVERSE POSSESSION, ESTOPPEL AND LIENS AGAINST.****§ 1158. Loss of title to corporate property by adverse possession.**

Title by adverse possession cannot be acquired in property held for a public use.<sup>54</sup>

mitting shows or exhibitions in any public park does not apply to keeping ponies for amusement of children, upon which they may ride for a consideration. *Longwell v. Kansas City*, 199 Mo. App. 480, 203 S. W. 657.

Where there was no provision in a lease of an amusement park by city for forfeiture of lease in the event of violation of Sunday laws by lessee, city authorities cannot be enjoined from permitting such use of park. *Green v. Pyser*, 80 N. J. Eq. 288, 84 Atl. 194.

City may erect in a public park a statute of one of the donors of such park. *Brahan v. Meridian*, 111 Miss. 30, 71 So. 170.

City cannot erect a garage in a public park for the convenience of persons engaged in caring for the park. Held, that such a structure would constitute a purpresure. *Wessinger v. Mische*, 71 Or. 239, 142 Pac. 612.

<sup>53</sup> Regulations must not be inconsistent with a state law. *Lev-ering v. Williams* (Md. 1919), 106 Atl. 176.

City may build a pavilion to be used as a public waiting room in a public park. *Dodge v. North End Association*, 189 Mich. 16, 28, 155 N. W. 438, quoting with ap-

proval from Section 1156, vol. 3, ante.

Encroachment on a public park by cultivating, plowing and otherwise defacing may be abated as a nuisance, though city may claim in its bill for abatement, to have legal title to the park. *Florence Sand Co. v. Florence* (Ala.), 75 So. 19.

Where park commissioners have not exercised authority to regulate the rate of speed for driving in parks, the maximum speed for driving in parks will be that fixed by state law. *Rockett v. Philadelphia*, 256 Pa. 347, 100 Atl. 826.

Negligence case arising from accident on speedway maintained by city in public park, held that such speedway was neither a highway or a park boulevard. *Eckert v. Levinson*, 91 Conn. 338, 99 Atl. 699.

<sup>54</sup> *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 1095, 60 So. 695, citing Section 1158, vol. 3, ante.

Prescriptive right not applicable to property dedicated to public use. *New Orleans v. Salmen Brick and Lumber Co.*, 135 La. 828, 838, 60 So. 237, quoting with approval from Section 1158, vol. 3, ante.

"Lands dedicated for street purposes by a municipality with

**§ 1162. Property as subject to taxation.<sup>55</sup>**

an assent thereto and release of all claim for damages by the owners make an existing street at least as between them. Where one in dealing with property so dedicated to street purposes, although not actually in public use, recognizes the public right to use such lands for street purposes he cannot thereafter in dealing with the same person repudiate the existence of the street." Thus where a railway company enters into the possession of lands dedicated to street purposes under an agreement with the municipality that if the railway should constitute an obstruction or impediment to the

ordinary use of any street, it would provide a remedy for the same satisfactory to the city, and also that the railway path should from time to time conform to what might thereafter be the regulation of the street or road over which it passed, the railway's occupancy is by virtue of a special franchise, and is not to be treated as adverse to the city. *People ex rel. v. Priest*, 206 N. Y. 274, 297, 99 N. E. 547, affirming 150 App. Div. 19.

<sup>55</sup> See Sections 2063, 2399, post; sections 2063, and 2399, vol. 5, ante.

## CHAPTER 29. \*

### CONTRACTS IN GENERAL.

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- III. COMPETITIVE BIDS.
- IV. VALIDITY, DURATION, RATIFICATION AND ESTOPPEL.
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#### I. INTRODUCTORY.

### § 1164. The four essentials in considering validity.

*First.* If the contract is beyond the scope of the power of the municipality, that is, ultra vires in the strict sense, no recovery thereon is permitted.<sup>1</sup>

*Second.* Municipal corporation may be liable for work done and materials furnished on a contract with an unauthorized agent, where the contract was one which the city had power to make.<sup>2</sup>

*Third.* If a municipality accepts property by virtue of a contract within its power but not made in the proper

<sup>1</sup> Section 1172, post; Section Education, 90 N. J. L. 273, 100 Atl. 211, L. R. A. 1917D, 206.

<sup>2</sup> Frank v. Jersey City Board of

manner, ordinarily it is bound to pay the reasonable value thereof, not under the void contract, but by way of compensation.<sup>3</sup>

But it is also held that merely accepting and using the benefits of a void contract, one for example, not made in writing as expressly required, creates no municipal liability.<sup>4</sup> Failure to comply with specified conditions precedent, as previous authorization of the work to be done, usually creates no municipal liability.<sup>5</sup>

### § 1165. Ordinance as contract.<sup>6</sup>

### § 1166. Notice imputed to one contracting with municipality.

Contractors and others when dealing with municipal

<sup>3</sup> Nebraska Telephone Company v. Red Cloud, 94 Nebr. 6, 142 N. W. 534; Vito v. Simsbury, 87 Conn. 261, 87 Atl. 722.

<sup>4</sup> Accepting and using benefits of void contract—not in writing—creates no liability against the city on theory of estoppel or implied contract, and “such a dead contract cannot be subsequently ratified so as to breathe vitality into it.” Likes v. Rolla, 184 Mo. App. 296, 303, 304, 167 S. W. 645.

<sup>5</sup> “Our Constitution, Section 48, Article 4, provides that the General Assembly itself, the supreme lawmaking power of the state, shall have no power to grant, or to authorize any county or municipal authority to grant, any extra compensation to a public officer, agent, servant or contractor, ‘after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay, nor authorize the payment of any claim hereafter credited against the state or any county or municipality of the

state under any agreement or contract made without express authority of law and all such unauthorized agreements or contracts shall be null and void.’ While this constitutional prohibition does not literally cover the class of officers or public agencies to which these drainage districts belong, it would seem that its spirit should cover them, and that spirit is against the allowance or payment for public work, ‘services or labor of any kind done in the first instance without authority of law, as was the case here.’” Watts v. Levee District, 164 Mo. App. 263, 282, 145 S. W. 129.

<sup>6</sup> State v. Indianapolis (Ind. 1919), 123 N. E. 405.

Ordinance granting franchise to lay tracks in street, when accepted becomes a contract binding on state and city—was granted by city under general powers given by legislature. City in granting acted as agent of state. Vincennes v. Vincennes Traction Co. (Ind. 1918), 120 N. E. 27.

corporations are charged with notice of the restrictions which the law imposes on such corporations and their officials in making contracts.<sup>7</sup>

## II. CREATION.

### § 1167. Power to make contracts.

The charter or applicable legislative act, of course,

<sup>7</sup> Alabama. *Pearson v. Duncan & Son* (Ala.), 73 So. 406; *General Electric Co. v. Ft. Deposit*, 174 Ala. 179, 56 So. 802; *Mobile v. Mobile Electric Co.* (Ala. 1920), 84 So. 816, 819, citing § 1166, vol 3, ante.

California. *Harbor Center Land Co. v. Richmond* (Cal. App.), 176 Pac. 50.

Kentucky. *Walker v. Richmond*, 172 Ky. 26, 189 S. W. 1122; *Princeton v. Princeton E. L. & P. Co.*, 166 Ky. 730, 179 S. W. 1074; *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 167 S. W. 920, 52 L. R. A. (N. S.) 880.

Oklahoma. *Enid v. Warner-Quinlan Asphalt Co.* (Okl.), 161 Pac. 1092; *O'Neil Engineering Co. v. Ryan*, 32 Okl. 738, 124 Pac. 19.

Massachusetts. *Bay State St. Ry. Co. v. Woburn* (Mass. 1919), 122 N. E. 268; *U. S. Drainage & Irrig. Dist. Co. v. Medford*, 225 Mass. 467, 472, 114 N. E. 734; *McGovern v. Boston*, 229 Mass. 394, 118 N. E. 667; *Simpson v. Marlborough* (Mass. 1920), 127 N. W. 887.

Michigan. *Schneider v. Ann Arbor*, 195 Mich. 599, 162 N. W. 110.

Missouri. *Likes v. Rolla*, 184 Mo. App. 296, 167 S. W. 645.

Pennsylvania. *Union Paving Co. v. Philadelphia* (Pa. 1919), 107 Atl. 370.

Texas. *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.

City is not bound by agreements of its officers which they have no authority to make. *State ex rel. Bank of Tacoma v. Tacoma*, 97 Wash. 190, 166 Pac. 66.

"Municipal bodies can only exercise such powers as are conferred upon them by their charters and all persons dealing with them must see that they have the power to perform the proposed act." *Merchants Trust Co. v. Chicago*, 264 Ill. 76, 105 N. E. 726, affirming 182 Ill. App. 298.

A party dealing with a municipality can reap no advantage from the fact that his illegal conduct is completed, as it is incumbered upon every one, dealing with a municipality to discover its authority to act. (City can recover back money paid under void contract, even though it has received value for the money.) *Bangor v. Ridley*, 117 Me. 297, 104 Atl. 230.

One dealing with a municipal corporation cannot impose liability on it on account of representations or contracts of corporate officers as to matters ultra vires since he is bound with a knowledge of the extent of corporate powers. *Hart v. Wyndmere*, 21 N. D. 383, 131 N. W. 271.

must authorize the contract, either in express terms,<sup>8</sup> or by necessary or fair implication,<sup>9</sup> otherwise it is void

<sup>8</sup> *Barrett v. Atlanta*, 145 Ga. 678, 89 S. E. 781.

Express authority to contract for fire apparatus. *Bauer v. West Hoboken*, 90 N. J. L. 1, 100 Atl. 223.

City may contract for water supply. *Neal v. San Antonio Water Supply Co.* (Tex. Civ. App. 1920), 218 S. W. 35.

<sup>9</sup> Council may contract for appropriate offices. *Voelcker v. Schnell*, 166 N. Y. S. 420.

Where office of architect existed, held building committee could not contract to employ architect. *Barnett v. St. Louis* (Mo. App. 1917), 198 S. W. 452.

Contract for pumping water for city's water supply is within general power of city officers. *Arnhold v. Klug*, 97 Kans. 576, 155 Pac. 805.

Express authority to acquire certain mills, factories, and industrial plants, includes machinery annexed to said mills. *Warren Mfg. Co. v. Baltimore*, 119 Md. 188, 86 Atl. 502.

Quasi municipal corporations have implied power to make contracts which are within the purpose for which they are created. *People v. Spring Lake District*, 253 Ill. 479, 97 N. E. 1042.

City may employ expert accountants without special authority therefor. *Ward v. Du Quoin*, 173 Ill. App. 515.

Authority of county court to employ expert accountant is implied as cognate to its duty to look after the public funds, in-

vestigate accounts of officials, etc. *Blades v. Hawkins*, 133 Mo. App. 328, 112 S. W. 979.

City has no implied authority to create office of city physician and its contract for employment of a physician of a specified time is invalid. *Jacobs v. Elmira*, 132 N. Y. S. 54, 147 App. Div. 433.

By virtue of power to preserve the public health an attendant on a patient with smallpox may be employed by an Illinois village in order to render its quarantine effective. *Pierce v. North Utica*, 200 Ill. App. 527.

Municipality may enter into agreement for use of county pest house. *Macon v. Bibb County*, 138 Ga. 366, 75 S. E. 435.

Under authority given councils to construct and maintain and change systems of sewers, council may incur indebtedness for that purpose, and bonds issued therefore are valid if all steps in issuance thereof are properly taken. *Kimbly v. Owensboro*, 176 Ky. 532, 195 S. W. 1087.

In California city having its own water system may contract for a supply of water and the terms and duration of such a contract are within its discretion and not subject to legislative regulation of rates for the use of water supplied to municipalities or inhabitants thereof, provided for in the state constitution. *Marin Water & Power Co. v. Sausalito*, 168 Cal. 587, 143 Pac. 767.

Presumption is against delegation to municipality of power of

and unenforcible.<sup>10</sup>

Restrictions as to powers to contract are designed to protect the public rather than those who contract with the municipality.<sup>11</sup>

Laws provide, in substance, that no county, city, town, village, township, school district or other municipal corporation shall make any contract unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract.<sup>12</sup>

The contract must be reasonable in its terms.<sup>13</sup>

state to regulate public service rates, unless there was a delegation of such power in express terms. So contract by city fixing rates is subject to power of Public Service Commission to fix public service charges. *Benwood v. Public Service Commission*, 75 W. Va. 127, 83 S. E. 295; *Atlantic Coast Electric Co. v. Public Utility Commissioners*, 92 N. J. L. 168, 104 Atl. 218.

City may make such provisions in contracts as to safeguard itself as to quality of work and to protect its credit as provisions for inspection of work and for bond of contractor to indemnify against his negligence. *Savage v. Tampa*, 64 Fla. 109, 59 So. 242.

<sup>10</sup> *Tate v. Johnson* (Idaho 1919), 181 Pac. 523.

<sup>11</sup> Must be within power of municipality. *Staebler & Gregg v. Anchorage* (Ky. 1919), 216 S. W. 348.

Must be authorized, as contract as to rates with public service

company. *Ottumwa Ry. & Light Co. v. Ottumwa* (Ia. 1919), 173 N. W. 270.

<sup>11</sup> *Weston v. Bank of Greene County* (Mo. App. 1917), 192 S. W. 126, 128, quoting from Section 1276, vol. 3, ante.

<sup>12</sup> *Mullins v. Kansas City*, 268 Mo. 444, 456, 188 S. W. 193.

Where there is no statutory restriction, city may contract for service to be rendered to it, for a reasonable length of time. *Salina Water Works v. Salina*, 195 Fed. 142.

Cannot contract for legal services to be performed for a succeeding city administration. *McCormick v. Hanover*, 246 Pa. 169, 92 Atl. 195.

<sup>13</sup> "A city cannot bind its inhabitants by a contract unreasonable in its terms." *State ex rel. v. Billings Gas Co.* (Mont. 1918), 173 Pac. 799, following *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249, 16 Am. & Eng. Corp. Cas. 301.

**§ 1168. Same—contracts prohibited.**

Clearly contracts foreign to the purposes for which the municipality was created are void, as a contract for legal services for a purpose not within the corporate functions,<sup>14</sup> or a contract to contribute to the expense of building a bridge outside of the city limits.<sup>15</sup>

A municipality cannot assume a liability where none legally exists. Thus it cannot pledge public funds in exoneration of the liability of one private corporation to another.<sup>16</sup>

Nor can a municipality dispose of its property without consideration. Hence, it cannot discharge without payment, a debt against a solvent party, where no controversy exists.<sup>17</sup>

So a contract between a city and a public service company fixing unalterable rates for a specified period, it has been held, is not authorized.<sup>18</sup>

**§ 1169. Same—contracts limiting legislative powers.**

A municipal corporation cannot make contracts which interfere with its legislative or governmental functions.<sup>19</sup>

**§ 1171. Same—incurring indebtedness beyond debt limit.**

Contracts creating debts in excess of the limitation prescribed by constitution or statute are not enforceable.<sup>20</sup>

<sup>14</sup> *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.

<sup>15</sup> *Mineral County v. Piedmont*, 73 W. Va. 296, 78 S. E. 63.

<sup>16</sup> *American Malleables Co. v. Bloomfield*, 82 N. J. L. 79, 81 Atl. 500, affirmed in 83 N. J. L. 728, 85 Atl. 167.

<sup>17</sup> *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388.

<sup>18</sup> *Ottumwa Ry. & Light Co. v. Ottumwa* (Ia. 1919), 173 N. W. 270, 272.

<sup>19</sup> *Warm Springs Co. v. Salt*

*Lake City* (Utah), 165 Pac. 788, 790, quoting with approval greater part of Section 1169, vol. 3, ante.

<sup>20</sup> Transaction which violates the constitution of the state will not be enforced. Debt created in excess of limitation imposed by constitution cannot be ratified by vote of electorate. *Re Afton*, 43 Okl. 720, 144 Pac. 184.

A statute which attempts to validate indebtedness in excess of the revenue and income for the year, in violation of the state

**§ 1172. Same—rights of parties where contract ultra vires or illegal.**

Ultra vires contracts and contracts within the power of the municipal corporation to make although illegally or irregularly made, are to be distinguished. Where the latter have been performed in good faith for the benefit of the public, recovery thereon is usually authorized.<sup>21</sup>

constitution is void. *Re Afton*, 43 Okl. 720, 144 Pac. 184.

Contract for a public improvement the cost of which is in excess of limitation on indebtedness is not invalid where such excess is contributed by a private corporation. *Savage v. Tampa*, 64 Fla. 109, 59 So. 242.

<sup>21</sup> *McGovern v. Chicago*, 281 Ill. 264, 118 N. E. 3, affirming 202 Ill. App. 139.

Contract by city to supply water for fifty years for five dollars in order to secure location of a state institution, is not a legitimate corporate purpose. *Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573, affirming 193 Ill. App. 600.

A contract which is expressly prohibited by statute is void and no recovery can be had thereon even though benefits have been received, while if merely ultra vires, a recovery can be had for the benefits enjoyed. *Hirsch & Spitz Mfg. Co. v. Enterprise*, 5 Ala. App. 387, 59 So. 315.

Defense of ultra vires can be made only by the party whose acts, or the acts of whose agents are claimed to be ultra vires. *Belfast v. Belfast Water Co.*, 115 Me. 234, 98 Atl. 738.

No liability on contract forbidden by statute. *Cohen v. Henderson* (Ky. 1918), 207 S. W. 4.

Contract in violation of a statute is ultra vires, and no liability arises thereon. *Honnold v. Carter County Comrs.* (Okla.), 177 Pac. 71, 76.

Where contract is irregular, and the city accepts and retains the benefits liability thereon arises. No recovery, however, can be had on a void contract. *O'Neill v. South Omaha* (Neb. 1918), 170 N. W. 174.

Assignee of a contract ultra vires the corporation can take nothing thereunder and the other party to the contract is not estopped to set up the want of corporate authority although it has received benefits under the contract. *Pearson v. Duncan & Son* (Ala.), 73 So. 406.

Equity will not relieve a municipal corporation from an ultra vires contract without providing for the restoration of the property received. The doctrine of ultra vires when invoked for or against a municipal corporation should not be allowed to prevail when it would defeat the end of justice and work a legal wrong. *Walker v. Richmond*, 173 Ky. 26, 189 S. W. 1122.

City resisting a claim made against it under a void contract, is in a different attitude from what it is when it comes into

**§ 1173. Power to contract for legal services.**

As the power to contract for legal services is necessary to the efficient exercise of the usual functions of municipal bodies, without express authority, unless restricted, legal services may be engaged.<sup>22</sup>

**§ 1174. Same—contracts for extra legal services.**

Extra legal services are sometimes sanctioned in particular cases.<sup>23</sup>

**§ 1176. Same—interest of the municipality.**

The employment of an attorney for a purpose for which there is neither express or implied authority plainly is *ultra vires*.<sup>24</sup> Therefore, a municipality cannot contract for legal services in a suit brought for the pur-

court asking relief, to recover payments made under a void contract, for benefits received and voluntarily paid for. In the latter case the rule that "he who seeks equity must do equity" applies. *Princeton v. Princeton E. S. & P. Co.*, 166 Ky. 730, 179 S. W. 1074.

<sup>22</sup> When necessary an attorney to aid the city attorney may be employed. *Topeka v. Richie* (Kan. 1919), 184 Pac. 728, 731, citing Section 1173.

The power to contract for legal services is indispensable to the proper exercise of the ordinary general powers of municipal bodies. *Cheesebrew v. Point Pleasant*, 71 W. Va. 199, 76 S. E. 424.

Board of rapid transit commissioners under particular statute, held could employ counsel and fix his compensation. *State ex rel. Spiegel v. Seimann*, 97 Ohio 334, 120 N. E. 174.

Contract for legal services to

contest an election, held to determine whether the corporation of the town should be abolished, held *ultra vires* and void. *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.

There is no implied liability on the part of a county to pay for services of an attorney appointed to defend an indigent accused. *Pardee v. Salt Lake County*, 39 Utah 482, 118 Pac. 122.

If the services are required to be performed by the county attorney, the county commissioners are without power to employ an attorney to perform them. Such contract is *ultra vires*. *Honnold v. Carter County Comrs.* (Okl.), 177 Pac. 71, 78.

<sup>23</sup> *Oak Creek v. Wiley* (Colo.), 170 Pac. 190; *Holdenville v. Sawson*, 40 Okl. 38, 135 Pac. 405.

<sup>24</sup> *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549.



pose of establishing title of individuals to certain municipal offices to which they claim to be elected.<sup>25</sup>

So it has been held that the employment of an attorney to appear before the state commission to resist an application by a telephone company to raise its rates, was in no way connected with the purpose for which the municipality was created, and was therefore void.<sup>26</sup>

It is competent for a city to employ attorneys in a case to which the city is not a party, but in which the decision will vitally affect the interests of the municipality.<sup>27</sup>

### § 1177. Who may act in behalf of municipality.

The officer, body or board duly authorized, must act in behalf of the municipality, otherwise a valid contract cannot be created.<sup>28</sup>

<sup>25</sup> Stearns v. Zion, 160 Ill. App. 414.

<sup>26</sup> Purcell v. Wadlington, 43 Okl. 728, 144 Pac. 380.

<sup>27</sup> Cheesebrew v. Point Pleasant, 71 W. Va. 199, 76 S. E. 424.

<sup>28</sup> Power to contract is in council unless specifically given to some other officer or board. Mena v. Tomlinson, 118 Ark. 166, 175 S. W. 1187.

City commissions or council must act in its organized capacity, not individually. Wichita Water Co. v. Wichita, 98 Kans. 256, 158 Pac. 49.

Power of mayor to contract is limited by charter. Fiske v. Worcester, 219 Mass. 428, 106 N. E. 1025.

Ordinance authorizing mayor to execute and deliver all contracts of the city, is valid if not in conflict with charter or statutes. Clarke v. Fall River, 219 Mass. 580, 107 N. E. 419.

Contract by city clerk held in-

valid. Worrell Mfg. Co. v. Ashland, 159 Ky. 656, 167 S. W. 922, 52 L. R. A. (N. S.) 880.

Boards are limited to powers conferred by law. Coy Kendall v. Harrison, 134 N. Y. S. 446, 150 App. Div. 46; West Jersey & Seashore R. R. Co. v. Atlantic City, 86 N. J. L. 634, 92 Atl. 369; Sulphur Springs v. Galbraith, 123 Ark. 619, 185 S. W. 474; Kindling Mach. Co. v. York City, 54 Pa. Super. Ct. 318.

Board created for particular purpose may use a reasonable discretion in making contracts to accomplish that purpose. McCutcheon v. Buffalo, 217 N. Y. 127, 111 N. E. 661, affirming 154 N. Y. S. 711, 168 App. Div. 301; People v. Spring Lake Dist., 253 Ill. 479, 97 N. E. 1042.

San Francisco board of public works may purchase automobiles as equipment for extension of existing public utility, of which such board had control, and which was

**§ 1178. Same—effect when contract made by wrong officer or board.<sup>29</sup>**

**§ 1179. Mode of executing, form and contents.**

The general rule is that the mode prescribed for making contracts must be followed.<sup>30</sup> Where the mode is prescribed and limited by law this mode is viewed as exclusive,<sup>31</sup> e. g., requiring competitive bidding,<sup>32</sup> or where

operated by the city. *Vale v. Boyle* (Cal.), 175 Pac. 787.

Power of manager of municipal lighting plant to contract as to coal. *Rockhill Iron & Coal Co. v. Taunton*, 261 Fed. 234.

<sup>29</sup> *Astoria v. Am. La France Fire Engine Co.*, 225 Fed. 21, 139 C. C. A. 80, reversing 218 Fed. 480.

<sup>30</sup> *Lamb v. Erie* (Pa. 1918) 105 Atl. 463; *Tharp v. Blake* (Tex. Civ. App.), 171 S. W. 549; *Cade v. Belington*, 82 W. Va. 613, 96 S. E. 1053; *Frisbie Co. v. East Cleveland* (Ohio), 120 N. E. 309; *McKechney v. Chicago*, 160 Ill. App. 544; *Buckeye Engine Co. v. Cherokee*, 54 Okl. 509, 153 Pac. 1166; *Wichita Water Co. v. Wichita*, 98 Kans. 256, 158 Pac. 49; *Arthur v. Petaluma*, 27 Cal. App. 782, 151 Pac. 183; *Mobile v. Mobile Electric Co.* (Ala. 1920), 84 So. 816, 818, citing § 1179, p. 2608, vol. 3, ante.

Strict adherence to law usually required. *Flinn v. Philadelphia*, 258 Pa. 355, 102 Atl. 24.

If the law does not prescribe the mode, acceptance by proper corporate authorities of a proposal will bind the city. *Nott Co. v. Sawyer*, 35 N. D. 587, 161 N. W. 202.

Contract signed by mayor, held valid although he did not approve

it by writing as law expressly declared. "It would be sacrificing substance to form to say that after the mayor had manifested his direct affirmative sanction (*McLean v. Holyoke*, 216 Mass. 62, 65, 102 N. E. 929) to every stipulation of the contract by executing it in behalf of the defendant (City) he must go through the further idle ceremony of signing a nominal approval of it." *Clarke v. Fall River*, 219 Mass. 580, 107 N. E. 419.

Signature of particular specified officer necessary. *McKinney v. Wagoner*, 45 Okl. 28, 144 Pac. 1071. If contract can be made by council only, one member thereof, cannot make. *Scott v. Lincoln* (Neb. 1920), 178 N. W. 203.

<sup>31</sup> *Fisk v. Worcester*, 219 Mass. 428, 106 N. E. 1025.

Where the state laws provide the method by which municipalities may dispose of property of a specified kind, the method so indicated must be substantially followed. *McDonald v. Price*, 45 Utah 464, 469, 146 Pac. 550, quoting Section 1180, vol. 3, ante.

<sup>32</sup> *Dolan v. Schoen*, 261 Pa. 11, 104 Atl. 149.

"We have uniformly held in numerous decisions, and it may now be regarded as the general

the contract must be authorized by ordinance,<sup>33</sup> or must be in writing.<sup>34</sup>

rule in this state, that where the charter act of a city prescribes the method or formal mode of making municipal contracts, it must be observed, and if not executed in conformity therewith a contract is not enforceable against the municipality. We have held that such requirements in the organic law of a city are mandatory, and that liability on municipal contracts can only be imposed by a compliance with the method prescribed by the statute." *Philadelphia Co. v. Pittsburgh*, 253 Pa. 147, 97 Atl. 1083, approving *Carpenter v. Yeadon Boro*, 208 Pa. 396, 399, 57 Atl. 837, 838, and *Hepburn v. Philadelphia*, 149 Pa. 335, 339, 24 Atl. 279, 280.

<sup>33</sup> *Keenan v. Trenton*, 130 Tenn. 71, 168 S. W. 1053.

Failure to publish ordinance required length of time, invalidates contract authorized by ordinance. *Block v. Meridan*, 194 Fed. 675.

Resolution authorizing employment of certain persons is invalid where charter required that all legislation which created indebtedness must be by ordinance. *Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 498.

"If the city could only exercise the power to provide engines and other apparatus for the department by ordinance it is immaterial whether in the exercise of that power it was acting in a governmental or purely private capacity." *Astoria v. American La France Fire Engine Co.*, 225, approving statement of Field, C. J.,

in *McCracken v. San Francisco*, 16 Cal. 591, 621, and *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063, and distinguishing *Beers v. Dalles City*, 16 Or. 334, 16 Pac. 835.

Under a charter provision prescribing that the city "is not bound by any contract or in any way liable thereon unless the same is authorized by city ordinance," a contract for supplies not so authorized is void and not binding on the city. *Astoria v. American La France Fire Engine Co.*, 225 Fed. 21, 24, 139 C. C. A. 80, reversing 218 Fed. 480, and approving *Grafton v. Sellwood*, 24 Or. 118, 32 Pac. 1026.

General charter provision that all contracts be authorized by ordinance, held not to apply to contract made in pursuance of special power conferred by another provision of the charter. *American La France Fire Engine Co. v. Astoria*, 218 Fed. 480.

A council resolution accepting lease of city offices passed over the veto of mayor, held constituted the making of the contract. *Voelcker v. Schnell*, 166 N. Y. S. 420.

By ordinance or resolution. *Bergen Beach Land Corp. v. New York*, 177 N. Y. S. 439.

<sup>34</sup> *Reiger v. Pittsburg*, 54 Pa. Super. Ct. 425; *Creekmore v. Central Construction Co.*, 157 Ky. 336, 163 S. W. 194; *Cotter v. Kansas City*, 251 Mo. 224, 229, 150 S. W. 52.

There can be no recovery on an

Laws provide, in substance, that contracts of municipal corporations, including the consideration, shall be in writing and dated when made, and shall be subscribed by the persons thereto or their agents authorized by law and duly appointed and authorized in writing. The fact that a municipal corporation by virtue of constitutional provisions has framed and adopted a freeholders' charter does not of itself create immunity against the provisions of such law.<sup>35</sup>

The law is applied to municipal corporations generally, whatever form of charter possessed by them, and whether county, township, or whether urban or suburban in character.<sup>36</sup>

implied contract after performance of work. *McGovern v. Boston*, 229 Mass. 394, 118 N. E. 309.

Contract shall be in writing held mandatory, and one not so made by agent cannot be ratified. *Montague Compressed Air Co. v. Fulton*, 166 Mo. App. 11, 30, 148 S. W. 422, holding there could be no recovery for labor and material furnished a city, in the absence of written contract or memorandum.

Not in writing' void; city not liable on theory of estoppel or implied contract by accepting and using benefits. *Likes v. Rolla*, 184 Mo. App. 296, 301 et seq., 167 S. W. 645.

Provision of an ordinance that proposals for performance of work shall be accompanied by a certified check to guarantee proper execution of contract, held to imply that contract therefor shall be in writing. *State ex rel. McCormick v. Wilmington*, 26 Del. 387 (3 Boyce 387), 84 Atl. 871.

Informal agreement of council to pay interest on warrants, of which no record was made was held not to be binding. *Alabama*

*City G. & A. Ry. Co. v. Gadsden*, 185 Ala. 263, 267, 64 So. 91, quoting Section 617, vol. 2, ante.

Deed conveying sewer to city with ordinance for purchase thereof constitutes written contract, etc. *Schwabe v. Moore*, 187 Mo. App. 74, 81, 172 S. W. 1157.

Oral contract for emergency work as the removal of garbage, held valid. *Maguire v. Philadelphia*, 66 Pa. Super. Ct. 300.

Writing. Requirement of statute to be observed, otherwise contract—here for supply of coal for light and power plant—is void. *Brown Coal Co. v. New Madrid* (Mo. App. 1919), 208 S. W. 109; *Likes v. Rolla*, 184 Mo. App. 296, 167 S. W. 645.

Where statute does not require contract be in writing oral contracts of city are valid. *Brownsville v. Tumlinson* (Tex. Civ. App.), 179 S. W. 1107.

<sup>35</sup> *Mullins v. Kansas City*, 268 Mo. 444, 456-458, 188 S. W. 193; *Municipal Securities Corporation v. Kansas City*, 265 Mo. 252, 268, 177 S. W. 856.

<sup>36</sup> *Anderson v. Ripley County*,

**§ 1180. Same—conditions precedent or subsequent to making contract, such as appropriations, etc.**

Requisite steps prescribed by law to be followed prior to making the contract and subsequent thereto, must be taken to render the contract binding; e. g., vote of the electors,<sup>38</sup> authorization by ordinance,<sup>39</sup> estimate of the necessary expenditure,<sup>40</sup> and making the appropriation therefor.<sup>41</sup>

181 Mo. 46, 57; *Anderson v. Ripley*, 181 Mo. 46, 80 S. W. 263; *Cook v. Cameron*, 144 Mo. 137, 142, et seq.; *Wollfolk v. Randolph County*, 83 Mo. 506; *Perkins v. School District*, 99 Mo. App. 483; *Crutchfield v. Warrensburg*, 30 Mo. App. 456.

"If a contract for public work is not in writing and does not state the consideration the contractor is to receive the statute pronounces it void and no cause of action will inure from the doing of public work under a void contract. Contractors are charged with notice of the restrictions the law imposes on the power of officials to contract on behalf of the municipality." *Cook v. Cameron*, 144 Mo. App. 137, 144, 128 S. W. 269.

"The law will not make that valid without a writing which the law requires should be in writing." *Chase v. Rd. Co.*, 97 N. Y. 387.

"From a void contract no cause of action can arise whether of quantum meruit or one sounding in damages." *Keating v. Kansas City*, 84 Mo. 415, 419.

<sup>38</sup> *McDonald v. Price*, 45 Utah 464, 469, 146 Pac. 550, 552, quoting and approving Section 1180, vol. 3, ante; *Perry Water, Light & Ice*

*Co. v. Perry*, 29 Okl. 593, 120 Pac. 582.

Contract for water service for fire hydrants submitting to vote of people. *State ex rel. v. Public Service Com.* (Me. 1918), 204 S. W. 497.

<sup>39</sup> Charter may require that expenditures in excess of certain amount be authorized by ordinance. *Clatskanie State Bank v. Rainier*, 72 Or. 243, 143 Pac. 909.

Where authority is given to issue bonds for a specific purpose, council may make a contract in relation to that purpose, before actually authorizing issue of such bonds. *Van Arsdale v. Justice*, 133 N. Y. S. 661, 75 Misc. Rep. 495.

<sup>40</sup> Where funds are actually on hand for authorized purchase of fire apparatus, the fact that there was no estimate for this expenditure in the city's budget will not invalidate contract therefor. *People ex rel. v. Mulholland Co. v. Nowak*, 163 N. Y. S. 374, 99 Misc. Rep. 111.

<sup>41</sup> Appropriation to pay as a prerequisite. *Municipal Securities Corp. v. Kansas City*, 265 Mo. 252, 268, 177 S. W. 856.

A contract for the construction of a public building the cost of which is in excess of the amount

Certain contracts are required to be accompanied by a sufficient bond which requirement is usually held mandatory.<sup>42</sup>

**§ 1181. Same—effect of irregularity in entering into contract or in form of contract.**

Irregularities in the making of a contract within the corporate powers which are directory merely will not necessarily invalidate the contract.<sup>43</sup>

Recovery on a quantum meruit is frequently permitted in such cases where the public has received the benefits.<sup>44</sup>

appropriated therefore is invalid. *Lord v. New York*, 157 N. Y. S. 127, 171 App. Div. 140.

If there is a sufficient appropriation at the time contract is awarded, it is immaterial that there was not a sufficient appropriation at the time bids were received. *People ex rel. Carlin Const. Co. v. Prendergast*, 163 N. Y. S. 583, 99 Misc. Rep. 8, affirmed in 163 N. Y. S. 1128.

<sup>42</sup> Contracts involving sums exceeding a specified amount to be accompanied by a sufficient bond, held mandatory. "Shall" was used. "The force of the statute cannot be waived or abrogated simply because the person contracting with the city appears to be of such financial responsibility as to render unnecessary the requirement of a bond. The statute is general in its terms and applies to all alike." *Bay State St. Ry. Co. v. Woburn*, 232 Mass. 201, 122 N. E. 268.

Law requiring bond of a contractor, held inapplicable to a contract of a city with an individual for the collection of ashes, street cleaning, etc. *Loonie v. Wilson* (Mass. 1919), 124 N. E. 272.

<sup>43</sup> Irregularities in the exercise of a specified power, will not relieve city from liability, where city is acting in a proprietary or quasi-private character, and has received the benefits of the contract. *First Nat. Bank v. Emmetsburg*, 157 Iowa 555, 138 N. W. 451.

Where the city is sued on a contract which is within its general powers, the burden is upon the city to plead and prove facts rendering the contract illegal. *National Meter Co. v. Bellwood*, 192 Ill. App. 424.

Irregularity in notice to aldermen of a special meeting where they are in fact notified, will not invalidate contract authorized at such meeting. *Ward v. DuQuoin*, 173 Ill. App. 515.

Where municipal corporation acts through its duly accredited officers, in performance of a duty clearly not ultra vires, it will be liable for benefits received under a contract irregularly executed. *New York S. & W. R. Co. v. Patterson*, 86 N. J. L. 101, 91 Atl. 324.

<sup>44</sup> *Konig v. Baltimore*, 128 Md. 465, 480, 499, 500, 97 Atl. 837, quoting part of § 1181, vol. 3, ante,

If the restrictions as to the mode and form constitute limitations on the power to contract, usually liability is denied.<sup>45</sup>

### III. COMPETITIVE BIDS.

#### § 1184. Purpose of requiring bids.

The purpose of requiring bids is to guard against in principal and dissenting opinions.

Quantum meruit recovery. *Keenan v. Trenton*, 130 Tenn. 71, 163 S. W. 1053.

Mere receipt of benefits does not raise implication to pay therefor, as where the promise was made by a single council member. *Scott v. Lincoln* (Neb. 1920), 178 N. W. 203.

Acceptance by resolution instead of by ordinance. "The contract entered into and which induced their installation in the first instance was within the power of the city and it is estopped to deny the right of compensation to that extent. Although it be true that an estoppel may not be invoked against a municipal corporation which acts entirely beyond the scope of the power conferred upon it, this doctrine does not obtain as to such matters as fall within the powers conferred. For an application of the broad principle see (*Wilson v. King's Lake Drainage*, etc., Dist., 257 Mo. 266, 165 S. W. 734; s. c., 176 Mo. App. 470, 158 S. W. 931; *Union Depot Co. v. St. Louis*, 76 Mo. 393; s. c., 8 Mo. App. 412). Therefore, where it appears that the power has been conferred upon the municipality to enter into the contract in compliance with which

the services have been rendered, the principle of estoppel obtains alike as in the case of individuals, where such contract has been fully complied with and the benefits received thereunder and retained and used by the adverse party. The right to recover the reasonable value thereof may be asserted independently of the contract, though it is predicated on its fulfillment—that is, by showing compliance with the terms imposed on the part of the party seeking relief—and the mere fact that the contract is, in some respects, irregular or that the power to enter into it, lodged in the corporation was defectively exercised, will not suffice to repel such right as to the benefit conferred on the one part, and received, retained and utilized on the other. (See *Edwards v. City of Kirkwood*, 147 Mo. App. 599, 127 S. W. 378; *Union Depot Co. v. St. Louis*, 76 Mo. 393; s. c., 8 Mo. App. 412.) But, of course, the recovery must not exceed the contract price. (*American Surety Co. v. Fruin-Bambrick Construction Co.*, 182 Mo. App. 667, 166 S. W. 333.)" *Schueler v. Kirkwood*, 191 Mo. App. 575, 584, 585, 177 S. W. 760.

<sup>45</sup> See § 1181, vol. 3, ante; *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 167 S. W. 922, 52 L. R. A.

favoritism, improvidence, extravagance and corruption in the awarding of municipal contracts,<sup>46</sup> and these requirements should be so construed and administered as to accomplish such purpose fairly and reasonably.<sup>47</sup>

### § 1185. Requirement for competitive bidding as mandatory.

The requirement of competitive bidding in the letting of municipal contracts is uniformly construed as mandatory and jurisdictional and non-observance will render the contract void and unenforceable.<sup>48</sup>

Under such restriction a fair opportunity must be given for free competition. No scheme or device promotive of favoritism or unfairness or which imposes limitations, not applicable to all bidders alike, will be tolerated.<sup>49</sup>

(N. S.) 880; *Konig v. Baltimore*, 128 Md. 465, 492, 493, 97 Atl. 837, dissenting opinion quoting with approval part of § 1181, vol. 3, ante.

<sup>46</sup> "To safeguard public funds and prevent favoritism, fraud and extravagance in their expenditures." *Leysler v. Momery*, 129 Idaho 412, 160 Pac. 262.

"The purpose of this provision is to insure competition in letting contracts for such improvements (public), to protect the taxpayers and the public." *Williams v. Topeka*, 85 Kan. 857, 118 Pac. 864.

"To guard against favoritism and extravagance in the award of contracts for work and material let out by public bodies for public uses." *McGovern v. Trenton*, 84 N. J. L. 237, 86 Atl. 539, 541.

<sup>47</sup> *Atkinson v. Webster City*, 177 Iowa 659, 158 N. W. 473, 479.

<sup>48</sup> *California. Arthur v. Petaluma*, 27 Cal. App. 782, 151 Pac. 183; *Clinton Construction Co. v. Clay*, 34 Cal. App. 625, 168 Pac. 588.

*Illinois. Lincoln v. Thompson*, 190 Ill. App. 36.

*Indiana. Hoosier Construction Co. v. Seibert* (Ind. App.), 114 N. E. 981, 984; *Edwards v. Cooper*, 168 Ind. 54, 79 N. E. 1047.

*Minnesota. Arpin v. Thief River Falls*, 122 Minn. 34, 141 N. W. 833.

*Missouri. Thrasher v. Kirksville* (Mo. 1918), 204 S. W. 804.

*Pennsylvania. Lewis v. Philadelphia*, 235 Pa. 260, 84 Atl. 33; *Philadelphia Co. v. Pittsburgh*, 253 Pa. 147, 97 Atl. 1083; *Dolan v. Schoen*, 261 Pa. 11, 104 Atl. 149.

*South Dakota. Will v. Bismark*, 36 S. D. 570, 163 N. W. 550.

"The duty to advertise for bids was not discretionary with the director, but was imposed upon him by legislative mandate which he was not at liberty to disregard." *Flynn v. Philadelphia*, 258 Pa. 355, 361, 102 Atl. 24.

<sup>49</sup> *Youmans v. Everett*, 173 Mo. App. 671, 675, 160 S. W. 274.



**§ 1186. Same—necessity for competitive bidding when not required by statute, charter of ordinance.<sup>50</sup>**

**§ 1187. Same—construction of particular statute or charter provisions.**

The proper construction of the applicable law, of course, will determine whether in the letting of the particular contract competitive bidding is required.<sup>51</sup>

<sup>50</sup> Need not be let under competitive bidding if law does not so require. *Henderson v. Enterprise* (Ala. 1918), 80 So. 115, 118, citing § 1186, vol. 3, ante; *Miller v. Boyle* (Cal. App. 1919), 184 Pac. 421; *Vermeule v. Corning*, 174 N. Y. S. 220.

"It is well established that in the absence of charter or statutory requirement municipal contracts need not be let under competitive bidding. In such cases the corporate authorities are only required to act in good faith and to the best interests of the municipality." *Price v. Fargo*, 24 N. D. 440, 455, 139 N. W. 1054, 1058, quoting with approval substance § 1186, vol. 3, ante.

<sup>51</sup> *Warren Bros. Co. v. Boyle* (Cal. App. 1919), 183 Pac. 706.

Law applying to "work materials and labor," held inapplicable to employment of auditors, as required by statute. *Heston v. Atlantic City* (N. J. L.), 107 Atl. 820.

Requirement of Baltimore Charter, held not applicable to contracts made by board of police commissioners. *Thrift v. Ammidon*, 126 Md. 126, 94 Atl. 532.

Under particular statute, held newspaper publication of advertisements, not "work, labor, nor

materials," requiring contracts therefor to be let to "lowest bidder." *Doeker v. Atlantic County Freeholders*, 90 N. J. L. 473, 101 Atl. 370.

Inapplicable to street lighting contract, inasmuch as rates for service is subject to change from time to time by state commission. *State ex rel. v. Oconto Electric Co.*, 165 Wis. 467, 161 N. W. 789.

Law requiring competitive bidding and estimate of probable cost as to certain contracts, held had no application to contract for construction of filtration plant. *Price v. Fargo*, 24 N. D. 440, 139 N. W. 1054.

The requirement of the charter for competitive bids for all expenditures for work done or materials furnished, held not to apply for renting of city offices. *Voelcker v. Schnell*, 166 N. Y. S. 420, 424.

Requirement held not to apply to contract for employment of an architect to erect a public building. *Stratten v. Allegheny County*, 245 Pa. 519, 91 Atl. 894.

Requirement applies to contract to construct a telephone system or the granting of a franchise therefor. *Arpin v. Thief River Falls*, 122 Minn. 34, 141 N. W. 833.

### § 1188. Same—as dependent on the amount involved.

The requirement as to competitive bidding dependent on the amount involved in the contract to be let, should be observed in good faith by the acting municipal authorities.<sup>52</sup>

### § 1192. Same—"ordinance" requiring bids.<sup>53</sup>

Although neither charter nor applicable statute prescribes competitive bidding, or a method for letting contracts, an ordinance providing for such bidding must be observed, otherwise the contract cannot be enforced against the municipality.<sup>54</sup>

Contract to supply gas to city hospital, to be let by competitive bidding. *Philadelphia Co. v. Pittsburgh*, 253 Pa. 147, 97 Atl. 1083.

The law required that all work for city except "ordinary repairs," should be let by competitive bidding, and that the council might provide a contingent fund for "necessary repairs or incidental expenses," etc., which might be expended without advertising, etc. Held, contracts for improvements of the city hall of a permanent character, including remodeling, partitions, stairways, windows, etc., new heating, lighting and pumping systems, should be let by competitive bidding, notwithstanding some of the items were "ordinary repairs," but they were so blended with items of permanent repairs, they could not be made the basis for separate claims. *Dolan v. Schoen* (Pa. 1919), 104 Atl. 149.

<sup>52</sup> \$500 or over. *Hester v. Atlantic City* (N. J. L.), 107 Atl. 820.

Exceeding \$250.00. *Ford v.*

*Great Falls*, 46 Mont. 292, 127 Pac. 1004.

Not exceeding \$500.00. *McGovern v. Chicago*, 281 Ill. 264, 118 N. E. 3, affirming 202 Ill. App. 139.

Repair of street pavement which does not exceed \$500.00. *McGovern v. Chicago*, 281 Ill. 264, 118 N. E. 3, affirming 202 Ill. App. 139.

Limit \$500.00 not applicable to contracts for less. *Hackett v. Hussels* (N. J. L.), 102 Atl. 527.

The law required that in letting contract for more than \$200.00 there should be advertising for proposals; held, not applicable to advertising for proposals for bids upon which to base a designation of a new and different official paper. *People ex rel. v. Lackawanna*, 223 N. Y. 445, 119 N. E. 894.

<sup>53</sup> *Flynn v. Philadelphia*, 258 Pa. 355, 102 Atl. 24, approving *Smith v. Philadelphia*, 227 Pa. 423, 76 Atl. 21, and *Hinkle v. Philadelphia*, 214 Pa. 126; *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004.

<sup>54</sup> *Lemon v. Shepherd*, 180 Mo.

§ 1193. Same—emergency as exception to the rule.<sup>55</sup>

§ 1194. Same—necessity for bids after work abandoned by contractor.<sup>56</sup>

§ 1195. Same—necessity for bids for extra work.<sup>57</sup>

§ 1197. Patented articles or materials.

Although denied in some states,<sup>58</sup> the broad proposition generally sustained is that a patented article or

App. 332, 167 S. W. 1145, approving *Excelsior Springs v. Ettenson*, 120 Mo. App. 215, 96 S. W. 701; *Webb City v. Aylor*, 163 Mo. App. 155, 147 S. W. 214; *Galbreath v. Newton*, 30 Mo. App. 380, 394.

<sup>55</sup> City cannot "construct or make new improvements, or carry on construction work which amounts to an improvement, without calling for bids as the statute requires. It no doubt may make many repairs, and may protect any improvement in case of an emergency, or do anything necessary to preserve and protect its property or that of the abutting owners in case of necessity without calling for bids." *Utah Savings & Trust Co. v. Salt Lake City*, 44 Utah 150, 138 Pac. 1165, 1168, holding city could not contract to construct dams to increase city water supply where there was no "claim on the part of the city that the work was done under an emergency, or that it should be excepted from the general rule for some other reason."

**Street cleaning contract**, held could be re-let without advertisement, etc. "Two contractors had abandoned the contract, and the accumulating refuse would become

a menace to the public. The authorities were warranted in putting an end to this condition in the way employed. Neither the contract nor the law required a further readvertisement." *New York v. Palladino*, 131 N. Y. S. 807, 146 App. Div. 850.

<sup>56</sup> *Moriarity v. Orange*, 89 N. J. L. 385, 98 Atl. 465, approving *Camden v. Ward*, 67 N. J. L. 558, 52 Atl. 392.

Not required, emergency. *New York v. Palladino*, 131 N. Y. S. 807, 146 App. Div. 850.

<sup>57</sup> *Lewis v. Philadelphia*, 235 Pa. 260, 84 Atl. 33, 36, approving *Smith v. Philadelphia*, 227 Pa. 423, 76 Atl. 221 (set out in § 1195, vol. 3, ante.)

<sup>58</sup> *Rockford v. Armour* (Ill. 1919), 125 N. E. 356.

"Under our statute a municipal corporation cannot in an ordinance for a local improvement to be paid for by special assessment require the use of a patented article not purchasable in the market or of material which can be obtained of only one person, firm or corporation, even though the owner of the patent or of the material should agree to furnish the article or material at a fixed price to

process may be specified under the requirement of competitive bidding.<sup>59</sup>

### § 1199. Requests for bids must invite and not restrict competition.<sup>60</sup>

any contractor bidding." "If such ordinance does not show on its face that the article specified is patented or controlled by a single owner that fact may be proved." *Rossville v. Smith*, 256 Ill. 302, 100 N. E. 292.

<sup>59</sup> *Arizona. Farmer v. Dahl* 19 Ariz. 395, 171 Pac. 130.

*California. Warren Bros. Co. v. Boyle* (Cal. App. 1919), 183 Pac. 706.

*Missouri. Meek v. Chillicothe*, 181 Mo. App. 218, 221, 167 S. W. 139; *Rackliffe-Gibson Const. Co. v. Walker*, 170 Mo. App. 69, 156 S. W. 65; *Barber Asphalt Pav. Co. v. Kansas City Hydraulic P. B. Co.*, 170 Mo. App. 503, 156 S. W. 749; *Custer v. Springfield*, 167 Mo. App. 354, 361, 151 S. W. 759.

*Montana. Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004.

*Oregon. Sherrett v. Portland*, 75 Or. 449, 147 Pac. 382.

*Washington. Great Northern Ry. Co. v. Leavenworth*, 81 Wash. 511, 142 Pac. 1155.

Patented pavement, where there is competitive bidding. *Union Paving Co. v. Schenectady*, 134 N. Y. S. 740, 74 Misc. Rep. 646.

"There is no objection to specifying a patented pavement where the patentee offers to all bidders alike the right to make use of the patented article upon reasonable terms." *Temple v. Portland*, 77 Or. 559, 151 Pac. 724; *Johns v.*

*Pendleton*, 66 Or. 182, 133 Pac. 817, 134 Pac. 312, 46 L. R. A. (N. S.) 990, Ann. Cas. 1915B, 454.

"The adoption of specifications for a patent pavement does not prevent competitive bidding and that proposition has been decided many times in different states." *Whitmore v. Edgerton*, 149 N. Y. S. 508, 87 Misc. Rep. 216.

Bitulithic substance which is merely a two-inch coating or top dressing and which forms a very small portion of the entire pavement, although patented, may be called for. *Wurdeman v. Columbus*, 100 Neb. 134, 158 N. W. 924, approving *Whitmore v. Edgerton*, 149 N. Y. S. 508, 87 Misc. Rep. 216; *Ford v. Great Falls*, 46 Mont. 292, 127 Pac. 1004.

Although the authorities conflict as to the right to prescribe a patented material for street paving under a law requiring competitive bidding "the great weight of the more recent authorities is in favor of such right, where the owner of the patent does not himself bid for the contract, but makes an offer to furnish the patented material or mixture for a stipulated price, on equal terms to all bidders." *Burns v. Nashville* (Tenn. 1920), 221 S. W. 828, 840, citing § 1197, vol. 3, ante.

<sup>60</sup> *People ex rel. v. Buffalo*, 176 N. Y. S. 642.

**§ 1200. Same—restricting hours of labor and prohibiting alien labor.<sup>61</sup>**

**§ 1202. Same—requiring work to be done within the state.<sup>62</sup>**

**§ 1203. Same—requiring employment of union labor or use of union label.<sup>63</sup>**

**§ 1204. Same—limiting articles or materials to those coming from certain place or made by certain manufacturer.<sup>64</sup>**

<sup>61</sup> Limiting hours of labor on public work, held not to conflict with charter that contracts shall be let to the lowest bidder. Although it may increase cost, yet charter does not require the work to be done at the lowest possible cost. "When the specifications are complete, including the prescribed limitations as to the hours of labor for men to be employed upon public work, all bidders are on the same footing and the one bidding the lowest sum is the lowest bidder within the meaning of the charter." *Milwaukee v. Rauef*, 164 Wis. 172, 159 N. W. 819.

**Alien labor.** In construction of public work by state, municipality or contractors only United States citizens shall be employed, and giving preference to citizens of the state, sustained. *People v. Crane*, 214 N. Y. 154, 108 N. E. 427, affirmed, 239 U. S. 195; *Heim v. McCall*, 239 U. S. 175, affirming 214 N. Y. 629.

<sup>62</sup> Paving brick to be manufactured in state. Defense: (1) void as interference with interstate commerce, and (2) stifled competition.

1. Rule is that until the Con-

gress interferes by asserting its power the states are left free and unaffected so far as matters of commerce between themselves is concerned.

2. If the result of the provision had been to restrain competition and enhance the cost of the material to the taxpayer, it would be void. But evidence showed and it was admitted that brick made in the state was cheaper. *Pasche v. South St. Joseph Town Site Co.* (Mo. App. 1916), 190 S. W. 30, following *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926, 3 Ann. Cas. 306, on the second proposition.

<sup>63</sup> Resolution that all contracts for printing be awarded to union offices, held to be in conflict with provision of charter that all such contracts be let by competitive bidding and awarded to lowest bidder. *Neal Publ. Co. v. Rolph*, 169 Cal. 190, 146 Pac. 659.

<sup>64</sup> Stone to be cut in city limits, etc. Review of cases. *Taylor v. Philadelphia*, 261 Pa. 458, 104 Atl. 766.

Material (Bermuda Lake asphalt) obtainable from one party only, provided it was readily ob-

## § 1206. Specifications calling for invalid contract or containing unauthorized provisions.

Bids are void which are based on void specifications.<sup>65</sup>

## § 1207. Form and contents of advertisement.

Advertisements drawn to deter rather than to invite competition obviously constitute an attempted evasion of the requirement, and a contract awarded thereunder will be set aside.<sup>66</sup>

The specifications should be clear, definite and identical to all bidders.<sup>67</sup> Those relating to public improvements must be made sufficiently definite and certain that all may know what each is bidding upon, and that any bidder who secures the contract may be compelled to perform it in a way to produce the kind, character and grade of improvement desired and that liability upon his bond may result from his failure to do so.<sup>68</sup>

tainable in the market. *Mueller v. Hudson County Boulevard Comrs.*, 87 N. J. L. 702, 94 Atl. 84.

Designation of Trinidad Lake asphalt sustained, although controlled exclusively by one contractor. *Barber Asphalt Paving Co. v. Kansas City Hydraulic Press Brick Co.*, 170 Mo. App. 503, 505, 156 S. W. 749.

<sup>65</sup> *People ex rel. v. Buffalo*, 176 N. Y. S. 642.

<sup>66</sup> *Johnson v. Atlantic City*, 82 N. J. L. 204, 91 Atl. 1105.

<sup>67</sup> *Mackinnon v. Newark* (N. J. L.), 100 Atl. 694.

**Specification** required by law in advertising for bids, held mandatory, and reasonable compliance necessary. Specifications: work to be done according to plans and specifications, call for bids on a cash basis, time within which bids shall be received, and within which

work shall be completed. Rate of interest warrants shall bear. *McKenzie v. Mandan*, 27 N. D. 546, 147 N. W. 808.

Statute: Proposals shall be accompanied by certified check or bond for an amount which shall not exceed ten per cent of the aggregate of the proposal. Resolution conformed, but notice of clerk failed to mention the alternative of a bond. Held, act of clerk would be disregarded. *Strauss v. Mowry*, 30 Cal. App. 360, 158 Pac. 340.

Construction of notice for bids for the sale to city of fire apparatus. *Shields v. Seattle*, 79 Wash. 308, 140 Pac. 353.

Specifications for fire engines. *Bauer v. West Hoboken*, 90 N. J. L. 1, 100 Atl. 223.

<sup>68</sup> *Leysler v. Mowery*, 129 Idaho 412, 160 Pac. 262.

**§ 1208. Same—when details impossible except to a limited extent.**

The nature of the work required should be stated as definitely as is practicable.<sup>69</sup>

**§ 1213. Publication and posting of the advertisement—mode and sufficiency.**

The notice for bids must be published in the manner and for the time required by law. Ordinarily the mode is regarded as the measure of power, and therefore material non-observance thereof will invalidate the contract and proceedings thereunder.<sup>70</sup>

The requirement of publication for one week means a period of seven full days.<sup>71</sup>

**69 Repair work**—soliciting bids—cannot state details and all work to be done such as depth of binders on the asphalt pavement and the grade to which the bituminous concrete pavement is to be brought. *Devlin v. Jersey City*, 90 N. J. L. 318, 10 Atl. 208.

**70** There must be a fair compliance with the requirements of the law, otherwise a contract let will not be legal. *Webster Groves Reber* (Mo. App. 1919), 212 S. W. 38.

"The notice for bids must be published for the time and in the manner required by the charter; and since the mode is the measure of the power a failure to follow the prescribed mode will invalidate an attempted special assessment." *Watson v. Salem*, 84 Or. 666, 164 Pac. 557, 1184, considering the period and manner of publication under particular charter.

Ordinances designated less time than statute, but publication was as prescribed by statute, held valid.

*Maret v. Hough* (Mo. App.), 185 S. W. 544.

Due notice was required but the law contained no definition as to what constitutes due notice. Two weeks' notice, one in English paper and one in German offering gas franchise for sale, held sufficient. *Carthright v. Byklesby & Co.*, 154 Ky. 106, 157 S. W. 45.

Requirement that notice for bids for street paving to be advertised "for four weeks in one or more newspapers of the city," held mandatory. Fifteen days' publication and accepting bids fifteen days thereafter, held not a compliance. *Moundville v. Yost*, 75 W. Va. 224, 83 S. E. 910.

Charter: Bids shall be advertised in official newspapers, and in such other papers and for such time as may be directed by the council; held, resolution authorizing the city engineer and clerk to advertise, etc., was bad as authorized delegation. *Helwig v. Gloversville*, 158 N. Y. S. 475.

**71** *Williams v. Ettenson*, 178

Usually the law does not regard fractions of a day.<sup>72</sup> However, when the law specifying the thing to be done itself makes the hour of the day an essential part of its command, obviously regard must be given to that hour.<sup>73</sup>

**§ 1218. Board or officer required to act in connection with advertising.<sup>74</sup>**

**§ 1220. The bid, its form and contents.<sup>75</sup>**

Mo. App. 178, 181, 170 S. W. 370; Michel v. Taylor, 143 Mo. App. 683, 687, 127 S. W. 949.

A week does not expire until seven full days have elapsed. Leach v. Burr, 188 U. S. 510, 47 L. ed. 567; Russell v. Croy, 164 Mo. 69, 92, 63 S. W. 849.

<sup>72</sup> Shaffer v. Detie, 191 Mo. 377, 387; St. Joseph v. Landis, 54 Mo. App. 315, 324.

<sup>73</sup> "If the law commands a certain thing to be done at a certain hour of the day that, of course, cannot be ignored as it would be if the whole of the day is taken." Williams v. Ettenson, 178 Mo. App. 178, 181, 182, 170 S. W. 370.

"The rule that a day is an indivisible period of time is a mere legal fiction and subject to numerous exceptions." Brady v. Gilman, 96 Minn. 234.

"The rule is to exclude fractions of a day except in those cases where justice requires an examination into the precise time of the day at which the act was performed. The fiction that a day is an indivisible point of time will not be allowed to work a wrong." Kimm v. Osgood, 19 Mo. 60.

"Where the precise hour when act is done becomes material \* \* \* this legal fiction would

not prevail against the truth." Peebles v. Charleston & W. C. Ry. Co., 7 Ga. App. 279, 66 S. E. 953.

In advertisements for bids for public improvements the publication of the date of the contract should not be counted. "The evident meaning of the ordinance was that the five days' advertising should have passed before the day when the contract should be let." Roth v. Hax, 68 Mo. App. 283, 288.

<sup>74</sup> Power to advertise vested in council cannot be delegated to city engineer and clerk. Helwig v. Gloversville, 158 N. Y. S. 475.

See § 1218, vol. 3, ante.

<sup>75</sup> **Signing.** The ordinance provided that "each bid shall be signed by the bidder, or by an authorized officer or agent, where the bid is by a firm or corporation," and that it should be rejected if not properly signed. Contract based on bid signed in the name of the corporation by a director at the direction of the president, held good, in absence of showing of fraud and disadvantage to municipality. Prendergast v. St. Louis, 258 Mo. 648, 167 S. W. 970.

In particular case. Horning v.



**§ 1221. Deposit or other security.<sup>76</sup>**

West New York, 82 N. J. L. 266, 81 Atl. 1116.

"A defect in the advertisement can in no event be cured, even though all the bidders bid upon a cash basis and state the rate of interest, if any others are precluded from bidding on account of a belief that because of a defect in the advertisement any contract that would be entered into would be illegal." *McKenzie v. Mandan*, 35 N. D. 107, 160 N. W. 852, modifying same case, 27 N. D. 546, 147 N. W. 808.

**Affidavit** that bid is genuine and not collusive, held not directory only and bid without is defective. *Barber Asphalt Co. v. Costa*, 171 Cal. 138, 152 Pac. 296.

<sup>76</sup> Applicable law provided that bids when filed shall be irrevocable; bidder cannot withdraw bid even prior to opening bids and check deposited cannot be recovered on refusal to enter into contract, it having been awarded to him, held valid. *Baltimore v. J. L. Robinson Const. Co.*, 123 Md. 660, 91 Atl. 682, quoting from with approval part of section 1221, vol. 3, ante, and distinguishing *Moffett v. Rochester*, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. ed. 1108.

Requirement by ordinance that all bidders for lighting franchise should accompany their bids with certified check of \$5,000 to be forfeited to the city as liquidated damages should bidder fail to comply with his bid and execute the contract in event of acceptance of his bid but if not accepted check

to be returned, held valid. *Portsmouth v. Portsmouth & Norfolk Corp.* (Va. 1918), 95 S. E. 278, quoting with approval greater part of section 1221, vol. 3, ante.

Bidders required to submit with bids certified check to town treasurer; cashier's check on an accredited bank to order of town with bidder's endorsement thereon, held insufficient. *Horning v. West New York*, 82 N. J. L. 266, 81 Atl. 1116.

Law required cash deposit or certified check for at least fifteen per cent of sum bid. The advertisement required at least \$500.00. Plaintiff put in bid with \$500.00 deposit which was less than fifteen per cent which was accepted. Held, no ground for avoidance of bid. Where by mutual consent obligation of bid is abandoned, deposit may be recovered. *Tunny v. Hastings*, 121 Minn. 212, 141 N. W. 168.

Deposit ordered returned by court where the successful bidder to whom was awarded a contract for the installation of a sewer system and the municipality failed to agree as to requirements of the contract and the meaning of the bid. *Dawson Springs v. Miller Coal & Contract Co.*, 155 Ky. 763, 160 S. W. 495.

It is within the power of city to require deposit and failure of the successful bidder to make the contract forfeits the security. *Weston v. Bank of Greene County* (Mo. App. 1917), 192 S. W. 126, 128.

Recovery limited to forfeited

**§ 1222. Withdrawal of bid.**

Inadvertent mistakes in a bid usually warrants the withdrawal of same before the bid is acted upon.<sup>77</sup>

**§ 1223. Modification of bids.**

While bids cannot be changed in substance after presentation and the lapse of the designated time,<sup>78</sup> mere irregularities in form may be corrected after being opened.<sup>79</sup>

**§ 1225. Opening the bids and consideration thereof.<sup>80</sup>**

deposit, not to difference between bid and amount city had to pay for work on readvertisement. *New York v. Seely-Taylor Co.*, 133 N. Y. S. 808, 149 App. Div. 98.

<sup>77</sup> Inadvertent mistakes in bid, held entitled bidder to withdraw bid before awarded, and did not forfeit deposit, etc. The trial court applied the equitable maxim that "He who seeks equity must do equity," and sought to place the parties in statu quo, and held that but for error city could have awarded contract to next lowest bidder, but was required to readvertise, and bid was \$10,000.00 more, etc., and hence city suffered damage more than enough to absorb plaintiff's deposit and thereupon took it. This ruling was held erroneous. *Martens v. Syracuse*, 171 N. Y. S. 87, 183 App. Div. 622.

Unintentional mistake in amount, warrants withdrawal before the bid is acted upon, and equity could relieve the bidder from executing a contract it never intended to make. *New York v. Seely-Taylor Co.*, 133 N. Y. S. 808, 149 App. Div. 98.

Law forbidding withdrawal even prior to opening bids sustained. *Baltimore v. J. L. Robinson Const. Co.*, 121 Md. 660, 91 Atl. 682.

<sup>78</sup> Section 1223, vol. 3, ante.

Time of completion of work is material and cannot be changed. *Urbany v. Carroll*, 176 Iowa 217, 157 N. W. 852.

<sup>79</sup> *Urbany v. Carroll*, 176 Iowa 217, 157 N. W. 852.

See § 1232, post; § 1232, vol. 3, ante.

<sup>80</sup> Delay as abandonment. Ordinance was passed October, 1912, and required work completed within 120 days after letting contract therefor, with usual extension for bad weather. On advertising one bid only was submitted which was opened but action thereon was deferred some seven months when the contract was awarded, directing completion of the work within 120 days, etc. Held, delay constituted abandonment of proceedings. *Metropolitan Paving Co. v. Girard Investment Co.*, 94 Mo. App. 661, 189 S. W. 401.

## § 1226. Reconsideration of bids.

The opening and rejection of a bid where there is only one, and reconsideration and acceptance thereafter without readvertising has been sanctioned.<sup>81</sup>

## § 1227. Discretion of officers in awarding contracts in general.<sup>82</sup>

The discretion in awarding the contract must be exercised fairly and reasonably within the spirit of the law.<sup>83</sup>

The award must follow the terms of the advertisement,<sup>84</sup> and the contract given to the lowest respon-

<sup>81</sup> The law specified no time for action; gave power to reject any and all bids; and required the contract to be let to "lowest and best bidder," subject to approval of the council. The reconsideration took place two and one half months after rejection of the bid. *Miller v. L. R. Figg Co.*, 175 Ky. 495, 194 S. W. 566.

<sup>82</sup> *People ex rel. v. Buffalo*, 176 N. Y. S. 642; *Stanwood v. Carson*, 169 Cal. 640, 147 Pac. 562.

Disregard of law as to time of receiving and opening bids renders contract awarded void. *Minden v. Glass*, 132 La. 927, 61 So. 874.

Contract not awarded until seven months had elapsed from receipt of bid—only one—held delay destructive of real competition, etc. *Metropolitan Paving Co. v. Girard Investment Co.*, 194 Mo. App. 661, 665, 189 S. W. 401.

May award contract where there is only one bidder. *Bauer v. West Hoboken* (N. J. L.), 100 Atl. 223. See § 1230, post; § 1230, vol. 3, ante.

<sup>83</sup> *Seysler v. Mowery*, 129 Idaho 412, 160 Pac. 262, quoting with ap-

proval part of § 1227, vol. 3, ante.

Duty in awarding contracts, is not merely ministerial. Judgment and discretion must be exercised. *Wurdeman v. Columbus*, 100 Neb. 134, 158 N. W. 924.

Garbage contract, held not let to lowest responsible as required. *Riddle v. Atlantic City*, 89 N. J. L. 122, 97 Atl. 790.

<sup>84</sup> Cannot authorize contract different in terms from specifications. *Konig v. Baltimore*, 126 Md. 606, 95 Atl. 478.

Can be awarded in accordance with the terms of the advertisement only. Thus where proposals called for a term of five years to begin September 25, 1911, the contract cannot be awarded for a term beginning December 15, 1911. Call for bids "in accordance with specifications on file," when in fact none were on file, and the contract was awarded for the removal of garbage in accordance with specifications annexed thereto, when in fact the specifications so annexed were not in legal existence at the time the call for proposals was advertised. Such a contract can-

sible bidder who complies with the advertised proposals.<sup>85</sup>

**§ 1228. Municipality generally not bound to award contract to "lowest bidder."<sup>86</sup>**

Where bids are requested, but there is no law requiring competitive bidding, nor that the contract shall be let to the lowest bidder, such contract need not necessarily be let to the lowest bidder, and where it is awarded to a higher bidder in good faith in the public interest a taxpayer cannot have the contract set aside in the absence of proof of fraud.<sup>87</sup>

The requirement that the contract shall be let to the lowest bidder, or lowest responsible bidder,<sup>88</sup> or the lowest and best bidder,<sup>89</sup> or the best responsible bidder,<sup>90</sup>

not lawfully be awarded in such circumstances." *O'Malley v. Hoboken*, 84 N. J. L. 83, 85 Atl. 449.

<sup>85</sup> *Armitage v. Newark*, 86 N. J. L. 5, 90 Atl. 1035.

<sup>86</sup> *Thoits v. Byxbee* (Cal. App.), 167 Pac. 166, 170, citing § 1228, vol. 3, ante.

Municipality is not necessarily required to let contract to lowest bidder. "It was quite within its discretion to award the contract to any bidder, regardless of the amount of the bid, if under the circumstances the interests of the city would thus be best served. Its action could only be attacked for fraud, collusion, corruption or bad faith." *Martens v. Syracuse*, 171 N. Y. S. 87, 91, 183 App. Div. 622.

If no restriction exists contract need not be let to lowest bidder, where the awarding officers act in good faith. *Caldwell v. Mountain Home*, 29 Idaho 13, 156 Pac. 909.

<sup>87</sup> *Price v. Fargo*, 24 N. D. 440, 456, 139 N. W. 1054, citing § 1228, vol. 3, ante.

When contract need not be let to lowest bidder the award cannot be attacked in absence of showing of fraud. *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374.

Need not be let to lowest bidder, if not for the public good. *Stubbs v. Aurora*, 160 Ill. App. 351, 360.

<sup>88</sup> To be awarded to lowest responsible bidder. *Baltimore v. J. L. Robinson Const. Co.*, 123 Md. 660, 91 Atl. 682.

"Of course, the contract must be let to the lowest responsible bidder." *Urbany v. Carroll*, 176 Iowa 217, 157 N. W. 852; *Riddle v. Atlantic City*, 89 N. J. L. 122, 97 Atl. 790.

<sup>89</sup> Contract to be let to the "lowest and best bidder," but officers may reject any and all bids. *Miller v. L. R. Figg Co.*, 175 Ky. 495, 194 S. W. 566.

<sup>90</sup> Under some laws as construed the contract cannot be let "to any other than the lowest bidder, unless some fact or facts exist by reason of which a bid other than

must be observed in good faith, in order to validate the award.<sup>91</sup> Thus under a law requiring contracts for im-

the lowest has been made by one who is, even though higher in price, the best responsible bidder.” *Seysler v. Mowery*, 129 Idaho 412, 160 Pac. 262.

**91 Bidder entitled to hearing.**

“Clearly the lowest bid did not get the contract. The lowest bid under an invitation to bidders was the aggregate of the lowest bids for separate items. This bid was \$16,488 lower than that of the successful bidder. The circumstances that this lowest bid was made up of separate proposals that had been invited is not a lawful ground for discrimination against it; such proposals were made in strict compliance with the terms of the advertisement for bids and under the statute the award must follow such advertisement or the contract will be invalid.

“In extenuation of this violation of the statute it is said that it was within the discretion of the city authorities to decide that it was more advantageous to the city to have its work done by a general contractor than by bidders for separate items. True it was not only the right but the duty of the city authorities to decide this question but when and how often? They had exercised this right once when they publicly advertised that bids of either sort would be received and that the contract would be awarded to the lowest responsible bidder. If they may exercise it the second time it must be in such a way as not to violate the statute which is clearly done if the

change of heart takes place after the bids are opened and results in depriving the lowest bid of its statutory vantage and the awarding of a contract contrary to the statute. If after the bids were received the city decided that it would be better to contract only with a general contractor, it was open to the city to reject all bids and to readvertise for bids by general contractors only. Common fairness as well as statutory obligation require such course condemning the one that was actually pursued in this case which violated not only the letter but the spirit of the statute in every essential respect. Nothing would so fatally discourage bidders as a well founded suspicion that contracts are not awarded to the lowest bidder who complies with the conditions of the public advertisement, and to encourage competitive bidding was one of the main purposes of the statute in question. By the express terms of the statute, therefore, the contract let in the present case is ‘invalid.’

“If, however, we are wrong in reading this statute as it is written and in deeming that it means just what it says, and if the correct view is that the city after discovering that the bidders on separate items are the lowest bidders may change its advertised scheme and decide that the competition shall be limited to bidders for the doing of the entire work in a single contract, then and in that case the present award is invalid because

provements to be let to the lowest responsible bidder after advertisement for bids, the lowest responsible bidder who complies with the terms, and submits a sample of the brick for paving as required which complies with the standard fixed by the proposal, is entitled to be awarded the contract. The fact that a higher bidder submitted a better quality of brick as a sample, is no warrant for giving him the contract.<sup>92</sup>

The requirement that the contract shall be let to the "lowest responsible bidder" does not require the letting to the lowest bidder upon the ascertaining of his financial responsibility only, but the term "responsible" includes the ability to respond by the discharge of the contractor's obligation in accordance with what may be expected or demanded under the terms of the contract. "The lowest responsible bidder," "must be held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability," and this is the sense "in which it has long been interpreted by courts and text writers."<sup>93</sup>

if any such decision was made the lowest bidder under the public advertisement for bids were entitled to be heard upon that question before it was decided against them. The status of the lowest bidders carrying with it this right, it legally indistinguishable from that accorded to such bidders in *McGovern v. Board of Public Works*, 57 N. J. Law 580, 31 Atl. 613 and *Faist v. Hoboken*, 72 N. J. Law 361, 60 Atl. 1120.

"This last cited case also disposes of the notion that the statute can be evaded under color or rejection 'of any and all bids.'

"For the reasons stated the contract in the present case is invalid and must be set aside." *Armitage v. Newark*, 86 N. J. L.

5, 90 Atl. 1036, 1037, per Garrison, J.

<sup>92</sup> *McGovern v. Trenton*, 84 N. J. L. 237, 86 Atl. 539, saying "Because a sample submitted by a higher bidder is a better brick for the higher price than the lower bid would furnish is no justification for the award to a higher bidder. If it were otherwise then it is manifest that the statutory requirements for public letting is a useless procedure."

<sup>93</sup> *Williams v. Topeka*, 85 Kan. 867, 118 Pac. 864, 866.

"Responsible bidder" means ability to perform contract, financial and otherwise. *Stubbs v. Aurora*, 160 Ill. App. 351, 360.

Under a law providing that after advertising, etc., the contract shall

Concerning the inquiry, how the responsibility is to be determined, "the authorities speak with practically one voice," namely, that the officers in whom the power is vested, "must determine the fact, and such determination cannot be set aside unless the action of the tribunal is arbitrary, oppressive or fraudulent. The determination of the question of who is the lowest responsible bidder does not rest in the exercise of an arbitrary and unlimited discretion, but upon a bona fide judgment, based upon facts tending to support the determination. The statute will not be so interpreted as to afford a cover for favoritism. The city authorities are required to act fairly and honestly upon reasonable information, but when they have so acted their decision cannot be overthrown by the court."<sup>94</sup>

be given "to lowest bidder who can furnish security satisfactory to the commission council," where the lowest bidder to whom the contract was awarded admitted that he could not furnish satisfactory security, the council awarded without re-advertising, the contract to the next lowest bidder. *Leitz v. New Orleans*, 136 La. 483, 67 So. 339.

"The lowest secure bidder does not mean the lowest bidder financially only. It means more than that. It means that the bidder is, by experience and otherwise capable of doing the work in a satisfactory manner." *People ex rel. v. Omen* (Ill. 1919), 124 N. E. 860, 865, per Carter, J.

<sup>94</sup> *Williams v. Topeka*, 85 Kan. 857, 118 Pac. 864; *West v. Oakland*, 30 Cal. App. 556, 159 Pac. 202.

The awarding officers rejected bid of lowest bidder, and awarded contract to next highest bidder, "on account of the unsatisfactory work done in the past by this firm

for the county." This action was taken without giving lowest bidder a hearing or making a finding that he was not a responsible bidder. The court said: "The board had no right to reject arbitrarily a bid on that ground. The bidder has a right to be heard and to a determination of the question which must have the support of proper facts in order that the rejected bidder may have an opportunity to review the action taken and the sufficiency of the proof upon which it is rested. *Faist v. Hoboken*, 72 N. J. L. 361, 60 Atl. 1120; *Harrington v. Jersey City*, 78 N. J. L. 610, 75 Atl. 942. The law has thus been settled in this state that before the lowest bidder can be rejected, where the statute requires that the contract shall be awarded to the lowest responsible bidder, upon the ground that such bidder is not responsible without giving him a hearing, and a distinct finding against him, that he is not responsible bidder upon the facts which warrant such a

When the officers have exercised their discretion in the award of the contract the presumption obtains that such action was regular and lawful, and such presumption can be overcome only by proof, that the officers acted without justification or fraudulently.<sup>95</sup>

Laws exist and are construed to mean that after the bids are in so that a choice may be made between the different kinds of pavement, considering both the kind, the material and the cost, the property owners to the required number may select the kind that they desire, even though the bid for another kind named in the specifications be lower.<sup>96</sup>

### § 1229. Right to reject all or any bids.

In exercising the power to reject any or all bids,<sup>97</sup> and proceeding anew with the awarding of the contract,<sup>98</sup>

conclusion.” *Kelly v. Essex County Board of Chosen Freeholders*, 90 N. J. L. 411, 101 Atl. 422, setting aside award, and distinguishing *McGovern v. Board of Public Works*, 57 N. J. L. 580, 31 Atl. 613.

Whether particular bid was the lowest bid. *People ex rel. v. Fobes*, 135 N. Y. S. 747, 151 App. Div. 57.

Who is lowest bidder. *West v. Oakland*, 30 Cal. App. 556, 159 Pac. 202.

<sup>95</sup> *Hallet v. Elgin*, 254 Ill. 343, 98 N. E. 530, declining to set aside an award to one who was not the lowest bidder, following *People v. Kent*, 160 Ill. 655, 43 N. E. 760, and *Johnson v. Sanitary District*, 163 Ill. 285, 45 N. E. 213.

Finding by council that a particular bidder was the lowest responsible bidder, in the absence of fraud is conclusive. *Thoits v. Byxbee* (Cal. App.), 167 Pac. 166, 170, citing § 1228, vol. 3, ante.

<sup>96</sup> *Union Paving Co. v. Schneetady*, 134 N. Y. S. 740, 74 Misc. Rep. 646, distinguishing *Smith v. Syracuse Improvement Co.*, 161 N. Y. 484, 55 N. E. 1077, and *Warren Bros. Co. v. New York*, 190 N. Y. 297, 83 N. E. 59.

<sup>97</sup> May reject all bids. *People ex rel. v. Fobes*, 135 N. Y. S. 747, 151 App. Div. 57; *Miller v. L. R. Figg Co.*, 175 Ky. 495, 194 S. W. 566.

One bid only which was rejected; sustained. *Re Farrell*, 157 N. Y. S. 823.

A board in rejecting bids for public work need not enter reasons therefor in the record. *West v. Oakland*, 30 Cal. App. 556, 159 Pac. 202.

<sup>98</sup> May reject all bids and re-advertise, if desired to change terms, etc. *Armitage v. Newark*, 86 N. J. L. 5, 90 Atl. 1035.



the officers cannot act arbitrarily or capriciously, but must observe good faith and accord to all bidders just consideration, thus avoiding favoritism, abuse of discretion or corruption.<sup>99</sup>

**§ 1230. Right to reject bid where there is only one bid.<sup>1</sup>**

Notwithstanding there is one bid only, if the law has been followed in all respects, it is competent to award the contract to such single bidder, and preserve the requirement of competitive bidding.<sup>2</sup>

**§ 1232. "Necessity" for rejecting bids when insufficient.**

There must be a substantial compliance with the proposal to warrant the consideration of the bid, else bidding would not be on equal terms and the advantages of competition lost. Unless the bid responds to the proposal in all material respects it is not a bid at all, but a new proposition.<sup>3</sup> However, mere irregularities in the form of the bid will not justify its rejection for these may be corrected after being opened on entering into the contract.<sup>4</sup>

**§ 1236. Acceptance of bid as creation of contract.**

The acceptance of a bid and the award of a contract, according to law, is frequently held to constitute a valid

<sup>99</sup> State ex rel. v. Dreyer, 183 Mo. App. 463, 484-490, 167 S. W. 1123.

<sup>1</sup> Re Farrell, 157 N. Y. S. 823; Miller v. L. R. Figg Co., 175 Ky. 495, 194 S. W. 566.

<sup>2</sup> Meyers v. Wood, 173 Mo. App. 564, 158 S. W. 909; Platte City v. Paxton, 141 Mo. App. 175, 178, 179, 124 S. W. 531; Bauer v. West Hoboken, 90 N. J. L. 1, 100 Atl. 223.

Two bids only, one not responsive to specifications, which may be rejected and contract awarded to the other although higher. Urbany

v. Carroll, 176 Iowa 217, 157 N. W. 852.

<sup>3</sup> Urbany v. Carroll, 176 Iowa 217, 157 N. W. 852, holding time for completion of the work differing from specifications was not responsive.

<sup>4</sup> Urbany v. Carroll, 176 Iowa 217, 157 N. W. 852.

Ordinance provided that if bid was not properly signed it should be rejected. Bid of corporation, signed by a director at the direction of the president lacking signature of officer, held not invalid

contract,<sup>5</sup> but whether a contract was complete on the award, or a subsequent written contract was contemplated depends upon a proper construction of the steps taken by the parties concerned, in view of the applicable law.<sup>6</sup>

### § 1238. Review of award by court in general.

Where the award is not made to the lowest responsible bidder as required by law, the courts will set it aside.<sup>7</sup>

in absence of showing of fraud or disadvantage to municipality. *Prendergast v. St. Louis*, 258 Mo. 648, 167 S. W. 970.

<sup>5</sup> "It makes no difference that the contract was not formally signed or the bond formally approved, as counsel for the government contends they should have been, both by the terms of the contract and by the statute of the United States. (28 Stat. 279.) Their formal execution, as we have seen, was not essential to the consummation of the contract. That was accomplished, as was decided in *Garfield v. United States*, 93 U. S. 242, by the acceptance of the bid by the envelope company and the entry of the order and awarding the contract to it." *United States v. Purcell Envelope Co.*, 249 U. S. 313, 317, 318. See *Harvey v. United States*, 105 U. S. 671, 688; § 1236, vol. 3, ante.

After acceptance of bid written contract was made, held not to relate back to date bid was accepted as affects labor law providing for cancellation when violated concerning hours of labor. *MacFarlane v. Mosier & Summers*, 143 N. Y. S. 221, 157 App. Div. 844, affirming 141 N. Y. S. 143, 79 Misc. Rep. 460.

<sup>6</sup> Both city and bidder contemplated that their undertaking as shown by the bid and the award should be reduced to writing and signed by them. Mayor required by mandamus to execute written contract. *McCormick v. Fisher*, 5 Pennewell (Del.) 273, 64 Atl. 68.

"In order to constitute a contract binding at law the bid must be accepted and the contract awarded accordingly." The acceptance of a bid based upon an advertisement and specifications or the adoption of a resolution formally awarding contract to the successful bidder may constitute a valid and binding contract. *State ex rel. v. Howell*, 3 Boyce (Del. Super) 387, 84 Atl. 871.

Requirement of a deposit with the bid to guarantee the execution of the contract could have no purpose or meaning if a written contract was not required. The deposit is not required to guarantee the performance of the contract. A bond is required for that purpose. *State ex rel. v. Howell*, 3 Boyce (Del. Super) 387, 84 Atl. 871.

<sup>7</sup> *Johnson v. Atlantic City*, 85 N. J. L. 145, 88 Atl. 950; *Johnson v. Atlantic City*, 82 N. J. L. 204, 81 Atl. 165.

However, the determination by the designated officers in the bona fide exercise of the discretion reposed in them, in making the award, in the absence of fraud, corruption or unfair dealing, will not be disturbed by the courts.<sup>8</sup>

And courts will not interfere in case of mere literal or technical violations of the law where no harm results.<sup>9</sup>

§ 1239. Same—mandamus.<sup>10</sup>

§ 1241. Same—action for damages by bidder.<sup>11</sup>

§ 1242. Same—certiorari.<sup>12</sup>

§ 1244. Fraud in letting contracts as precluding recovery thereon.<sup>13</sup>

The offer of a secret or special rebate to one or more

Bidder falsely represented that his bid was made without relation to other bidders. He was the only bidder except a paving company of which he was superintendent. Set aside. *Miller v. Hoboken*, 90 N. J. L. 167, 100 Atl. 216.

<sup>8</sup> *Thoits v. Byxbee* (Cal App.), 167 Pac. 166; *Gantenbein v. Pasco*, 71 Wash. 635, 129 Pac. 374, following *Stern v. Spokane*, 60 Wash. 325, 111 Pac. 231.

In absence of fraud court will not interfere with discretion. *Hallet v. Elgin*, 254 Ill. 343, 98 N. E. 530.

Municipal officers may decide whether bidder to whom contract is awarded is responsible, and usually court will not interfere. *Konig v. Baltimore*, 128 Md. 465, 97 Atl. 837.

<sup>9</sup> *Konig v. Baltimore*, 128 Md. 465, 97 Atl. 837.

<sup>10</sup> *People ex rel. v. Fobes*, 135 N. Y. S. 747, 151 App. Div. 57.

In absence of fraud usually man-

damus will not lie to interfere with discretion in awarding contracts. *Stubbs v. Aurora*, 160 Ill. App. 351, 361.

Bid rejected, mandamus denied. *Re Ferrell*, 157 N. Y. S. 823.

To compel execution of contract for removal and disposal of garbage. *State ex rel. v. Howell*, 3 Boyce (Del. Super) 84 Atl. 871.

<sup>11</sup> *People ex rel. v. Buffalo*, 176 N. Y. S. 642; *United States v. Purcell Envelope Co.*, 249 U. S. 313.

<sup>12</sup> *Miller v. Hoboken*, 90 N. J. L. 167, 100 Atl. 216.

Lies to review awarding of a contract for paving. *Mueller v. Hudson County Boulevard Comrs.*, 87 N. J. L. 702, 94 Atl. 84.

Removal of garbage contract. *O'Malley v. Hoboken*, 84 N. J. L. 83, 85 Atl. 449; *McGovern v. Trenton*, 84 N. J. L. 237, 86 Atl. 539; *Armitage v. Newark*, 86 N. J. L. 5, 90 Atl. 1035.

<sup>13</sup> Of course, fraud, bad faith,

of the abutting property owners made by the successful bidder for the purpose of preventing or allaying the opposition of such owners to the proposed improvement, and at a time when their opposition might prove sufficiently effective to defeat the bidder and prevent him from obtaining the contract, is a fraud the law will not tolerate nor allow to come to a successful issue.<sup>14</sup> But an offer to protesting property owners of a small discount for the prompt payment of the tax bills that would be issued against the property not made secretly or to particular property owners but made generally and open to all interested property owners who might wish to avail themselves of it cannot be said to be founded on corruption.<sup>15</sup>

Nor is a cash discount for the payment of a tax bill offered to one person after the contract had been let and the work completed, not in pursuance of any previous understanding or a showing that it was connected with any improper or unfair purpose, or that it could possibly have affected the public bid or the rights of other property holders.<sup>16</sup>

#### IV. VALIDITY, DURATION, RATIFICATION AND ESTOPPEL.

### § 1246. Validity in general.<sup>17</sup>

To be valid and enforceable, as stated in prior sections,

etc., vitiates the contract. *Hallet v. Elgin*, 254 Ill. 343, 98 N. E. 530.

See § 1246, post; § 1246, vol. 3, ante.

<sup>14</sup> *Rackliffe-Gibson Construction Company v. Zielda-Forsee Investment Company*, 144 Mo. App. 67; *Rider v. Parker-Washington Co.*, 144 Mo. App. 67; *Field v. Barber Asphalt Pav. Co.*, 117 Fed. 925, 928.

“Obviously the vice of such conduct lies in its tendency to increase the cost of the work to honest property owners, to corrupt such

property owners as might be seduced into participation in a scheme that would give them an undue advantage over their neighbors and frequently to result in the doing of unnecessary public work that would not be done if honest opposition were given its rightful opportunity.” *Rackliffe-Gibson Construction Company v. Zielda-Forsee Investment Company*, 170 Mo. App. 93, 97, 98 S. W.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Kurtz v. Knapp*, 127 Mo. App. 608, 612, 106 S. W. 537.

<sup>17</sup> *Municipal Securities Corpora-*

the contract must be within the power of the municipality to make,<sup>18</sup> and made, in substance at least, as prescribed.<sup>19</sup>

Slight irregularities in the making of the contract, not resulting in injury to either party, will not invalidate it.<sup>20</sup>

Fraud, of course, will vitiate the contract, as where acts in awarding the contract show an intent to evade the requirement that the contract be awarded to the

tion v. Kansas City, 265 Mo. 252, 177 S. W. 856.

Public improvements contracts, § 1910, post.

<sup>18</sup> City not bound by contracts which its officers had no authority to make. *Jacobs v. Elmira*, 132 N. Y. S. 54, 147 App. Div. 433.

Contract not authorized by ordinance. *Astoria v. American-La France Fire Engine Co.*, 225 Fed. 21, 139 C. C. A. 80, reversing 218 Fed. 480; *Clatskanie State Bank v. Rannier*, 72 Or. 243, 143 Pac. 909.

Contract invalid because not approved by majority vote of electorate. *Hagerman v. Hagerman*, 19 N. M. 118, 141 Pac. 613.

Contract of municipality which provided for the mingling of public and private funds in the construction of a railroad, held to be void as contrary to constitutional provision that no municipality shall raise money for or loan its credit to any private company or corporation. *Hunter v. Roseburg*, 80 Or. 588, 157 Pac. 1065.

Where there was acceptance of bid by city substantially as made and performance by other party, city is bound. *Martin v. Chanute*, 86 Kans. 26, 119 Pac. 377.

Person who contracts to work for city at a certain rate is bound by his contract although city ordinance provides that a higher rate may be paid for such work. *Brophy v. Buffalo*, 166 N. Y. S. 972.

<sup>19</sup> Liability of city for work and materials furnished by contractor and accepted by city under an invalid contract. *State ex rel. Morris v. Clark*, 116 Minn. 500, 134 N. W. 129; *Mobile v. Mobile Elec. Supply Co.*, 6 Ala. App. 131, 60 So. 426.

<sup>20</sup> Where contract for street improvement has been regularly made except as to some specifications which only affected liability of contractor, such irregularity will not invalid bonds issued for the improvement. *Sawz v. Fishburn*, 17 Cal. App. 583, 120 Pac. 1068.

In construing a contract between two municipalities, held it was not necessary to determine whether or not contract was ultra vires as to one of the parties, where contract was fully executed and no injury was suffered by either party. *Detroit Board of Water Com'rs. v. Highland Park*, 192 Mich. 607, 159 N. W. 160.

lowest bidder, as a result of collusion with the contractor.<sup>21</sup>

So a contract which is the result of an unlawful combination between a city department and the contractor to defeat the provisions of law relative to letting of contracts is invalid.<sup>22</sup>

And the property owner is not liable for assessment for street improvement, where there has been bad faith and no substantial compliance with the contract, although the work was accepted by the city.<sup>23</sup>

### § 1247. Same—contracts to procure legislation.

Agreements for compensation contingent upon obtaining certain legislation, are usually held void.<sup>24</sup>

But in Illinois it has been adjudged a city may authorize its mayor to appear before congressional committees, etc., to urge an appropriation bill to assist the city in building levees and may pay his legitimate expenses in connection therewith.<sup>25</sup>

### § 1249. Same—agreements as to union labor.

A municipality cannot fix by ordinance a minimum wage, in excess of the current wage, to be paid to all laborers.<sup>26</sup>

<sup>21</sup> *Oconto Electric Co. v. Peoples L. & P. Co.*, 165 Wis. 467, 161 N. W. 789.

<sup>22</sup> *Lewis v. Philadelphia*, 235 Pa. 260, 84 Atl. 33.

<sup>23</sup> *Atkinson v. Webster City*, 177 Iowa 659, 158 N. W. 473.

Contract awarded on a bid which was not properly signed as required by ordinance, is not invalid where there is no fraud in connection therewith. *Prendergast v. St. Louis*, 258 Mo. 648, 167 S. W. 970.

There is no fraud in purchase by city for a reasonable price of a

sewer constructed for private use but adapted to public use. *Schwabe v. Moore*, 187 Mo. App. 74, 172 S. W. 1157.

<sup>24</sup> Section 366, vol. 1, ante.

<sup>25</sup> *Meehan v. Parsons*, 271 Ill. 546, 111 N. E. 529, reversing 194 Ill. App. 131.

<sup>26</sup> 1. City cannot act in matters involving a public policy having no definite relation to the police power or the governmental functions of the city.

2. In contracting for work done under special assessment, city is

**§ 1251. Same—presumption as to validity.**

In the absence of proof to the contrary it will be presumed that all requirements of the law relating to the entering into the contract were observed.<sup>27</sup>

**§ 1252. Contracts between municipality and its officers.**

Municipal officers cannot be interested in contracts of any character with the city.<sup>28</sup>

Courts without hesitation enforce this general salutary principle, and statutes and municipal charters usually forbid such contracts in express terms.<sup>29</sup> In the absence

an agent of property owners assessed and is bound to act for their best advantage. *Malette v. Spokane*, 68 Wash. 578, 123 Pac. 1005.

<sup>27</sup> Passage of the ordinance for the street improvement. *Carlson v. South Omaha*, 91 Neb. 215, 133 N. W. 1047.

<sup>28</sup> Section 513, ante; § 513, vol. 1, ante.

<sup>29</sup> Contract of city with an officer thereof prohibited by statute. *Mogul v. Garvey*, 54 Ind. App. 547, 103 N. E. 118; *Osburn v. Stone*, 170 Cal. 301, 150 Pac. 367; *Bangor v. Ridley*, 117 Me. 297, 104 Atl. 230.

Contract between city and water company, the president of which is mayor of the city, is void. *State ex rel. Gladwin v. Cheney*, 67 Wash. 151, 121 Pac. 48.

There can be no recovery for performance or part performance of such contract. *Seaman v. New York*, 159 N. Y. S. 563, 172 App. Div. 740.

Where by statute it is made a misdemeanor for any member of the city council to be directly or indirectly interested in any improvement at public expense, or

in furnishing any supplies or property of any kind to the city, the city is not liable even when by the execution of the prohibited contract benefit has accrued to it. *Dallas v. Sea Isle City*, 84 N. J. L. 679, 87 Atl. 467.

Assignment by contractor for city of part of the proceeds of his contract to a bank a member of which is also a member of the city council which has to approve and accept the work of the contractor, is void, being contrary to statutes and public policy which will not permit a public officer to occupy a position where he would have an opportunity to advance his own interests at the expense of the public interests. *James v. Hamburg*, 174 Iowa 301, 156 N. W. 394.

A municipal officer who gives the city service in good faith, cannot receive compensation therefor, in view of a law forbidding city officers from being interested directly or indirectly in any service to be performed for the city. *Peet v. Leinbaugh*, 180 Iowa 937, 164 N. W. 127.

Councilmen selling to city con-

of express prohibition, whenever a public officer enters into a contract, the execution of which may make it possible for his personal interests to become antagonistic to his faithful discharge of a public duty, such contract will be held void as against public policy.<sup>30</sup>

So contracts from which municipal officers derive personal benefits not general to all the citizens are void; e. g., a contract for supply of water for a city in which a water company agrees to supply water to land of certain members of the council which is located outside of the city.<sup>31</sup>

### § 1253. Duration of contract.

A provision in a contract that it may be terminated

tractors materials, without prior agreement or understanding, held not interest in municipal contract under a law forbidding. *People v. Southern Security Co.* (Mich.), 165 N. W. 769.

Where officer is prohibited from being interested in any contract with city but not prohibited from furnishing work and materials, city officer may recover for use by city of a horse and wagon furnished by him. *Morrissey v. Saratoga Springs*, 133 N. Y. S. 365, 73 Misc. Rep. 432.

Mere fact that an alderman, against whom a bank owned a deficiency judgment, voted for lease of the bank property, in absence of facts showing bad faith, does not invalidate lease. *Voelcker v. Schnell*, 166 N. Y. S. 420.

See § 599, ante; § 599, vol. 2, ante.

Sale of merchandise to municipality by officers thereof is not prohibited by statute which prohibits the "collection of illegal fees for service rendered or to be rendered"

by a municipal officer. *Collman v. Wanamaker*, 27 Idaho 342, 149 Pac. 292.

<sup>30</sup> Secretary of public health board cannot recover for services rendered on contract to treat small pox patient, at expense of the municipality. *New Carlisle v. Tullar*, 61 Ind. App. 230, 110 N. E. 1001, 1003, citing § 513, vol. 2, ante.

Where city officers acquired real property knowing that it might be purchased by city and conveyed it to city at a material advance in price, the city may recover the advance in price. *Minneapolis v. Canterbury*, 122 Minn. 301, 142 N. W. 812.

The fact that a contractor on public improvement bought some supplies from a firm in which city officers were interested is not sufficient evidence that such officers were interested in the contract so as to make it void. *O'Neill v. Auburn*, 76 Wash. 207, 135 N. W. 1000.

<sup>31</sup> *Gauterbein v. Paseo*, 71 Wash.



by the city if not performed satisfactorily was adjudged valid although not specifically authorized by the applicable law.<sup>32</sup>

Where a city was authorized to contract for a water supply without limitations as to terms, a provision to pay a certain sum, yearly for twenty years for water supplied to hydrants of the city, thereafter the water for said hydrants to be supplied free of charge, was held to be within the power of the city and binding on the company.<sup>33</sup>

### § 1254. Same—binding successors.

Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business or proprietary powers.<sup>34</sup>

With respect to the former, their exercise is so limited that no action taken by the government body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist.<sup>35</sup>

For example, the governmental power to fix rates<sup>36</sup> for water.<sup>37</sup>

635, 642, 129 Pac. 374, citing § 513, vol. 2, ante.

<sup>32</sup> *Moriarity v. Orange*, 89 N. J. L. 385, 98 Atl. 465.

<sup>33</sup> *Belfast v. Belfast Water Company*, 115 Me. 234, 98 Atl. 738.

Street lighting contract for twenty-five years, held reasonable. *Omaha Gas Co. v. Omaha*, 249 Fed. 350.

<sup>34</sup> Section 1254, vol. 3, ante.

<sup>35</sup> *McCormick v. Hanover Tp.*, 246 Pa. 169, 92 Atl. 195, L. R. A. 1915E, 581, holding ultra vires a contract for legal service to be per-

formed under a new township board.

<sup>36</sup> City cannot conclude itself by contract from exercising its rate fixing power. Such power is not implied from power given to regulate rates. *San Francisco-Oakland Terminal Ry. v. Alameda*, 226 Fed. 889.

<sup>37</sup> City cannot bargain away governmental power to fix rates for water. Thus the council cannot contract to supply water indefinitely to one of its citizens in consideration for right to lay sewer

On the other hand, it has been held that where power to contract for lighting is given and no limit as to duration is fixed, there is no implied limit to the official life of the council enacting the ordinance providing therefor.<sup>38</sup>

However, contracts for public utilities are generally regarded as relating to business rather than governmental affairs.<sup>39</sup>

Contracts, if made in good faith, extending beyond the terms of the officers making them are ordinarily valid,<sup>40</sup> but where the nature of an office or employment is such as to require a municipal board or officer to exercise a supervisory control over the appointee or employee, together with the power of removal, such employment or contract of employment by the board is in the exercise of a governmental function, and contracts relating thereto must not be extended beyond the life of the board.<sup>41</sup>

Accordingly a contract of a council employing one to sprinkle streets for a year, after a new council was elected, and just before it assumed office was held void and contrary to public policy, and that the new council might avoid the contract at its pleasure.<sup>42</sup>

through his land. *Horkan v. Moultrie*, 136 Ga. 561, 71 S. W. 785.

<sup>38</sup> *Omaha Gas Co. v. Omaha*, 249 Fed. 350.

<sup>39</sup> Section 1254, vol. 3, ante.

<sup>40</sup> Section 1254, vol. 3, ante.

<sup>41</sup> *State v. Hudson*, 27 N. J. L. 214, approved in *McCormick v. Hanover Tp.*, 246 Pa. 169, 92 Atl. 195, L. R. A. 1915E, 581, holding that a contract by a township board for legal services to be rendered when a new board would be in office, was void.

<sup>42</sup> "The council composed of the outgoing members placed the matter of sprinkling the streets beyond the control of the corporation. We are of the opinion such contract is void as against public policy.

The general rule supported by a number of authorities is that a contract extending beyond the term of office of the members of a public board, such as a board of county commissioners, a municipal board, or other like controlling body representing a municipal corporation, is, if made in good faith, ordinarily a valid contract. The ground upon which these decisions are based is that a board is a continuous existing corporation; while the personal members change the corporation continues unchanged. A well recognized exception to the rule exists applicable to contracts in reference to matters which are personal to the board in their nature, and the contract limits the

**§ 1255. Ratification and estoppel.<sup>43</sup>**

“Ratification, like waiver, rests upon the doctrine of estoppel. An estoppel may arise against a municipality the same as against any other party.”<sup>44</sup>

The doctrine of laches or estoppel, it has been held, will not apply to public work done under a contract because not in writing as expressly required by the law. Thus a city is not estopped to deny its liability to a contractor by the oral promise of its duly constituted agents that he shall be paid for extra work performed by him.<sup>45</sup>

powers of the succeeding members to exercise a discretion in the performance of a duty owing the public. This exception to the rule is based upon the grounds of public policy.” *Temple v. Corbell*, 17 Ariz. 1, 147 Pac. 745, 748, citing § 1254, vol. 3, ante.

<sup>43</sup> A claim against municipality on an implied contract must be made within the time fixed by the statute of limitations. *Wichita Water Co. v. Wichita*, 98 Kans. 256, 158 Pac. 49.

**Ratification.** If city council had authority to authorize a contract, (although it does not do so) its subsequent ratification is equivalent to an original authorization. *Re Christey*, 155 N. Y. S. 39, 92 Misc. Rep. 1.

If ordinance authorizing making is void because not signed by mayor, there can be no ratification or estoppel on the part of the city. *Baker Mfg. Co. v. Richmond* (Mo. App. 1917), 198 S. W. 1128.

Where a contract has been fully or in part executed although ultra vires or illegal, but not malum in se, it should be enforced as far as executed. City cannot avoid

liability for benefits received. *California-Oregon Power Co. v. Medford*, 226 Fed. 957.

If within city's power to make, but is merely irregular, it may be ratified. *Hermance v. Public School Dist.* (Ariz. 1919), 180 Pac. 442; *Iverson v. Williams School Dist.* (N. D. 1919), 172 N. W. 818.

Cannot ratify a contract made by mayor without authority, e. g. one employing private detectives. *Tate v. Johnson* (Idaho 1919), 181 Pac. 523.

<sup>44</sup> *Vermeule v. Corning*, 174 N. Y. S. 220, 222.

<sup>45</sup> “Statutes and charter provisions constitute powers of attorney to the officers of municipalities beyond which such officers may not go. Those dealing with such agents must be held to know these statutory and charter powers which effectively limit such officers' powers, and radius of action. Officers of municipalities are not general agents; they are special agents whose duties are set forth in the statutes which create them and which define their powers, and of these statutes, and therefore their officers' powers, the public which

While equitable estoppel may not be invoked against a municipal corporation when it acts beyond the scope of its powers the doctrine is applicable when it acts within its undoubted corporate powers.<sup>46</sup>

Thus where it enters into a contract, or becomes obligated to another by operation of law, within its municipal powers, the doctrine of estoppel obtains against it with the same force and effect as against an individual, and hence, it cannot deny the binding force and effect of such contract or obligation.<sup>47</sup> When the power is clearly vested and it is irregularly or defectively exer-

deals with them must take notice and govern themselves accordingly. Vain and futile would constitution and statute and charter be if any officer of the state, or of a county or of a city or other municipalities, could follow them only when they saw fit. If by estoppel such salutary provisions enacted with wise foresight as checks upon extravagance and dishonesty can be utterly abrogated at will by any officer such provisions then subserve no purpose and the public corporation has no earthly protection against either greed or graft." *Mullin v. Kansas City*, 268 Mo. 444, 460, 461, 188 S. W. 193.

<sup>46</sup> *Wilson v. Kings' Lake Drainage and Levee District*, 176 Mo. App. 470, 497, 158 S. W. 931; *Schueler v. Kirkwood*, 191 Mo. App. 575, 584, 585, 177 S. W. 760.

Where the contract is wholly ultra vires there can be no estoppel, but where authority exists to make the contract, but proceedings have been informally taken, rule of estoppel operates against municipality. *McCormick Lumber Co. v. Highland School Dis't*, 26 Cal. App. 641, 147 Pac. 1183.

City estopped from questioning validity of street repair contract because of neglect of certain preliminary formalities, aside from mode of entering into its contract. *McGovern v. Chicago*, 281 Ill. 264, 118 N. E. 3, affirming 212 Ill. App. 139.

<sup>47</sup> *Wilson v. Kings Lake Drainage & Levy District*, 257 Mo. 266, 289, 165 S. W. 734.

"When a municipal corporation enters into a contract which it has authority to make the doctrine of estoppel applies to it with the same force as against individuals." *Union Depot Co. v. St. Louis*, 76 Mo. 393, 396, 8 Mo. App. 412. "But the doctrine does not apply when the municipality acts wholly beyond its powers, in entering into the contract. The reason is that the city cannot do indirectly what it cannot do directly, and if no power is vested by law, no ultra vires act of the city, or its officers or agents, can be cured by aid of the doctrine of estoppel. *Edwards v. Kirkwood*, 147 Mo. App. 599, 615, 127 S. W. 378.

cised by the municipality and its officers and agents, the case presents a defective execution of the power only, and this affords a basis for the application of the doctrine of equitable estoppel.<sup>48</sup>

**§ 1256. Same—what contracts may be ratified, and to what contracts estoppel applies.**

A municipality may ratify the unauthorized contracts of its officer or agents which are within the general scope of its corporate powers;<sup>49</sup> but there can be no ratifica-

<sup>48</sup> *Edwards v. Kirkwood*, 147 Mo. App. 599, 615, 616, 127 S. W. 378.

"An estoppel is a legal consequence—a right—arising from acts or conduct; while acquiescence and ratification are but facts presupposing a situation incomplete in its legal aspect, i. e. not as yet attended with full legal consequences." *Watts v. Levee District*, 164 Mo. App. 263, 281, quoting from *Bigelow on Estoppel* (5th ed.) P. 457, and making application.

Municipal corporation may be equitably estopped from questioning validity of contract which has been acted on for 20 years and involved large expenditures. *Chicago v. Chicago & Western Ind. R. Co.*, 174 Ill. App. 452.

Contractor denied right to challenge contract on the ground of error in writing amount of his bid. *Conner v. Ambridge*, 64 Pa. Super. Ct. 223.

Electric Company is estopped from questioning validity of a contract which was made through its solicitation, with the city through the mayor, and which it has acted upon and from which it has received substantial benefits. *Wack-*

*enhut v. Empire Gas & Electric Co.*, 166 N. Y. S. 29.

The assignee of a contract *ultra vires* the corporation can take nothing thereunder and the other party to the contract is not estopped to set up the want of corporate authority although it has received benefits under the contract. *Pearson v. Duncan & Son (Ala.)*, 73 So. 406.

<sup>49</sup> *Van Arsdale v. Justice*, 133 N. Y. S. 661, 75 Misc. Rep. 495; *Hamilton Avenue*, 48 Pa. Super. Ct. 156; *Bourgeois v. Atlantic County Board of Freeholders*, 82 N. J. L. 82, 81 Atl. 358.

If ratified the city is liable although made by an unauthorized agent, e. g. to purchase property. "The contract was *intra vires*, and in such case a municipality may ratify an unauthorized contract just as an individual or a private corporation may do; and ratification may be inferred from acquiescence after knowledge of the facts or from conduct inconsistent with any other supposition." *Union Water Meter Co. v. New Martinsville (W. Va. 1919)*, 98 S. E. 516, citing § 1255, vol. 3, ante.

tion of a contract which it had no power to make.<sup>50</sup>

A municipality cannot be estoppel to aver its incapacity to make a contract by receiving benefits thereunder.<sup>51</sup>

That is, it cannot be made liable either on the theory of estoppel or implied contract, where it had no capacity to make the contract or where it was made in express violation of law.<sup>52</sup>

Nor can it be estoppel to set up the invalidity of a void contract which has never been ratified by competent authority.<sup>53</sup>

A contract which violates an express provision of the law cannot be ratified,<sup>54</sup> e. g., one not awarded by competitive bidding, as required,<sup>55</sup> or one that must be upon a consideration wholly to be performed after the making of the contract, and to be in writing.<sup>56</sup>

Such invalid contracts cannot be ratified after performance.<sup>57</sup>

#### § 1257. Same—ratification of contract in which municipal officer interested.

It has been held that a city council cannot ratify a contract with a corporation in which a city officer is a stockholder when such a contract is prohibited by statute.<sup>58</sup>

So it has been held that where a charter imposes a penalty for making a contract with the city by a city

<sup>50</sup> *Minneapolis St. P. R. and D. E. T. Co. v. Minneapolis*, 124 Minn. 351, 145 N. W. 609.

<sup>51</sup> *Eastern Ill. State Normal School v. Charleston*, 271 Ill. 602, 111 N. E. 573, affirming 193 Ill. App. 600.

<sup>52</sup> *Likes v. Rolla*, 184 Mo. App. 296, 302 et seq. 167 S. W. 645.

<sup>53</sup> *Astoria v. American La France Fire Engine Co.*, 225 Fed. 21, 139 C. C. A. 80, reversing 218 Fed. 480,

<sup>54</sup> *Hagerman v. Hagerman*, 19 N. Mex. 118, 141 Pac. 613, violating express statute in making.

<sup>55</sup> *Clinton Constr. Co. v. Clay*, 34 Cal. App. 615, 168 Pac. 588.

<sup>56</sup> *Likes v. Rolla*, 184 Mo. App. 296, 167 S. W. 645.

<sup>57</sup> *Likes v. Rolla*, 184 Mo. App. 296, 167 S. W. 645.

<sup>58</sup> *Frele v. Lansing*, 189 Mich. 501, 155 N. W. 591.

officer, such a contract is void, as a penalty implies a prohibition, and cannot be ratified.<sup>59</sup>

When authorized ratification of such contract must be by the most unqualified acceptance by the duly constituted authorities, with full knowledge and then only to the extent of rendering the municipality liable as on an implied contract for the reasonable value of services or property.<sup>60</sup>

### § 1258. Same—mode of ratifying contract.<sup>61</sup>

To constitute due ratification the general rule is there must be formal corporate action.<sup>62</sup>

But it does not necessarily follow that lack of an affirmative act will exempt the city from liability. It may be bound by inaction. A municipality "may be bound by a vote of its council, by the acceptance of benefits,<sup>63</sup> by

<sup>59</sup> Frele v. Lansing, 189 Mich. 501, 155 N. W. 591.

<sup>60</sup> Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

<sup>61</sup> Hansen v. Anthon (La.), 173 N. W. 939.

<sup>62</sup> Rockhill Iron & Coal Co. v. Taunton, 261 Fed. 234; Tracy Cement Tile Co. v. Tracy, 143 Minn. 415, 419, citing § 1258, vol. 3, ante.

<sup>63</sup> Ratification by acceptance and use of property. National Meter Co. v. Bellwood, 192 Ill. App. 424; Whigham v. Gulf Refining Co., 20 Ga. App. 427, 92 S. E. 238; Wycoff v. Strong, 26 Idaho 502, 144 Pac. 341; Bourgeois v. Atlantic County Board of Freeholders, 82 N. J. L. 82, 81 Atl. 358; Frank v. Jersey City Board of Education (N. J. L.), 100 Atl. 211, L. R. A. 1917D, 206.

City is liable for property which it has accepted under a void contract. "A distinction is taken between void contracts and illegal contract. Property surrendered

under a merely void contract may be recovered, but not so where contract is illegal." General Electric Co. v. H. Deposit, 174 Ala. 179, 56 So. 802.

City may ratify a contract which it has power to make by allowing work to proceed and acceptance of benefit thereof. Ettor v. Tacoma, 77 Wash. 267, 275, 137 Pac. 820, citing § 1258, vol. 3, ante.

City is estopped from setting up want of authority to execute contract when impliedly (by accepting benefits) it ratified the contract. Diamond Power Co. v. West Point, 11 Ga. App. 533, 75 S. E. 903.

Mere fact that work has been done and city is deriving some benefit therefrom does not imply a ratification. American Hardwood Lumber Co. v. Benton, Ark. 200 S. W. 276.

A void contract is not ratified by payments thereunder from a fund

paying for service in connection with the work, or by bringing an action at law upon the contract or by mere silence.”<sup>64</sup>

The ratification must be by the officer or body originally empowered to make the contract,<sup>65</sup> and in mode and form required by law in the first instance,<sup>66</sup> since ratification is equivalent to previous authorization and operates upon the act ratified in the same manner as though authority had been given originally.<sup>67</sup>

### § 1260. Same—who may ratify.

A contract may be ratified only by the officer or board authorized to make it in the first instance.<sup>68</sup>

### § 1261. Same—ratification by legislative curative acts.

Defective contracts to determine the amounts of unpaid taxes and assessments may be cured by legislative act.<sup>69</sup>

raised for another purpose and city can recover payments so made. *Vermeule v. Corning*, 166 N. Y. S. 546.

Allowance by council of expenditures by mayor not formally authorized is a ratification of mayor's action in making expenditures. *Meehan v. Parsons*, 271 Ill. 546, 111 N. W. 529, reversing 194 Ill. App. 131.

<sup>64</sup> *Ettor v. Tacoma*, 77 Wash. 267, 267, 137 Pac. 820, citing § 1258, vol. 3, ante; *Kincad v. Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820.

Auditing bills rendered and making payments on account as ratification. *Vermeule v. Corning*, 174 N. Y. S. 220.

<sup>65</sup> *Kindling Mach. Co. v. York City*, 54 Pa. Super. Ct. 318.

<sup>66</sup> *Reiger v. Pittsburg*, 54 Pa. Super. Ct. 425.

<sup>67</sup> Law specified form or mode—by ordinance and in writing—held, could ratify unauthorized contract only by observing same form or mode. *Astoria v. American La France Fire Engine Co.*, 225 Fed. 21, 26, 139 C. C. A. 80, reversing 218 Fed. 480, and adopting doctrine of *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, that where the authority could originally be conferred only in a particular form or mode, the ratification must follow the same form or mode, since ratification is equivalent to previous authority and operates upon the act ratified in the same manner as though the authority has been originally given.

<sup>68</sup> *Kindling Mach. Co. v. York City*, 54 Pa. Super. Ct. 318.

<sup>69</sup> *Graynor v. Port Chester*, 160 N. Y. S. 978, 174 App. Div. 122.



## V. IMPLIED CONTRACTS.

**§ 1262. Right to recover on implied contracts.**

Where the invalidity of a contract arises from a mere failure to comply with essential requirements of the law, a municipality may be required to do justice and a recovery will be allowed as upon an implied contract to pay for what has been received.<sup>70</sup>

Thus where a city borrowed money for a legitimate purpose from a bank whose president was a member of the city council and without submitting the question to a popular vote as required, but good faith appeared in the entire transaction, a recovery was allowed as on an implied contract.<sup>71</sup>

Power to make the particular contract, without limitations as to the mode of making, although irregularly made, if not against public policy, authorizes recovery, where benefits thereon have been received.<sup>72</sup>

<sup>70</sup> City is not liable for service received which is of no benefit to it. *Tuolumme County Elec. Power & Light Co. v. Sonora*, 31 Cal. App. 655, 161 Pac. 128.

No implied liability arises against municipality by the acceptance of a public improvement made under a contract let without compliance with a mandatory provision of the statute (requiring competitive bidding). *Forisbie v. East Cleveland*, 98 Ohio 266, 120 N. E. 309.

Where city had power to purchase but took possession of property under an invalid contract, an obligation to pay for the property will be implied from the transaction. *Keenan & Wade v. Trenton*, 130 Tenn. 71, 163 S. W. 1053.

Contractor with city, who is without fault in the premises, may recover on implied contract fair

cost he has been put to in executing an invalid contract. *Armitage v. Essex Const. Co.*, 88 N. J. L. 640, 96 Atl. 889, affirming 87 N. J. L. 134, 94 Atl. 51.

<sup>71</sup> *First Nat. Bank v. Goodhue*, 120 Minn. 362, 139 N. W. 599, 43 L. R. A. (n. s.) 84.

Recovery by contractor where electorate failed to ratify, on implied contract for work done. *General Electric Co. v. H. Deposit*, 174 Ala. 179, 56 So. 802.

<sup>72</sup> *Cade v. Belington*, 82 W. Va. 613, 96 S. E. 1053, 1054; quoting with approval from § 1262, vol. 3, ante; *Frank v. Jersey City Board of Education* (N. J. L.), 100 Atl. 211, L. R. A. 1917D, 206; *Van Buren Light & Power Co. v. Van Buren* (Me. 1920), 109 Atl. 3.

Although officers of municipality in ordering goods for city acted beyond their authority, city is

**§ 1263. Same—contract beyond scope of power.**

There is no implied liability on a contract strictly ultra vires, that is, one which the municipality had no power to make.<sup>73</sup>

**VI. CONSTRUCTION, OPERATION, TERMINATION AND ASSIGNMENT.****§ 1268. Construction of contracts.**

Rules invoked in the construction of contracts between private individuals and corporations are usually applicable in the construction of municipal contracts.<sup>74</sup>

The rule that a contract made with the public is to be construed most favorably to the public cannot be in-

liable if it accepts and uses goods so ordered. *Mobile v. Mobile Electrical Supply Co.* 6 Ala. App. 131, 60 S. E. 426.

In *Kentucky* there can be no recovery against a municipal corporation upon an implied contract to pay for services because of benefits received. *Staebler & Gregg v. Anchorage* (Ky. 1919), 216 S. W. 348, 350, 351.

<sup>73</sup> *Mineral County Court v. Piedmont*, 72 W. Va. 296, 78 S. E. 63.

Section 1172, ante, § 1172, vol. 3, ante.

In absence of power to make an express contract, recovery was denied under an implied contract. *Tate v. Johnson* (Idaho 1919), 181 Pac. 523.

<sup>74</sup> *Gates v. Public Service Com.*, 86 Or. 442, 168 Pac. 939; *Mena v. Tomlinson Bros.*, 118 Ark. 166, 175 S. W. 1187; *Union L. H. & P. Co. v. Young*, 146 Ky. 430, 142 S. W. 692.

**Construction of particular contracts.** A contract to pave the "roadway" of an alley, held not to apply to a part of the alley used

as a platform by railroad station. *Henderson v. Carey-Reed Co.*, 180 Ky. 449, 202 S. W. 882.

A contractor for dumping and disposal of street rubbish cannot be prohibited by the street commissioner from using an efficient device in performing the work although by the contract the work was subject to the supervision, inspection and approval of such commissioners. *Dailey v. New York*, 156 N. Y. S. 124, 170 App. Div. 267, affirming 149 N. Y. S. 109, 86 Misc. Rep. 86.

Where a contractor on garbage disposal agreed to pay a specified amount for the privilege of doing the work he will be required to pay the sum specified irrespective of the amount of garbage delivered, there being no guaranty on part of the city as to the amount of garbage it would deliver. *New York v. New York Disposal Corp.*, 166 N. Y. S. 963, 100 Misc. Rep. 536.

When a contractor agrees to repair any damage caused by over-

voked to add another meaning by implication, where the meaning of the contract is plain.<sup>75</sup>

Where specifications for bids state that in case of doubt as to the meaning, the director of public works would furnish a further explanation, the city is bound by the explanation given by such director.<sup>76</sup>

If the meaning of the contract is doubtful, often the conduct of the parties thereto will be followed in construction, e. g., a contract for the sale of waterworks by the municipality.<sup>77</sup>

If a particular contract is by its terms a purchase although it purports to be a lease, it will be construed according to its terms, and if conditions precedent to a purchase have not been observed as required, the contract will be held invalid.<sup>78</sup>

Where terms used are defined by the contract itself, such definitions must be followed.<sup>79</sup>

## § 1269. Performance or breach.

If the contract makes the time of delivery of material an essential element of the contract an extension of time given by the city council ordinarily will not excuse the company from paying the liquidated damages provided

flow of a stream doing certain construction work, such contractor is not liable for damage caused by overflow of stream which resulted from negligence of city. *Moran v. Salt Lake City* (Utah), 173 Pac. 602.

Contract for street cleaning, designed as an arbitration agreement. *Curran v. Philadelphia* (Pa. 1919), 107 Atl. 636.

Applicable statutory provisions by operation of law enter into and become a part of a contract. "The obligation of a contract is measured by the standard of the laws in force at the time it was entered

into, and its performance is to be regulated by the terms and rules which they prescribe." *Cincinnati v. Public Utilities Com.* (Ohio 1918), 121 N. E. 688, 690.

<sup>75</sup> *Puget Sound International Ry. v. Everett* (Wash.), 175 Pac. 40.

<sup>76</sup> *Philadelphia v. Welsbach Street Lighting Co.*, 218 Fed. 721, 134 C. C. A. 399.

<sup>77</sup> *Beloit Water Co. v. Beloit*, 91 Kans. 665, 139 Pac. 388.

<sup>78</sup> *Hagerman v. Hagerman*, 19 N. M. 118, 141 Pac. 613.

<sup>79</sup> *Union L. H. & P. Co. v. Young*, 146 Ky. 430, 142 S. W. 692.

by the contract in case of breach of the conditions as to time.<sup>80</sup>

A city will not be relieved from its obligation under a contract by failure of the contractor to perform the contract at the time fixed by the ordinance providing for the work if the delay was caused by an attempt to refer the ordinance to a referendum vote.<sup>81</sup>

If a contractor has failed to perform substantially a contract for a public improvement and the city has made payments thereon, it is entitled to recover the cost of completing the contract less the unpaid balance of the agreed price.<sup>82</sup>

Where an accounting company fully performed its contract when it delivered to the city one copy of the report it was employed to make, the city has no title to another copy which was made by the company for the mayor.<sup>83</sup>

If a contractor with a city should abandon the contract the city may enter into a new contract, without advertising for bids (although required to do so in such contracts in the first instance) and in such case, the first contractor will be liable to the city for loss, if any, measured by the difference between the two contracts.<sup>84</sup>

If a contract by a municipal board provides for inspection and approval of material by its representatives, in the absence of fraud or collusion between such agents and seller, such board cannot refuse to pay for material on the ground that its agents who inspected and accepted the material were incompetent.<sup>85</sup>

A contract of a municipality with a lighting company authorized a municipal board to declare a breach after public hearing in the event there appeared probable cause that the contract was not being carried out in good faith. Here it was properly adjudged that the existence of

<sup>80</sup> *Ludlow Valve Mfg. Co. v. Chicago*, 181 Ill. App. 388.

<sup>81</sup> *Mena v. Tomlinson*, 118 Ark. 166, 175 S. W. 1187.

<sup>82</sup> *Inland Const. Co. v. Rector* (Ark.), 202 S. W. 712.

<sup>83</sup> *Butte v. Nevin*, 46 Mont. 380, 128 Pac. 600.

<sup>84</sup> *New York v. Palladino*, 131 N. Y. S. 807, 146 App. Div. 850.

<sup>85</sup> *Acme Lumber Co. v. New Orleans*, 137 La. 899, 69 So. 739.

probable cause was not for the exclusive determination of such board, but was an essential condition of fact precedent to its action open to general inquiry in a court.<sup>86</sup>

### § 1270. Rescission of contract.

Provision for the termination of a contract need not be authorized by statute.<sup>87</sup>

Obviously a city may revoke a contract when it has reserved such right.<sup>88</sup>

But when a subsequent agreement which did not form part of the original contract was supported by sufficient consideration, the city cannot rescind it and avoid liability for work under such agreement.<sup>89</sup>

A municipality is not estopped by dishonest acts of a former official in permitting a contractor with the city to disregard the terms of his contract, but it may annul the contract for failure to observe its term.<sup>90</sup>

A contractor for excavation work who encounters unexpected difficulties is not entitled to cancellation of the contract where he has assumed such risk by express term of his contract.<sup>91</sup>

Where the contract is abandonment by the contractor often provision is made authorizing the city to hold deferred payments as liquidated damages.<sup>92</sup>

### § 1272. Modification of contract.

A municipal corporation having power to make a con-

<sup>86</sup> *National Surety Co. v. St. Louis*, 200 Fed. 387, 118 C. C. A. 539.

<sup>87</sup> *Moriarty v. Orange*, 89 N. J. L. 385, 98 Atl. 465, affirmed in 100 Atl. 1070.

<sup>88</sup> *Hibernian Banking Ass'n v. Chicago*, 178 Ill. App. 138.

<sup>89</sup> *Wright v. Tacoma*, 87 Wash. 334, 151 Pac. 837.

<sup>90</sup> *Consolidated Beef Co. v. Philadelphia*, 245 Pa. 268, 91 Atl. 367.

<sup>91</sup> *Blackstaff Engineering Co. v. Louisville*, 147 Ky. 649, 145 S. W. 152.

<sup>92</sup> *Auyalioga Contracting Co. v. Port Huron*, 233 Fed. 346, 147 C. C. A. 282.

tract may modify it,<sup>93</sup> and this power is lodged in the officer or officers authorized to make the contract.<sup>94</sup>

The contract itself may authorize a modification and a modification which involves an increased expenditure is not prohibited by a charter provision requiring advertisement for bids before letting certain contracts.<sup>95</sup>

When the original contract which was advertised as required provides for modifications, failure to advertise modifications will not avoid the modified contract. A new consideration is not necessary to support a modification of a contract which contains provision for modification.<sup>96</sup>

Where a contract provides that changes may be made by order in writing by the architect and that claims for extra work must be presented by the contractor and approved by the mayor, the contractor cannot recover for extra work done by him when none of the steps required were taken. The contractor must show that the contract was modified or waived.<sup>97</sup>

### § 1273. Assignment of contract.

A contractor with a city may assign all moneys to become due from the city on his contract. When the city pays installments due to the assignee without notice of any claim for material or labor, the assignee takes absolute title thereto.<sup>98</sup>

The assignee of a non-negotiable claim against a municipal corporation has the same rights as any other such assignee.<sup>99</sup>

<sup>93</sup> *Hibernian Banking Ass'n v. Chicago*, 178 Ill. App. 138.

Section 1921, vol. 4, ante.

<sup>94</sup> *Atlantic City v. Warne Bros. Co.*, 226 Fed. 372, 382, 144 C. C. A. 202, citing § 1921, vol. 4, ante.

<sup>95</sup> *Carron v. Dawson*, 129 Minn. 453, 152 N. W. 842.

<sup>96</sup> *Harrison v. Tampa*, 247 Fed. 569.

<sup>97</sup> *Millen v. Boston*, 217 Mass. 471, 105 N. E. 453.

<sup>98</sup> *National Surety Co. v. American Savings Bank & Trust Co.* (Wash.), 172 Pac. 264.

Assignment of sidewalk construction contract without city's consent, denied. *State ex rel. v. Aubrey* (Ind. App.), 124 N. E. 278.

<sup>99</sup> *Hibernian Banking Ass'n v. Chicago*, 178 Ill. App. 138.

See § 1922, ante; § 1922, vol. 4, ante.

## VII. REMEDIES.

## § 1274. Remedies where contract invalid or violated.

Suits as on an implied contract are sustained in all just cases, notwithstanding the invalidity of the contract.<sup>1</sup>

But there can be no recovery for services rendered to a city on a contract which is in violation of law.<sup>2</sup>

If a contractor with a city has fully performed his contract, he may compel specific performance on the part of the city.<sup>3</sup>

If a contractor with a city refuses to continue to perform his contract, a right of action accrues immediately and recovery can be had for future as well as past damages consequent upon such breach.<sup>4</sup>

<sup>1</sup>Section 1262, et seq. ante; § 1262, et seq. vol. 3, ante. First Natl. Bank v. Emmetsburg, 157 Ia. 555, 138 N. W. 451; Mobile v. Mobile Elec. Supply Co., 6 Ala. App. 131, 60 So. 426.

Where contract was rescinded because of mutual mistake, contractor may on implied contract recover back a deposit made by him. Balaban v. New York, 149 N. Y. S. 954, 87 Misc. Rep. 312. See § 1221, ante.

May recover for coal delivered to city and consumed by city under invalid contract. Sanal Norton Yards v. Rochester, 117 Minn. 114, 134 N. W. 644.

<sup>2</sup>Haskins & Sells v. Oklahoma City, 36 Okl. 57, 126 Pac. 204.

Defense that contract is void, to be pleaded precisely. Skinner & Kennedy Stationery Co. v. Board of Education, 182 Mo. App. 541, 545, 165 S. W. 835.

In an action to recover for goods delivered and accepted by a city, the contractor need not prove that there was no illegality in the con-

tract, as burden of such proof is on city. Fabric Fire Hose Co. v. Caddo, 59 Okl. 89, 158 Pac. 350.

Where city terminates a contract in accordance with right received because performance was not satisfactory, the question as to whether contractor was entitled to compensation for work done before termination was not left to final decision of city, but was a judicial question to be determined by courts upon disagreement of the parties. Boyer v. Kansas City (Mo. Ap. 1918), 205 S. W. 873.

<sup>3</sup>Destructor Co. v. Atlanta, 232 Fed. 746.

<sup>4</sup>Bridgeport v. Aetna Indemnity Co., 91 Conn. 197, 99 Atl. 566, holding that liability of an indemnity company on its bond accrued at the date of the breach.

In an action on a bond of a contractor with a city, when the bond has been lost, the presumption is that the bond furnished fulfilled the requirements of the ordinance. Macon v. Fidelity &

Where by the terms of a contract, the city may terminate it if performance thereof is unsatisfactory, it may relet such contract without competitive bidding and hold the first contractor liable for its loss in the transaction.<sup>5</sup>

The city may compel one of its officers who has illegally contracted with the city to account for benefits received by him in the transaction.<sup>6</sup>

### § 1275. Recovery of money illegally paid on invalid contracts.

By statute in Oklahoma if municipal officers illegally spend public money and fail to bring an action for its recovery within a reasonable time after demand of more than ten resident taxpayers, an action may be maintained against such officers and those to whom money was so paid.<sup>7</sup>

### § 1276. Right of contractor to set up invalidity as defense.

A municipality can recover on a contract irregularly made and which would be void if suit thereon should be against it.<sup>8</sup>

The appearance of a property owner on notice before a municipal council which was considering a street improvement and objecting thereto precludes him after the work is completed from questioning the council's jurisdiction in the premises because of irregularity in giving notice to property owners.<sup>9</sup>

Deposit Co., 194 Mo. App. 677, 189 S. W. 645.

Garbage reduction contract violated by city; damages. Bridgeport v. Aetna Indemnity Co. (Conn. 1919), 105 Atl. 680.

<sup>5</sup> Moriarty v. Orange, 89 N. J. L. 385, 98 Atl. 465, affirmed in 100 Atl. 1070.

<sup>6</sup> Minneapolis v. Canterbury, 122 Minn. 301, 142 N. W. 812.

<sup>7</sup> State ex rel. Morrison v. Muskogee (Okl.), 172 Pac. 796.

<sup>8</sup> Weston v. Bank of Greene County (Mo. App. 1917), 192 S. W. 126, 128, quoting with approval from Section 1276, vol. 3, ante.

<sup>9</sup> Miller v. Oelwein, 155 Iowa 706, 136 N. W. 1045.



## CHAPTER 30.

### STREETS AND ALLEYS.

- I. DEFINITIONS, WHAT CONSTITUTE, AND OTHER GENERAL CONSIDERATIONS.
- II. ESTABLISHMENT AND OPENING.
- III. TITLE TO STREETS.
- IV. CONTROL OVER IN GENERAL AND USE THEREOF BY MUNICIPALITY.
- V. ABUTTING OWNERS, THEIR RIGHTS AND LIABILITIES.
- VI. ENCROACHMENTS ON STREET AND USE THEREOF OTHER THAN FOR TRAVEL.
- VII. REMEDIES.
- VIII. USE OF STREET BY PUBLIC.
- IX. VACATION, ABANDONMENT, ADVERSE POSSESSION AND ESTOPPEL.

#### I. DEFINITIONS, WHAT CONSTITUTE, AND OTHER GENERAL CONSIDERATIONS.

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#### II. ESTABLISHMENT AND OPENING.

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- § 1353. Fairs and carnivals.
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#### I. DEFINITIONS, WHAT CONSTITUTES AND OTHER GENERAL CONSIDERATIONS.

### § 1279. Highway defined.

The term "highway" is a generic name for all kinds of public ways in which the public has a right of way or passage,<sup>1</sup> all traveled ways whether in country or town,<sup>2</sup> in-

<sup>1</sup> Parson v. San Francisco, 23 Cal. 462, 463.

The word "public" adds nothing to the meaning of the word "highway." St. Louis v. Bell Place Realty Co., 259 Mo. 126, 134, 168 S. W. 721; Walton v. St. Louis I. M. & S. Ry. Co., 67 Mo. 56.

The phrase "public highway"

has been characterized as a tautological expression. A highway is a passage, road or street, which every citizen has a right to use, and is therefore necessarily public. Walton v. St. Louis I. M. & S. Ry. Co., 67 Mo. 56.

<sup>2</sup> Harding v. Medway, 51 Mass. 465, 469.

cluding streets,<sup>3</sup> alleys,<sup>4</sup> a cul de sac, whether urban,<sup>5</sup> or suburban,<sup>6</sup> and sometimes a private road.<sup>7</sup>

A public wharf on a navigable stream connected with a public street and in a sense an extension of such street is in the eye of the law a public highway. "Its character is similar. The right to the common use of it in the public is similar, and in a very just sense, the right of the city in and its duty towards it are akin to its rights and duties towards its public streets."<sup>8</sup>

Thus it has been held that a wharf built from a public highway into navigable waters is an extension of a public highway,<sup>9</sup> and that where a private dock is built over a

<sup>3</sup> Roads include streets, but streets do not include roads. *Sanderson v. Texarkana*, 103 Ark. 521, 146 S. W. 105, 107.

Law as to operation of automobiles on the highways of the state, held to include the streets of a city. *Burns v. Kendall*, 96 S. C. 385, 80 S. E. 621.

"Street" means "public highway" as used in motor vehicle speed statute. *Forgy v. Rutledge*, 167 Ky. 182, 180 S. W. 90, 93.

<sup>4</sup> "The term 'highway' is a generic name of all kinds of public ways and may include alleys." *Heppes v. Chicago*, 265 Ill. 506, 103 N. E. 455, 457; *Mobile v. Ohio R. R. Co. v. Davis*, 130 Ill. 146, 22 N. E. 850.

<sup>5</sup> *Stockwell v. Duncel*, 159 N. Y. S. 32, 174 App. Div. 481.

<sup>6</sup> "We cannot accede to the proposition that a cul-de-sac, or road that ends at a man's farm or place of business may not become a public highway simply because it is used by the public in their dealings with the party at the end of the road. The road is open to public use and the word

'public' means all those persons who may have occasion to use the road. *Gillespie v. Duling*, 41 Ind. App. 217, 83 N. E. 728; *Sheaff v. People*, 87 Ill. 189, 29 Am. Rep. 49. The test of a public highway is not as to the limited use to which the road may be subjected, nor as to the number of people that may use it, but rather as to the right of the public—that is, all persons—to use it as a road when they have occasion to do so." *Law v. Neola Elevator Co.*, 281 Ill. 143, 117 N. E. 435.

<sup>7</sup> The word "highway" sometimes embraces a private road. *Walton v. St. Louis I. M. & S. Ry. Co.*, 67 Mo. 56; *Jenkins v. Chicago & Alton R. R. Co.*, 27 Mo. App. 578, 582.

<sup>8</sup> *Hafner Mfg. Co. v. St. Louis*, 262 Mo. 621, 638, 172 S. W. 28, holding that no one has an exclusive use of land dedicated for a public wharf; and that the city had power to remove obstructions interfering with the public use.

<sup>9</sup> *The Empire State*, Newb. Adm., 541 Fed. Cas. No. 12, 145.

public street upon the shore of navigable waters, the dock becomes a part of the street and the public has a right to travel over it.<sup>10</sup>

A plank approach to such wharf as a means of ingress thereto and egress therefrom, it has been held, is a part of the public highway which the owners in common with the public have the right to use.<sup>11</sup>

“Where a highway is laid out along a shore, following the line of the shore, although it may come in contact with the water at intervals, there is not constructive extension of the street into the water.” This is an exception to the rule that “a highway laid out to a navigable stream, presumptively terminates at a public landing, and may be so used by the whole public.”<sup>12</sup>

Accordingly it has been held, contrary to the rule above stated, that an approach or wharf to a ferry is not a part of a highway or a continuation of a street.<sup>13</sup>

### § 1280. Streets, avenues and boulevards—definition and nature.

A street is a public way through a city, town or village.<sup>14</sup>

<sup>10</sup> *Buffalo v. D. L. & W. R. R. Co.*, 190 N. Y. 84, 82 N. E. 513, 16 L. R. A. (N. S.) 506.

<sup>11</sup> *Narragansett Real Estate Co. v. Mackenzie*, 34 R. I. 103, 82 Atl. 804, 809.

<sup>12</sup> *Anderson Steamboat Co. v. King County*, 84 Wash. 375, 146 Pac. 855, 857.

<sup>13</sup> “A dock or wharf is not ordinarily held to be a part of a public highway (*State ex rel. v. Superior Court*, 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913E, 1076) and, although it be that a street converted into a ferry approach by means of a wharf is presumed to be a highway, the presumption like all presumptions of fact, is

only a rule of evidence shifting the burden of proof, and when it is made to appear that the ferry has been constructed and maintained by the public as a ferry approach, it follows that it is incidental to the franchise right. In legal contemplation the ferry ends upon the ground, and not at the outer ends of a wharf which is made necessary on account of the waters being too shallow for navigation, or for other reasons.” *Anderson Steamboat Co. v. King County*, 84 Wash. 375, 146 Pac. 855, 856.

See § 1280 post, note.

<sup>14</sup> “Street” defined—“place,” *Carlin v. Chicago*, 262 Ill. 564,

The word street, avenue or highway implies a way of a public character and nature, and no other way whatever.<sup>15</sup>

Streets do not include roads yet roads do include streets.<sup>16</sup>

The streets and other ways of the city or town are viewed as a part of the general highways of the state.<sup>17</sup>

104 N. E. 905, reversing 177 Ill. App. 89.

The construction of docks at foot of highway extends the public easement "over the newly made land to the water's edge." *New Rochelle v. New Rochelle Coal & Lumber Co.*, 144 N. Y. S. 852, 83 Misc. Rep. 194, affirmed 158 N. Y. S. 1111.

See § 1279, page 2783, note 7, vol. 3, ante; § 1279, ante.

See § 1391, page 2965, note 38, vol. 3, ante.

"Ordinarily a street is a public way for the travel of footmen, and for the travel of persons upon horseback, and in vehicles and for the travel of vehicles which are necessary to be used in transporting the commodities of traffic and whatever may be used by the public for their pleasure and necessities. Ordinarily a street in a city or populous town contemplates a carriageway and a footway. The governing bodies \* \* \* may designate a portion of the street for the use of footmen and a portion for the use of vehicles \* \* \* A public way is nevertheless a street, though its use is confined to travel by pedestrians only." By dedication a street may be limited to use by pedestrians. *Home Laundry Co. v. Louisville*, 168 Ky. 499, 182 S. W. 645, 649.

<sup>15</sup> *Re New York Central R. R. Co.*, 200 N. Y. 123, 93 N. E. 515, approved in *Greil v. Stollenwerck* (Ala.), 78 So. 79, 82, citing Section 1280, vol. 3, ante.

<sup>16</sup> *Sanderson v. Texarkana*, 103 Ark. 521, 146 S. W. 105, 107.

Private toll road, held not a public street relating to right of the municipality to improve and levy assessments on abutters therefor. *Philadelphia v. Kerchner*, 62 Pa. Super. Ct. 562, 565.

"All highways in a city or incorporated town are streets, as distinguished from a public county road." *Wiggins v. Skeggs*, 171 Ala. 492, 495, 54 So. 756; *McCain v. State*, 62 Ala. 138.

<sup>17</sup> "The streets and other highways of the city are, however, a part of the other and general highways of the state, and as such and to the extent that the interests involved are not purely local to cities and incorporated towns such power as a municipality has thereover is granted to the municipality by the state, and may be modified or withdrawn by the state from the municipality unless the state has waived its right to do so." *Winfield v. Public Service Commission* (Ind.), 118 N. E. 531.

Usually under the generic term "street" is included all parts of the way, the roadway, the gutters and the sidewalks.<sup>18</sup>

That is, the word "street" in its general sense includes sidewalk areas; yet it is a matter of common knowledge that such areas are devoted to a different use than that part of the street between the curbs, and, aside from exceptional cases, ordinarily are improved under a different system as regards payments of the cost thereof.<sup>19</sup>

**Boulevard** is characterized as "a broad thoroughfare, beautified with trees and turf,"<sup>20</sup> and a parkway as "a broad avenue in or around a city, especially one laid out with trees, belts of turf," etc. Laws do not always distinguish them, but often employ the term "boulevard" only.<sup>21</sup> Usually the word "boulevard" is employed in a descriptive sense in municipal charters, and statutes, providing for their establishment and maintenance. The word is well understood, and means a way designed for pleasure as well as for commercial inter-communication, and having the scenic features which please rather than profit. Restrictions imposed upon their commercial use render them more desirable for pleasure than business, and consequently they are treated in the law, in many respects, different from streets, and frequently in their improvement and maintenance a different system of special taxation or local assessments is applied to them than that applied to the improvement and maintenance of ordinary streets.<sup>22</sup>

<sup>18</sup> *Eickhoff v. Argenta*, 120 Ark. 212, 179 S. W. 367, quoting from Elliott, *Roads and Streets*, p. 17; *Little Rock v. Fitzgerald*, 59 Ark. 494, 28 S. W. 32, 28 L. R. A. 496.

<sup>19</sup> *Abbot v. Milwaukee*, 148 Wis. 26, 134 N. W. 137, holding that an improvement law referring to "any street or alley or part thereof," excluded sidewalks.

<sup>20</sup> Power to establish boulevards, Section 1833, vol. 4, ante.

<sup>21</sup> *Chaplin v. Kansas City*, 259 Mo. 479, 488, 168 S. W. 763, quoting Webster's International Dict.

<sup>22</sup> *Albers v. St. Louis*, 268 Mo. 349, 358, 188 S. W. 83.

A highway cannot be held to be a street rather than a boulevard because the ordinance establishing it makes no provision for the regulation of traffic thereon, or for excluding business structures therefrom, or for a build-



**§ 1281. Same—street includes more than surface.**

Public right to the use of the street extends to the full width, and indefinitely upward and downward.<sup>23</sup>

The public easement therein comprehends all kinds of travel—movements beneath the surface, upon the surface and above the surface.<sup>24</sup>

**§ 1282. Same—bridge as part of street.<sup>25</sup>****§ 1283. Street distinguished from country road.**

Roads include streets, but streets do not include roads.<sup>26</sup>

Charter power to control streets is not authority to control a county road extending through the municipal area.<sup>27</sup>

**§ 1285. Alleys.**

Alleys may be public, or private;<sup>28</sup> and if public they

ing line, or for the planting of trees and shrubbery. *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 168 S. W. 721.

The words "public highway" used in an ordinance do not preclude the idea of a "boulevard," or justify the conclusion that only a "street" was meant. *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 134, 168 S. W. 721.

<sup>23</sup> *Nessen v. New Orleans*, 134 La. 462, 64 So. 286, 51 L. R. A. (N. S.) 324; *New Orleans v. Kaufman*, 138 La. 897, 70 So. 874, citing Section 2775, vol. 6, ante.

<sup>24</sup> *Fox v. Hinton* (W. Va. 1919), 99 S. E. 478.

<sup>25</sup> Approach to bridge as a street. *Washington County v. Pennsylvania R. Co.*, 238 Pa. 240, 86 Atl. 71.

<sup>26</sup> *Sanderson v. Texarkana*, 103 Ark. 521, 146 S. W. 105, 107.

<sup>27</sup> "In determining whether a passageway in a city is a street or a county road, resort must be had to the intention of the legislature as gathered from the city charter, the general laws, and the whole course of legislation on the subject." *Cole v. Seaside*, 80 Or. 73, 156 Pac. 569, 571, following *Bowers v. Neil*, 64 Or. 104, 109, 128 Pac. 433, 435; *Oliver v. Newberg*, 50 Or. 92, 91 Pac. 470; and *Huddleston v. Eugene*, 34 Or. 343, 55 Pac. 868, 43 L. R. A. 444, 1 Minn. Corp. Cas. 334.

<sup>28</sup> Alley has been defined as a narrow street, and when the term is used without the prefix "private" it is to be deemed a public alley. *Bellevue Gas & Oil Co. v.*

are highways,<sup>29</sup> and in general are governed by the rules applicable to street.<sup>30</sup>

### § 1286. Sidewalks.

A sidewalk is a way for foot passengers or a public way especially intended for pedestrians;<sup>31</sup> a path or way for the use of foot passengers at the side of a street.<sup>32</sup>

Carr (Okl.), 161 Pac. 203, 205, citing Section 1285, vol 3, ante (McQuillin, Mun. Ord., Section 563).

An alley may exist by virtue of a common law dedication. *McMahon v. Borland*, 262 Ill. 358, 104 N. E. 701, 707.

Owner of abutting property may close private. *Smith v. Thomas Elevator Co.*, 278 Ill. 328, 116 N. E. 113; *Hamilton v. Leon (Ia.)*, 164 N. W. 633.

<sup>29</sup> *Heppes Co. v. Chicago*, 260 Ill. 506, 103 N. E. 455, 457; *Mobile & Ohio R. R. Co. v. Davis*, 130 Ill. 146, 22 N. E. 850.

**Public alley**, existence of under particular facts. *O'Brien v. He-man*, 191 Mo. App. 477, 496, 177 S. E. 805; *Hunter v. Weston*, 111 Mo. 176, 19 S. W. 1098, 17 L. R. A. 633; Section 2735, vol. 6, ante.

**Private alley**, held not a highway by prescription although shown on a map, nor by provision of a municipal charter declaring alleys on named map to be public ways. *Farmers & Mechanics Savings Bank v. Lockport*, 151 N. Y. S. 865, 89 Misc. Rep. 157.

<sup>30</sup> "If the alley is a public one, it is a highway, and in general is governed by the rules applicable to streets." *Elliott, Roads & Streets*, Section 23, quoted in *Byrne v. Wheeling Can Co.*, 72

W. Va. 600, 78 S. E. 758, observing: "Defendant says that though the street may not be vacated for private uses, yet alleys may be. No such distinction can be made. The reason underlying the principle that a vacation can be made only in the interest of the public applies as strongly to the case of alleys as to that of streets."

"An alley \* \* \* is no more than a way subject to a modified supervision, and liable to be used for drainage and other urban service under municipal regulation." *Edison Illuminating Co. v. Misch*, 200 Mich. 114, 166 N. W. 944, 947, quoting with approval from *Paul v. Detroit*, 32 Mich. 108.

<sup>31</sup> *Russo v. Pueblo*, 63 Colo. 519, 168 Pac. 649.

<sup>32</sup> *Jackson v. Sedalia*, 193 Mo. App. 597, 603, 187 S. W. 127.

**Sidewalk** in particular statute, held to mean the space between the property line and the street curbing set apart for that purpose, denying that it was limited to such part of that space as is or shall have been ordered to be constructed of cement or other paving material suitable for sustaining the burden of heavy travel. Accordingly, a sidewalk fifteen feet wide may consist of cement or artificial stone five feet wide and on each side thereof sodded

Street in its broad and general sense includes sidewalk,<sup>33</sup> but in a law referring to "any street or alley or part thereof" relating to special assessments for construction, it was held that sidewalk was not included, the court applying the usual rule of strict construction.<sup>34</sup>

**§ 1287. Roads as streets on annexation of territory or formation of municipality.**

A public road included within the legal limits of a municipality ordinarily becomes one of its public streets and the jurisdiction thereover passes from the county or parish authorities to the municipal authorities.<sup>35</sup>

ground five feet wide. *Holmes v. Heeter & Son*, 146 Ky. 52, 142 S. W. 210, denying *People ex rel. v. Marshall Field*, 197 Ill. 564, 64 N. E. 544, and approving *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895, "which is in point of fact much like the case at bar and in accord with the conclusions we have reached."

A city may establish lawn strips between the sidewalk and the pavement, or between the sidewalk and the property line, for grass plots, flower beds and shade trees. *Harman v. Parsons*, 81 W. Va. 197, 94 S. E. 135.

<sup>33</sup> Section 1280, ante; § 1280, vol. 3, ante.

"A sidewalk is a part of the street, exclusively reserved for pedestrians, and constructed somewhat differently than other portions of the street, made use of by animals and vehicles generally. It is paved differently that the public may be better served by maintaining the two portions of the way separately. Whatever may be the difference it consti-

tutes a part of the street." *Central Life Assur. Soc. v. Des Moines* (Iowa 1919), 171 N. W. 31, per Ladd, C. J.; *Warren v. Henly*, 31 Iowa 31.

<sup>34</sup> *Abbott v. Milwaukee*, 148 Wis. 26, 134 N. W. 137.

<sup>35</sup> Section 293, ante; § 293, vol. 1, ante; *Hendricks v. Carter*, 21 Ga. App. 527, 94 S. E. 807; *Columbus v. Ogletree*, 102 Ga. 293, 29 S. E. 749; *Moreauville v. Boyer*, 138 La. 1070, 71 So. 187; *Duckworth v. Springfield*, 194 Mo. App. 51, 184 S. W. 476.

**Extending limits;** control of public roads and highways become vested in city. *Laclede-Christy Clay Products Company v. St. Louis*, 246 Mo. 446, 151 S. W. 460.

**County road.** City cannot assume jurisdiction of, and improve a county road running through its limits. *Cole v. Seaside*, 80 Or. 73, 156 Pac. 569.

County roads in city limits, to remain county roads till accepted by ordinance or resolution. *Silverton v. Brown*, 63 Or. 418, 128 Pac. 45.

**§ 1288. Width and extension of streets.**

In proceedings to widen and extend streets it is essential to observe carefully all applicable legal requirements.<sup>36</sup>

Thus a municipality cannot widen a street by relocation but must pursue the course provided by law for widening.<sup>37</sup>

If not prescribed by law the determination of the width of streets is an administrative question for the municipal authorities, and not the court.<sup>38</sup>

To widen or extend a street, or change a street to a boulevard or vice versa, often the consent of the property owners is required.<sup>39</sup>

**§ 1289. Names of streets.**

Streets are named because it has been found to be useful, that is, to add to their use, not, it is true, in the same sense that a pavement adds to such use, but in a sense in a matter that appertains in some wise to such use. Exclusive authority over streets and "all matters and things appertaining to the use" thereof, given to the council, is a vesting of power to name streets. Naming a street is a legislative act, not judicial, although the street had another name, and is generally done by ordinance.<sup>40</sup>

<sup>36</sup> *Murdock v. Pittsburgh*, 243 Pa. 573, 90 Atl. 336.

<sup>37</sup> *Improvement Co. v. Pittsburg*, 234 Pa. 486, 83 Atl. 408.

<sup>38</sup> *Moreauville v. Boyer*, 138 La. 1070, 71 So. 187.

Although the street name was changed, in the absence of evidence to the contrary, the location, boundaries and width of street continued without change. *Kelley v. Jones*, 110 Me. 360, 86 Atl. 252.

Highways to be prescribed a named width by some statutes, but there may be discretion to

make of less width. *Parsons v. Rye*, 140 N. Y. S. 961.

<sup>39</sup> Where street has been declared by ordinance to be a boulevard, written consent of two-thirds of property owners is required to change to street. But mere declaration of ordinance that named street is boulevard, does not make it such, and no consent to change to street is necessary. *St. Louis v. Christian Bros. College*, 257 Mo. 541, 165 S. W. 1057.

<sup>40</sup> *Darling v. Jersey City*, 80 N. J. L. 514, 78 Atl. 10, per Garrison, J.

**§ 1290. Grade of street.<sup>41</sup>**

**§ 1291. Street work including sprinkling and removal of snow from sidewalk.**

An ordinance may require under penalty property owners and occupants of real property fronting upon a street to keep same clean and remove ice, snow, earth and other substances from the sidewalk, curbing and guttering.<sup>42</sup>

II. ESTABLISHMENT AND OPENING.

**§ 1294. Method of establishing streets.**

Streets, alleys and public ways in urban communities are established by (1) grant,<sup>43</sup> (2) condemnation,<sup>46</sup> (3)

<sup>41</sup> Power to grade, widen, etc., streets given to council. *Temple v. Corbell*, 17 Ariz. 1, 147 Pac. 745.

The board of public service shall have power to establish the grades of the center line of all public highways, streets, boulevards, parkways and alleys. This shall be done on demand of abutting property owners. *St. Louis Charter* (1914), Art. 3, Section 5 (e).

Establishment of. Section 1843, post; Section 1843, vol. 4, ante.

See Index.

<sup>42</sup> *Kansas City v. Holmes*, 274 Mo. 159, 202 S. W. 392, 395, citing Section 924, vol. 3, ante; *Smith v. Meier & Frank Inv. Co.*, 87 Or. 683, 171 Pac. 555, holding no civil liability implied against property owner.

**Sprinkling.** "Exclusive control over the streets, alleys, avenues and sidewalks," and power "to appoint all officers and agents," "fairly includes the exclusive right to cause the streets to be sprinkled." *Temple v. Corbell*, 17 Ariz. 1, 147 Pac. 745, 748.

See § 2036, post; § 2036, vol. 5, ante.

<sup>43</sup> Platting lots etc. *People ex rel. v. Massieon*, 279 Ill. 312, 116 N. E. 629.

Monuments, surveys, plats of subdivisions, as evidence of location of streets, city's prescriptive use of street. *Wolpert v. Chicago*, 280 Ill. 187, 117 N. E. 447.

By grant in deed, prescription or dedication. *Edgefield County v. Georgia-Carolina Power Co.*, 104 S. C. 311, 88 S. E. 801.

By grant, dedication, eminent domain or user for the prescribed period. *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344.

<sup>46</sup> *Duckworth v. Springfield*, 194 Mo. App. 51, 184 S. W. 476.

By condemnation either an easement or a fee may be taken. *Re Ely Ave.*, New York City, 153 N. Y. S. 1049, 150 N. Y. S. 698, 88 Misc. Rep. 320.

Chapter on Eminent Domain, ante.

dedication,<sup>47</sup> and (4) prescription or user.<sup>48</sup> These several methods are considered in appropriate places in this work.

### § 1295. Established by prescription.<sup>49</sup>

Uninterrupted use by the public of a way for a long

<sup>47</sup>Shreveport v. Simon, 132 La. 69, 60 So. 795; Clatskanie v. McDonald, 85 Or. 670, 167 Pac. 650; Drimmel v. Kansas City, 180 Mo. App. 339, 344, 168 S. W. 280.

By dedication or adverse user. Duckworth v. Springfield, 194 Mo. App. 51, 184 S. W. 476.

Land dedicated as a street and recognized and used as such is a public street without acceptance by ordinance. Londen v. Starr, 171 Iowa 528, 154 N. W. 331.

Dedication and acceptance, county road. "Whether a road has been established by dedication is a conclusion of law from facts." Kansas City v. Burke, 92 Kan. 531, 141 Pac. 562, 144 Pac. 193.

Never a public street, in view of evidence. Walton v. Harigel (Tex. Civ. App.), 183 S. W. 785.

Dedication by implication, evidence must show clearly intent on part of owner to devote property exclusively as street. Savannah v. Standard Fuel Supply Co., 140 Ga. 353, 78 S. E. 906.

Dedication or dedication by prescription; may be established by proof of existence for many years. Ft. Worth & D. C. Ry. Co. v. Ayers (Tex. Civ. App.), 149 S. W. 1068.

Dedication of alley, evidence to establish. Perrow v. San Antonio & A. P. Ry. Co. (Tex. Civ. App.), 178 S. W. 973.

Evidence of dedication and use,

\*etc. Home Laundry Co. v. Louisville, 158 Ky. 499, 182 S. W. 643.

In England "Most highways have, or are deemed to have, originated from the owner's dedication of his land to the public for the purposes of passage and acceptance by the public of his gift, evidenced by their user of the way," 16 Halsbury, Laws of England, p. 12.

See Chapter 33, Dedication, post.

<sup>48</sup>Shreveport v. Simon, 132 La. 69, 60 So. 795.

Alley by prescription. Balmat v. Argenta, 123 Ark. 175, 184 S. W. 445.

Lands including streets had been taken charge of by the public authorities and worked as a street as evidence tending to show existence of the highway. Atlanta v. Williams, 15 Ga. App. 654, 84 S. E. 139.

Alleyway, evidence to show existence of justifying decree establishing. Daniel v. Doughty, 120 Va. 853, 92 S. E. 848.

City may acquire by dedication or adverse possession. Johnson v. Shenandoah, 153 Iowa 434, 133 N. W. 761, 764, saying that "while statute of limitations will not as a rule, run against a city, it will operate in its favor and give it title to the right to use a strip as a street or alley. This is fundamental law."

<sup>49</sup>Sullivan v. Worcester (Mass. 1919), 121 N. E. 788; Raymond v.

period of time without objection or question by any one establishes the way a public way by prescription, or it will be presumed to have originated by grant or dedication by the owner.<sup>50</sup>

However, the use which determines whether a traveled way has been used as a public thoroughfare must be the main use, and not relatively an insignificant one.<sup>51</sup>

Baton Rouge (La. 1919), 82 So. 75; Pittsburgh v. Pittsburgh & L. E. R. Co. (Pa. 1919), 106 Atl. 724; Barnard v. Butte (Mont. 1918), 177 Pac. 402, 405.

<sup>50</sup> Use by public must be adverse, exclusive and under claim of right, and not by permission. Atlanta v. Georgia R. & Banking Co. (Ga. 1919), 98 S. E. 83.

"To establish a highway by prescription the user must be adverse, open and notorious, exclusive, continuous and uninterrupted for the period required by the statute." Tri-City Artificial Ice Co. v. Day (Ill. 1920), 127 N. E. 106, 109; Doss v. Bunyan, 262 Ill. 101, 104 N. E. 153.

Evidence to show existence, to enjoin erection of structure in public way. Childs v. Chicago, 198 Ill. App. 590.

Parol evidence is competent to show that the way as opened and actually used as street boundaries. Johnson v. Palmetto, 139 Ga. 556, 77 S. E. 807.

Implied acceptance of dedication of land for streets. Bronxville v. Lawrence Park Realty Co., 143 N. Y. S. 785.

Public highway established by use of over thirty years. Canton Borough v. Williams, 67 Pa. Super. Ct. 239.

Uninterrupted use and enjoy-

ment of roadway by the public for more than fifty years, creates way by prescription or presumption of grant. If one denies he must prove. Law v. Noela Elevator Co., 281 Ill. 143, 117 N. E. 435.

Established by user. Failure to reserve the right of a street in the conveyance of lots is not conclusive proof that no street exists; it is quite uncommon in deeds to reserve highways. Construction of a cross fence for the convenience of property owners with bars for passing by the public did not divest the road of its public character. Stockwell v. Duncel, 159 N. Y. S. 32, 174 App. Div. 481.

<sup>51</sup> McCutcheon v. Buffalo Terminal Station Com., 151 N. Y. S. 451, 455, 88 Misc. Rep. 601, approving Irwin v. Dixon, 50 U. S. (9 How.) 10, 13 L. ed. 25.

**The levy of taxes on property** does not estop the public from claiming it as a highway; "but the continuous payment of taxes is evidence rebutting the presumption of dedication." Clatskanie v. McDonald, 85 Or. 670, 167 Pac. 560.

The fact that the owner paid taxes held would not estop city from claiming that land constituted a public street. Seattle v. Hinekey, 67 Wash. 273, 121 Pac. 444, 446, following. Campan v.

**§ 1296. Same—prescription as distinguished from adverse possession.**

A strip of land becomes a public street by prescription independent of dedication, where it has been used by the public generally as a street and where it is commonly known as a street by a particular name for a period of years, in the absence of evidence showing permissive use only.<sup>52</sup>

That is, where the municipality used the land involved as a public street for the statutory period of limitation, under claim of right and improved the same "it became a street by prescription or adverse possession."<sup>53</sup>

If, however, under the particular facts, the use is permissive only and not under a claim of right, although for many years, the public character of the way is not established.<sup>54</sup>

It has been stated that the "doctrine of adverse possession does not apply to municipalities or other bodies exercising governmental functions, for the reason that the statute of limitations does not run against the state or any of its instrumentalities so as to prevent the exercise of its proper governmental functions."<sup>55</sup>

**1297. Same—basis of rule—dedication distinguished.**

"Whether the strip of land was used with the consent

Detroit, 104 Mich. 560, 62 N. W. 718, 719; *Ottawa v. Yentzer*, 160 Ill. 509, 43 N. E. 601, 604.

<sup>52</sup> "During all or practically all of that period its boundaries were clearly defined by fences. The use was open, continuous and adverse. There is nothing in the record to indicate a merely permissive use. The fact that this strip of land was known generally as Galer Street and used continuously as a thoroughfare negatives a merely permissive use by the public.

Every element of right by adverse possession is present." *Seattle v. Hinekley*, 67 Wash. 273, 121 Pac. 444, 446.

<sup>53</sup> *Quinn v. St. Louis & S. F. R. Co.*, 253 Mo. 48, 161 S. W. 820.

Strip used as a public alley, and recognized by property owner; facts held to establish it as a public alley. *Hamilton v. Leon* (Ia.), 164 N. W. 633.

<sup>54</sup> *Smith v. Thomas Electric Co.*, 278 Ill. 328, 116 N. E. 113.

<sup>55</sup> *Johnson v. Shenandoah*, 153



of the legal owners or in hostility to their title, the result is the same. If used with their consent and approval, there was a parol dedication to the public. If used without their consent, a prescriptive right is clearly established." <sup>56</sup>

**§ 1298. Same—rule stated—illustrations.**

Taking possession of land, improving it as a street and using it as such for a considerable period tends to establish it as a street although the condemnation proceedings to secure the land for such purpose were void.<sup>57</sup>

Dedication may be presumed or arise from public use. Thus a public way on railroad lands may be established by prescription by proof of public use for more than twenty years and acquiescence in such use by the railroad, although the railroad itself made some use of the way, as a road.<sup>58</sup>

So uninterrupted use under claim of public right, acquiesced in by the owner for the statutory period, of a strip of land as a public way was held to establish the public right by prescription,<sup>59</sup> and on extension of the corporate limits, such way becomes a street.<sup>60</sup>

However, no length of adverse possession by user upon the side of a highway by an abutting owner can give him title to the part of the highway so encroached upon. The

Iowa 434, 133 N. W. 761, 763, as applied to location of an alley in a suit to enjoin a city from changing the location and boundaries.

<sup>56</sup> *Humphrey v. Krutz*, 77 Wash. 152, 137 Pac. 806.

<sup>57</sup> *Quinn v. St. Louis & San Francisco R. R. Co.*, 253 Mo. 48, 161 S. W. 829.

<sup>58</sup> "The mere fact that the railroad company made use of the road in approaching its freight house and its passenger station is not sufficient to repel the presump-

tion of dedication arising from a public use by a long-continued public user for twenty years." *Dickinson v. Delaware L. & W. R. Co.*, 87 N. J. L. 264, 83 Atl. 703, following *Riverside v. Pennsylvania R. R. Co.*, 74 N. J. L. 476, 66 Atl. 433.

<sup>59</sup> *Wiehe v. Pein*, 281 Ill. 130, 117 N. E. 849, approving *Thorworth v. Scheets*, 269 Ill. 573, 110 N. E. 42.

<sup>60</sup> *Laclede-Christy Clay Products Co. v. St. Louis*, 246 Mo. 446, 460, 151 S. W. 460.

applicable maxim is "once a highway always a highway."<sup>61</sup>

### § 1299. Same—sufficiency of user.<sup>62</sup>

User recognized by the owner, as a matter of right as distinguished from permissive for the required time, will be sufficient.<sup>63</sup>

But use by agreement will not establish use by prescription.<sup>64</sup>

The use must be prescriptive under claim of right, not merely permissive only, otherwise dedication cannot arise.<sup>65</sup>

<sup>61</sup> *Parsons v. Rye*, 140 N. Y. S. 961.

<sup>62</sup> *McMahon v. Borland*, 262 Ill. 358, 104 N. E. 701; *Montpelier v. McMahon*, 85 Vt. 275, 81 Atl. 977; *New Rochelle v. New Rochelle Coal & Lumber Co.*, 144 N. Y. S. 852, 83 Misc. Rep. 194; *Seaman v. Portland*, 69 Or. 288, 137 Pac. 203; *Mt. Vernon v. Young*, 124 Iowa 517, 100 N. W. 694; *Bridges v. Grand View*, 158 Iowa 402, 139 N. W. 917.

*Martin v. St. Ansgar*, 165 Iowa 560, 146 N. W. 47, stating the public right to the land involved "must be established by clear and unequivocal testimony."

Street by prescription, public use under claim of right for thirty-four years. *Olympia v. Lemon* (Wash.), 161 Pac. 363.

Street, established by adverse possession. *Silverton v. Brown*, 63 Or. 418, 128 Pac. 45.

Highway established by adverse possession—beach land. *Hibn Co. v. Santa Cruz*, 170 Cal. 436, 150 Pac. 62.

Highway not established by prescription, no showing of parol

dedication. *Maggs v. Seattle*, 74 Wash. 323, 133 Pac. 388.

Insufficient. *Cincinnati R. & Ft. W. R. Co. v. Cleveland, C. C. & St. L. R. Co.* (Ind. 1919), 123 N. E. 1, 4.

Establishment by user denied. *Re Stees* (Minn. 1919), 172 N. W. 219.

<sup>63</sup> *Norfolk & W. Ry. Co. v. Bristol*, 116 Va. 955, 83 S. E. 421.

"The lines and boundaries of highways, streets and alleys between public and private owners cannot be established by acquiescence for the reason, among others, no one is authorized to represent the state or its instrumentalities in making any such agreement or acquiescence in a given line." *Johnson v. Shenandoah*, 153 Iowa 434, 133 N. W. 761, 764.

<sup>64</sup> *Johnson v. Robertson*, 156 Iowa 64, 135 N. W. 585.

<sup>65</sup> "A mere permissive use cannot create a prescriptive right, and no inference adverse to the owner can be drawn from mere travel across unenclosed land by the public without objection." *Warren v. Jacksonville*, 15 Ill. 236, 58 Am.

To create a public way by prescription, it is usually stated that it is necessary that the use shall be under a claim of right, adverse, open, notorious, exclusive, continuous and uninterrupted for the statutory period.<sup>66</sup>

Dec. 610; followed in *Doss v. Bunyan*, 262 Ill. 101, 104 N. E. 153; *Anchor v. Stewart*, 270 Ill. 57, 110 N. E. 385, denying injunction to restrain construction of spur track across the land claimed to be an alley.

"Under all the authorities the user must be under a claim of right, and must also be unequivocally adverse, in order that the public may acquire the right in question by prescription." *Kepler v. Richmond* (Va. 1919), 98 S. E. 747, 750.

<sup>66</sup>"A prescriptive right could not come from a permissive use. Mere travel by the public is not sufficient to establish a prescriptive right as a user. It must be under a claim of right by the public and not by the mere acquiescence of the owner. (*Palmer v. Chicago*, 248 Ill. 201.) \* \* \* To establish a public highway by prescription the use of the public must have been adverse, under claim of right, continuous, uninterrupted and with the knowledge of the owner of the estate. Occasional travel is not sufficient. (*Chicago v. Wildman*, 240 Ill. 215.) It must appear that a certain and well-defined line of travel has existed over the period of fifteen years. (*Chicago v. Galt*, 224 Ill. 421; *Doss v. Bunyan*, 262 Ill. 101, 108, 104 N. E. 153.) *Heater v. Chicago & Alton R. R. Co.*, 200 Ill. App. 331, 335, 336.

"To establish a highway by

prescription there must be an actual adverse public use, general uninterrupted, continued for the period of the statute of limitations under a claim of right. \* \* \*

A permissive use of a way by certain portions of the community constitutes a license, and not a dedication and is ordinarily something that may be revoked. \* \* \* Where the use is merely permissive, and not adverse, there is no basis on which a right of way by prescription may rest." *Parrott v. Stewart*, 65 Or. 254, 260, 132 Pac. 523, 525; *Peterson v. Robertson*, 73 Or. 263, 266, 144 Pac. 568.

Where the use was permissive in its origin it could not become adverse without some unequivocal assertion of the rights of the public as inconsistent with the title. *Clatskanie v. McDonald*, 85 Or. 670, 167 Pac. 560; *Bohrnstedt Co. v. Scharen*, 60 Or. 349, 354, 119 Pac. 337.

Mere permissive use not adverse is no basis for claim of right of way by the city by prescription. *West v. Houston* (Tex. Civ. App.), 163 S. W. 679, 680.

Burden on city to establish that it acquired the property as a street by adverse possession. *Barnard Realty Co. v. Butte*, 48 Mont. 102, 136 Pac. 1064.

Strip of land used as a walkway for fifteen years; burden to show that the use was merely permissive is on the land owner.

**§ 1300. Same—duration of user.**

The limitation for action to recover land is usually the duration of user recognized, to establish title in the public by prescription or adverse possession.<sup>67</sup>

**§ 1302. Same—extent acquired.**

The extent of the prescriptive easement, it is held, is governed entirely by the extent of user. This is the general rule applicable.<sup>68</sup>

White v. Calhoun, 151 Ky. 124, 151 S. W. 362.

Statutory provision as controlling. Barnard Realty Co. v. Butte, 48 Mont. 102, 136 Pac. 1064.

Alley established by prescription without actual knowledge of owner, under circumstances that he should have known of it. Manchester v. Clarkson, 195 Mich. 354, 162 N. W. 115.

<sup>67</sup> Adverse possession for forty years, under authority by city gives title to street. Brady v. Baltimore, 130 Md. 506, 101 Atl. 142, 144, declaring that "prescription will not run against the city or the public," citing Cuscha v. Williamsport, 117 Md. 318, 319, 83 Atl. 389; Ulman's Case, 83 Md. 144, 145, 34 Atl. 366.

Alley used by public for twenty-five years raises the presumption that city accepted, and void attempt to vacate does not destroy existence of alley. Rollo v. Pool, 281 Ill. 607, 117 N. E. 756.

City took control and used land as street with acquiescence and consent of owner for thirty-eight years, held sufficient. Statute said fifteen years. Lincoln v. St. Louis, S. & P. Ry. Co., 201 Ill. App. 152.

More than twenty-four years. Newberg v. Kienle, 60 Or. 486, 120 Pac. 3.

More than ten years. Humphrey v. Krutz, 77 Wash. 152, 137 Pac. 806.

Ten years. Quinn v. St. Louis & S. F. R. Co., 253 Mo. 48, 161 S. W. 829, 824.

More than forty years, "City is estopped from claiming a right to shift the boundaries of the street which have been accepted and acquiesced in by everybody for nearly half a century, merely to attain mathematical exactness." Hart v. Independence, 84 Or. 194, 164 Pac. 719.

Fifty years. Norfolk & W. Ry. Co. v. Bristol, 116 Va. 955, 83 S. E. 21.

<sup>68</sup> Section 1302, vol. 3, ante.

"It is clear that if the city had any right in this strip of land as a street or for public travel such right was acquired by prescription. Therefore the public can only claim such rights in this strip of land as it had acquired by actual user; the extent of the prescriptive easement being governed entirely by the extent of user." McCutcheon v. Buffalo Terminal

But the use of a part of a dedicated strip of land, it has been held, is constructive use of the entire strip.<sup>69</sup>

The distinction between prescription and dedication in this respect is thus shown.<sup>70</sup>

**§ 1303. Same—statutory and charter provisions as affecting rule.<sup>71</sup>**

**§ 1304. Opening streets.**

To constitute a way a street or public way, within the jurisdiction of the public authorities, its recognition or establishment as such must distinctly appear.<sup>72</sup>

Mere improvement of a street is not always sufficient.<sup>73</sup>

Station Co., 154 N. Y. S. 711, 722, affirming 151 N. Y. S. 451, 88 Misc. Rep. 601.

<sup>69</sup> Eugene v. Garrett, 87 Or. 435, 170 Pac. 731, following Bayard v. Standard Oil Co., 38 Or. 438, 447, 63 Pac. 614.

<sup>70</sup> See § 1297, vol. 3, ante.

<sup>71</sup> Keppler v. Richmond (Va. 1919), 98 S. E. 747, 750, citing Section 1303, vol. 3, ante.

Public easement on ground of statutory uses denied, where both travel and work required for statutory period. Re Stees (Minn. 1919), 172 N. W. 219.

Statute providing that streets, lanes and alleys within the city laid out by private persons shall be deemed public highways, held inapplicable to lands laid out in a township and afterwards incorporated within the city. O'Donnell v. Pittsburg, 234 Pa. 401, 83 Atl. 314.

<sup>72</sup> Sections 1294 to 1303, ante.

Street opened and used for travel generally held a public highway without showing acceptance by the appropriate public authorities, as

related to automobile injury concerning the parties to the suit. Colebank v. Standard Garage Co., 75 W. Va. 389, 84 S. E. 1051.

Repeal of an ordinance opening a street is to annul all proceedings had by virtue of that ordinance. It restores the parties to the same position which they occupied before the ordinance for the opening of the street was passed. It is an annulment of the proceedings to open the street. Re Black Street, Pittsburgh, 236 Pa. 395, 84 Atl. 918.

Full power to establish, open, widen, extend, etc., streets. Gorman v. Chicago B. & Q. R. R. Co., 255 Mo. 483, 491, 164 S. W. 509.

<sup>73</sup> **Improvement.** Although street was improved, it had never been dedicated or recognized by the municipality; held not a public street, notwithstanding it seems the owners of the land intend to dedicate it to the public. Long v. Barber Asphalt Pav. Co., 151 Ky. 1, 151 S. W. 6, approving Nevin v. Roach, 86 Ky. 492, 9 Ky. Law Rep. 819, 5 S. W. 546,

In laying out, establishing and opening streets and public ways—a power generally conferred in express terms on municipal corporations—substantial observance of the applicable legal mandatory requirements are essential.<sup>74</sup>

All of the necessary steps appertaining thereto are considered elsewhere in this work.<sup>75</sup>

### III. TITLE TO STREETS OR ALLEYS.

#### § 1305. Ownership of streets.

Unless the contrary appear by competent evidence, the established rule in a majority of the states is that the abutting land owner owns the fee in the public way to

<sup>74</sup> City has plenary power to open and keep open and free from obstruction all streets, public ways, squares, etc. *New Orleans v. Kaufman*, 138 La. 897, 70 So. 874.

Laying out and opening streets. Opening by condemnation by ordinance. *Chicago v. Walker*, 251 Ill. 629, 96 N. E. 536.

Laying out over land to be acquired by purchase or condemnation of width prescribed by law. *Allen v. Kebler*, 134 N. Y. S. 369, 76 Misc. Rep. 40, affirmed in 136 N. Y. S. 1130, 151 App. Div. 920.

Laying out road. *Goerke v. Manitou*, 25 Colo. App. 482, 139 Pac. 1049.

Opening through burial grounds. *United Brethren Congregation v. Emans Borough*, 56 Pa. Super Ct. 136.

In opening width of sidewalks may be regulated; or abolished. *Jones v. Houston* (Tex. Civ. App.), 188 S. W. 688.

Opening, when consent of owners required. *Shamokin Borough v. Helt*, 250 Pa. 80, 95 Atl. 385.

Acts constituting opening, as un-

equivocal acts clearly showing an intention, followed by work on the street and the enactment of an ordinance. *Re Philadelphia Parkway*, 250 Pa. 257, 95 Atl. 429.

In proceedings to reestablish street bounds strict compliance with statute held jurisdictional prerequisite. "Strict compliance with each of the enumerated steps of the statute was the condition of the validity of the entire proceeding. Failure to comply with any one of the required steps would constitute a jurisdictional defect." *Hartford Trust Co. v. West* *Hartford*, 84 Conn. 646, 81 Atl. 244, following *Kiefer v. Bridgeport*, 68 Conn. 405, 411, 412, 36 Atl. 801.

In the Illinois Road & Bridge statute the words "laying out" and "laid out," are used from beginning to end, as applying to the establishment of public highways by commissioners under the statute and the words cannot apply to the statute or plot. *Heppes Co. v. Chicago*, 260 Ill. 506, 103 N. E. 455, 457.

<sup>75</sup> Condemnation, see Chapter 32,

the center thereof,<sup>76</sup> but the rule is otherwise in some

Eminent Domain, § 1452, et seq. vol. 4, ante; Chapter 32, ante. Opening, laying out, improving, etc., Chapter 37, Public Improvements, § 1816, et seq. vol. 4, ante; Chapter 37, ante.

City has power to select streets for boulevards, to cause them to be opened and widened, including the exercise of the right of eminent domain, to control parks, parkways, boulevards and other grounds and thoroughfares, to improve, adorn and regulate them. *Chaplin v. Kansas City*, 259 Mo. 479, 487, 168 S. W. 764, holding a city could condemn a public alley for a parkway.

<sup>76</sup> "At common law the ultimate fee to the middle of the street was in the abutting landowner. There was reasoning underlying the above rule of the common law for the ultimate fee of lands should reside somewhere, and where it resided in the abutting landowner to the middle of a street, it furnishes to that landowner an efficient weapon for his protection against an unwarranted appropriation of the street in the proper maintenance of which the situation of his property gives him a peculiar interest." *Cloverdale Homes v. Cloverdale*, 182 Ala. 419, 62 So. 712, 715, 47 L. R. A. (N. S.) 607.

**Alabama.** Abutting landowner has fee to center of public way, either street or alley. *Cloverdale Homes v. Cloverdale*, 182 Ala. 419, 62 So. 712, 716, 47 L. R. A. (N. S.) 607.

**California.** *Porter v. Los Angeles* (Cal. 1920), 189 Pac. 105.

**Massachusetts.** "The town has

no right in its governmental capacity to the locus of the street, but it has a right as a municipal corporation owning land abutting on the street." *Brookline v. Whidden*, 229 Mass. 485, 118 N. E. 981.

**Minnesota.** *Pederson v. Rushford* (Minn. 1920), 177 N. W. 943.

**New York.** Title to center of street in property owner. *Dunn v. New York Telephone Co.*, 175 N. Y. S. 115.

The only interest of the municipality in the streets is that of the public in the highway; it has no control of whatever rights the owners of the fee may have in them. *Northern Westchester Lighting Co. v. Ossinging*, 139 N. Y. S. 373, 154 App. Div. 789.

Fee of land remains in the abutter burdened with a public easement. *Appleton v. New York*, 144 N. Y. S. 138, 82 Misc. Rep. 258.

"In general as to highways the presumption is that the public own only the easement of way, and that the fee of the locus, subject to such easement remains in the adjoining owners." *New Rochelle v. New Rochelle Coal & L. Co.*, 144 N. Y. S. 852, 83 Misc. Rep. 194, affirmed in 158 N. Y. S. 1111.

"In the absence of proof the presumption is that the fee of the village streets is in the abutting owners and the easement of the village in the public streets gave it no title to the sewer which had been constructed therein." *Ward v. Kropf*, 207 N. Y. 467, 101 N. E. 469, affirming 127 N. Y. S. 1148, 143 App. Div. 919, holding that there could be no recovery on an invalid contract for the construc-

states,<sup>77</sup> as will appear in the sections which follow.

tion of sewers in streets, not accepted by the municipality.

**North Dakota.** "Here the rule of law is established that the adjacent lot owners owns a fee in the half of the street which is contiguous to his property." *Gram Const. Co. v. Minneapolis*, St. P. & S. S. M. Ry. Co., 36 N. D. 164, 161 N. W. 732, 734; *Donovan v. Albert*, 11 N. D. 289, 91 N. W. 441, 58 L. R. A. 775, 95 Am. St. Rep. 720.

**Rhode Island.** In the absence of evidence to the contrary the presumption is that the land owner owns the fee of the street adjacent to this land, "subject at most to an easement therein as a way on the part of the public." *Adams v. White & Sons* (R. I.), 103 Atl. 230.

**Texas.** "The rule in this state is that the owner of a lot fronting on the street owns the fee to the center of the street, subject only to the easement of the public." *Waples-Painter Co. v. Ross* (Tex. Civ. App.), 141 S. W. 1027; *Roaring Springs Townsite Co. v. Paducah Tel. Co.* (Tex. Civ. App.), 164 S. W. 50, 53.

**Vermont.** "Towns and cities are not the owners of streets and highways within their limits, but it is the policy of this state to delegate to municipalities very extensive powers in respect to highways and their use by the public." *Barre v. Barre & M. Traction & Power Co.*, 88 Vt. 304, 92 Atl. 737, 739.

A municipality has no property right in land taken for a

highway. It does not even own the easement which is in the public. *Burlington Light & Power Co. v. Burlington* (Vt. 1918), 106 Atl. 513, 516.

**West Virginia.** Fee in owner, easement in public. *Fox v. Hinton* (W. Va. 1919), 99 S. E. 478.

**77 Colorado.** A municipality has no unqualified fee in the streets. *Goerke v. Manitou*, 25 Colo. App. 482, 139 Pac. 1049.

**In Iowa** the general rule is that the fee title to the streets is in the municipality, the exception being in certain cities organized at an early date under special charter. *Callahan v. Nevada*, 170 Iowa 719, 153, N. W. 188, L. R. A. 1916B, 927.

The fee of all streets and alleys is in the city. *Walker v. Des Moines*, 161 Iowa 215, 142 N. W. 51.

**Michigan.** Fee of alley in city in trust for public. *Edison Illuminating Co. v. Misch* (Mich.), 166 N. W. 944, 947, following *Bay County v. Bradley*, 39 Mich. 166, 33 Am. Rep. 367.

**New York.** "The city as such has no property interest in the street in which it has no fee." *McCutcheon v. Buffalo Terminal Station Com.*, 154 N. Y. S. 711, 719, affirming 150 N. Y. S. 850, 88 Misc. Rep. 148.

Fee of particular streets in city of New York. *Lincoln Safety Deposit Co. v. New York*, 210 N. Y. 34, 103 N. E. 768, affirming 132 N. Y. S. 1135, 148 App. Div. 895; *Appleton v. New York*, 219 N. Y. 150, 114 N. E. 73, affirming 148 N.



**§ 1306. Same—Illinois rule.**

In Illinois in the absence of proof as to who owns the fee it is a presumption of law that the fee of a public street is in the municipality.<sup>78</sup>

However, it is established in that state that the fee of the streets and alleys is vested in the local municipality in trust for all the citizens of the state and not merely for local use, and the legislature has supreme control over them unless restrained by some constitutional limitation.<sup>79</sup>

**§ 1307. Title of municipality is that of trustee.**

The title to streets and public ways whether in the people or a municipality, or in fee or in easement is held in trust for the public use.<sup>80</sup>

Y. S. 870, 163 App. Div. 680, reversing 144 N. Y. S. 138, 82 Misc. Rep. 258.

**Ohio.** Land for and afterwards used for street and railroad purposes consideration granted to a municipality "the title will not revert in the grantor unless it be in pursuance of a stipulation in the grant that it shall revert." Cleveland Terminal & V. R. Co. v. State, 85 Ohio 251, 97 N. E. 967. See § 1415, post.

**Tennessee.** "A municipal corporation for the government of a town or city is the proprietor of the streets which it holds as easements in towns for the benefit of the corporation, and which it has the power to grade, pave or otherwise improve." Fleming v. Memphis, 126 Tenn. 331, 148 S. W. 1057, following Humes v. Mayor & Alderman, 1 Humph. 403.

<sup>78</sup> Sherwin v. Aurora, 257 Ill. 458, 100 N. E. 938, 43 L. R. A. (N. S.) 1116, affirming 168 Ill. 320; Chester

v. Wabash, Chester & Western R. Co., 182 Ill. 382, 55 N. E. 524.

"The law has long been settled in this state that any city which has a fee, under the power to control its streets granted by the cities and villages act may allow any use of them that is not inconsistent with the public objects for which they are held." Springfield v. Postal Telegraph Cable Co., 253 Ill. 346, 97 N. E. 672, affirming 164 Ill. App. 276; Sears v. Chicago, 247 Ill. 204, 93 N. E. 158, 139 Am. St. Rep. 319.

Fee of particular alley held to be in property owner, subject to public easement. McMahon v. Borland, 262 Ill. 358, 104 N. E. 701, 707.

<sup>79</sup> Hepples Co. v. Chicago, 260 Ill. 506, 103 N. E. 455, 457.

<sup>80</sup> **Illinois.** "The village and its officers hold the title in its streets in trust for the use of the public. The law recognizes no right in them to barter or sell the same for

### § 1309. Right to soil and mineral under streets.

Public authorities may remove soil, gravel and other like materials from one part of a street to another por-

a money consideration." *Wiehe v. Pein*, 281 Ill. 130, 117 N. E. 849, 853.

**Iowa.** The fee is in the city, and title thereto is held in trust for the public generally. *Walker v. Des Moines*, 161 Iowa 215, 142 N. W. 51, saying: "This was laid down on great consideration in *Clinton v. R. R. Co.*, 24 Iowa 455." *Callahan v. Nevada*, 170 Iowa 719, 153 N. W. 188.

"Lands taken or dedicated for the use of streets and highways is subject to the right of the public to have them used as such, also the right of the abutter to use them as such in connection with his land." *Wegner v. Kelley* (Iowa), 157 N. W. 206, 208.

**Kentucky.** "The municipality in its governmental capacity holds the streets in the nature of a trust for the public and the public may acquire an easement in the street through the action of the municipal authorities for the benefit of the public or by adverse user by the public for the statutory period." *Home Laundry Co. v. Louisville*, 168 Ky. 499, 182 S. W. 645, 650.

**Louisiana.** "Such property (Streets) is out of commerce. It is dedicated to public use, and held as a public trust for public use. It is inalienable by corporations." *New Orleans v. Carrollton Land Co.*, 131 La. 1092, 60 So. 695.

"Streets are not the property of any one, they belong to the whole community. They are not the prop-

erty of the corporation for if they were the corporation could exclude the whole world from the use of them—on the contrary the use of them belongs to the whole world." *Daublin v. New Orleans*, 1 Mart. (O. S.) 187, approved in *New Orleans v. Kaufman*, 138 La. 897, 899, 70 So. 874, stating: "This doctrine derived from the Roman Law has been incorporated in all of our civil codes."

"The streets and banks of the river are 'loci publici,' out of commerce, and the municipal authorities are bound to see that the use of them by the public be not obstructed." Quoted with approval in *New Orleans v. Kaufman*, 138 La. 897, 899, 70 So. 874, from *Sheperd v. Municipality No. 3*, 6 Rob. (La.), 349, 41 Am. Dec. 269.

**Michigan.** The fee of an alley is in the municipality in trust for the public. *Edison Illuminating Co. v. Misch.*, 200 Mich. 114, 166 N. W. 944, 947; *Bay County v. Bradley*, 39 Mich. 166, 33 Am. Rep. 367.

**New York.** "Where the fee of a street or highway is in a city the city holds the street in trust for the people at large." *McCutcheon v. Buffalo Terminal Station Com.*, 154 N. Y. S. 711, 719, affirming 150 N. Y. S. 850, 88 Misc. Rep. 148.

"The public highways and streets are acquired and held by the state in trust for the use of all the people." *Bradley v. Degnon Contracting Co.*, 224 N. Y. 60, 120 N. E. 89, 91.

"The title to the streets and

tion of that or some other street for the purpose of improvement.<sup>81</sup>

The title of property abutting on a public street extends to the center of the street, and the owner thereof is entitled to the minerals therein with the right of removal so long as he leaves the street intact. However, the abutting owner cannot remove minerals from under or adjacent to an established highway in such manner as to cause a subsidence or other injury thereto; and to do so is a nuisance which in a clear case will be restrained in equity at the suit of the municipality. A street is entitled to such support as will keep it in place, both lateral and vertical. If the removal of coal at the side or underneath will destroy the street it may not be done. But such coal may be removed to any amount that will not injure the highway. And the amount that may be so removed is a matter of fact.<sup>82</sup>

#### IV. CONTROL IN GENERAL AND USE THEREOF BY MUNICIPALITY.

### § 1310. Legislative control paramount—delegation of power.

The highways of the state including the streets and public ways in municipalities are under the primary and paramount control of the state.<sup>83</sup>

highways whether in the people or a municipality, or in fee or in easement is held for the public use. The fee of the streets acquired by the City of New York is held by it in trust for the use of all the people of the state and not as corporate or municipal property.” *People ex rel. v. New York Railways Co.*, 217 N. Y. 310, 112 N. E. 49, 51, affirming 155 N. Y. S. 1133, 171 App. Div. 910.

<sup>81</sup> *La Grange v. Brown* (Tex. Civ. App.), 161 S. W. 8, 10, quoting from and approving *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep.

360, cited in § 1309, vol. 3, ante.

<sup>82</sup> *Scranton v. People’s Coal Co.*, 256 Pa. 332, 100 Atl. 818, denying an injunction at suit of municipality.

Section 227, ante; § 227, vol. 1, ante.

<sup>83</sup> *Strauss v. Enright*, 174 N. Y. S. 113; *Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151.

The legislature exercises plenary control over public highways whether they are public county roads or streets in cities and towns. *Stewart v. De Land-Lake Helen*

The state has plenary power over all public highways whether urban or suburban, unless restricted by the constitution,<sup>84</sup> subject to the limited rights of the abutting property owners.<sup>85</sup>

This power may be exercised by the state itself or it may be delegated by it to its municipalities or other agencies,<sup>86</sup> and may be withdrawn in whole or in part at any

Special Road & Bridge District, 71 Fla. 158, 71 So. 42, 50.

Control of county roads is primarily in the state and until in plain terms the state gives control to the municipality the latter cannot exercise authority over the same. *Christie v. Bandon*, 82 Ore. 481, 162 Pac. 248; *Cole v. Seaside*, 80 Ore. 73, 156 Pac. 569.

<sup>84</sup> *Bradley v. Degnon Contracting Co.*, 224 N. Y. 60, 120 N. E. 89, 91.

<sup>85</sup> *Stern v. International Ry. Co.*, 153 N. Y. S. 520, 525, 167 App. Div. 503.

<sup>86</sup> *Lowden v. Starr*, 171 Iowa 528, 154 N. W. 331.

Legislative sanction directly given or conferred through municipal action is necessary to authorize the use of streets for posts and wires of telegraph and telephone companies. *Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, 97 N. E. 672, 674, affirming 164 Ill. App. 276.

Control of streets may be given to municipality, a park commission or another authority. *Illinois Malleable Iron Co. v. Lincoln Park Comrs.*, 263 Ill. 446, 105 N. E. 336, 51 L. R. A. (N. S.) 203.

The state may delegate to specific bodies or commissions the control of certain streets or part thereof for specific purposes, as a Term-

inal Station Commission. *McCutcheon v. Buffalo Terminal Station Commission*, 217 N. Y. 127, 111 N. E. 661, 668. *Board of Revenue and Road Commissioners, State ex rel. v. Mobile Board of Revenue & Road Commissioners*, 180 Ala. 489, 61 So. 368.

"The rule is that the plenary power of the legislature over streets barring constitutional restrictions may be exercised by itself or delegated by it to municipal authorities or other agencies." *Bingham v. Kollman*, 256 Mo. 573, 591, 165 S. W. 1097.

"Streets, like roads, form the great highways of the state upon which the travel of the people is done and their property carried. The state in its sovereignty over all public highways has full power over the streets as well as over public roads and unless prohibited by the constitution the legislature may confer on such agency as it may deem best power of supervision and control over streets \* \* \* The streets of such towns and cities are public highways dedicated to the use not only of the people of such municipal corporations but to the whole people of the county. One of the chief objects of its incorporation is to give to the municipality control and supervision over the streets within its

time.<sup>87</sup> This doctrine is fully established by judicial decisions.

The public highways and streets are acquired and held by the state in trust for the use of all the people. For ordinary and general transportation and traffic they are free and common to all citizens. Thus much is conclusively implied in their acquisition and maintenance, regardless of the estate or title by which they are held.<sup>88</sup>

Streets primarily are for the use of the people as a whole, and cannot, therefore, be diverted for private use,<sup>89</sup> or the rights of the public therein unreasonably

limits and to charge it with the duty to keep and maintain them in a condition so that they are constantly fit for safe, free and convenient public use." *Sanderson v. Texarkana*, 103 Ark. 521, 146 S. W. 105, 107.

<sup>87</sup> "The streets and other highways of the city are a part of the other and general highways of the state, and as such and to the extent that the interests involved are not purely local to cities and incorporated towns such power as a municipality has thereover is granted to the municipality by the state, and may be modified or withdrawn by the state from the municipality unless the state has waived its right to do so." *The city in granting franchises, acts as the agent of the state. Winfield v. Public Service Com. (Ind.)*, 118 Ind. 531, 533.

The streets of the municipality are parts of the general highway of the state and as such the state has primary control over them while the interests of the public are concerned and such powers thereover as municipalities have while the interests of the general public are involved are granted to

the municipalities by the state and may be withdrawn by the state; in effect, an agency for the public welfare is thus established and may be thus centered in the municipality. *Farmers & Merchants Co-operative Telephone Co. v. Boswell Tel. Co. (Ind.)*, 119 N. E. 513.

<sup>88</sup> *Bradley v. Degnon Contracting Co.*, 224 N. Y. 60, 120 N. E. 89, 91, per Collin, J.

<sup>89</sup> "Where the fee of a street or highway is in a city the city holds the street in trust for the people at large. In respect to streets to be closed in which the city has no fee only the public at large is interested, and the legislature has the full power and authority to release the public right therein, and to provide for the closing of the same whenever the public interest requires. The city never had the right to sell or dispose of any of these streets or to divert the same to private use, and simply held the same as agent and trustee for the public, there being no property right in the municipality which falls within the language of the clause of the constitution." *McCutcheon v. Buffalo Terminal Station Co.*, 154 N. Y. S. 711, 719,

curtailed or abridged,<sup>90</sup> or unreasonably interfered with through or for any private appropriation or use. However, the legislature, or the municipality or other agency, where power to do so has been duly delegated, can authorize structures in them for private use or benefit which are reasonably incidental to the ordinary uses of a street and which without such authority would be encroachments and public nuisances. It can in so far as the state or the people at large are concerned or have rights in them subject them in part or wholly to public use other than the ordinary street uses, as for example, for a steam or commercial railroad or a street railroad.<sup>91</sup>

712, affirming 151 N. Y. S. 451, 88 Misc. Rep. 601.

<sup>90</sup> "The state legislature acting for the people who use the highways for travel has paramount authority over the same, subject to the limited rights of the abutting property owners and local authorities. Primarily the roads are for the use of the people as a whole. Main Street, Buffalo, is a very old thoroughfare, and the rights of the people therein antedate those of either the city or of the railway company. The local authorities have no power to abridge or curtail the public right in said street." Stern v. International Ry. Co., 153 N. Y. S. 520, 525, 526, 167 App. Div. 503.

"The streets and highways belong to the public. They are built and maintained at public expense for the use of the general public in the ordinary and customary manner. The state and the city as an arm of the state, has absolute control of the streets in the interest of the public. No private individual or corporation has the right to the use of the streets in the prosecution of the business of

common carrier for private gain without the consent of the state, nor except upon the terms and conditions prescribed by the state or municipality, as the case may be. The use of the streets as a place of business or as main instrumentality of business is accorded as a mere privilege and not as a matter of natural right." Hadfield v. Lindin, 98 Wash. 657, 168 Pac. 516.

<sup>91</sup> Bradley v. Degnon Contracting Co., 224 N. Y. 60, 120 N. E. 89, 91.

Use of street for railroad purpose can be granted only by legislature, unless given by statute to city. Bradley v. Degnon Contracting Co., 140 N. Y. S. 825, 80 Misc. Rep. 90, affirmed in 141 N. Y. S. 852, 157 App. Div. 237.

To operate motor busses or jitneys for hire may require from the state through a public service commission a certificate of public necessity and convenience, and also consent of local authorities. Public Service Co. v. Booth, 156 N. Y. S. 140, 170 App. Div. 590, affirming 155 N. Y. S. 568.

**§ 1311. Extent of municipal control.**

Aside from constitutional restriction, as the highways of the state, including streets and public ways in cities, towns and villages are under the primary and paramount control of the legislature, all powers of municipalities over them must depend upon the proper construction of the grant of authority contained in the charter of the given local corporation and the statutes applicable thereto.<sup>92</sup>

A municipality has no inherent power over street,<sup>93</sup> but as mentioned,<sup>94</sup> the state may surrender to any municipality part or full control of the streets and thoroughfares within its limits.<sup>95</sup>

<sup>92</sup> "The highways of the state including the streets in the city are under the primary and paramount control of the legislature. In the absence of constitutional restrictions there is no limit upon the power of the legislature as to the uses to which streets may be devoted. As the municipal powers are derived from the legislature it follows that the authority of municipalities over streets and the uses to which they may legitimately be put depend, within constitutional limitations, entirely upon the charter powers of the municipality granted by the legislature." *People ex rel. v. Marshall Field & Co.*, 266 Ill. 609, 107 N. E. 864, 867.

"The highways of the state, including the streets in cities and towns are under the paramount and primary control of the legislature and all powers of cities and towns over streets must depend upon the authority granted in special charters or general laws applying to such municipalities. Whatever power the state has over its highways can be granted by it to the

municipalities it has created, and in this instance exclusive control and power over the streets, alleys, sidewalks and public grounds within its bounds have been granted to the city of San Antonio not only in the special charter granted it, but by the general laws of the state." *Greeve v. San Antonio* (Tex. Civ. App.), 178 S. W. 6, 7.

<sup>93</sup> *Barhite v. Home Telephone Co.*, 63 N. Y. S. 659, 50 App. Div. 25.

<sup>94</sup> Section 1310, ante.

<sup>95</sup> *California. Sunset Telephone & Telegraph Co. v. Pasadena*, 161 Cal. 265, 118 Pac. 796, 802.

*Indiana. Windle v. Valparaiso*, 62 Ind. App. 342, 113 N. E. 429, 432.

*Illinois. Sullivan v. Best*, 286 Ill. 315, 121 N. E. 565.

*Iowa. Central Life Assur. Soc. v. Des Moines* (Iowa 1919), 171 N. W. 31.

*Louisiana. New Orleans v. Le Blanc*, 139 La. 113, 71 So. 248.

*Montana. Ford v. Grape Falls*, 46 Mont. 292, 127 Pac. 1004, 1008.

*Missouri. Joplin v. Wheeler*, 173

In some cases the constitution,<sup>96</sup> in others, home rule, constitutional or freeholders' charters,<sup>97</sup> and in others' general statutes,<sup>98</sup> confer power in whole or in part over

Mo. App. 590, 158 S. W. 924; *Windsor v. Bast* (Mo. App. 1917), 199 S. W. 722.

Massachusetts. *Commonwealth v. Slocum*, 230 Mass. 180, 119 N. E. 687.

N. Carolina. *Moore v. Carolina Power and Light Co.*, 163 N. C. 300, 79 S. E. 596.

Nebraska. *Omaha L. & B. R. Co. v. Lincoln*, 97 Neb. 122, 149 N. W. 319.

New York. *Bradley v. Degnon Contracting Co.*, 140 N. Y. S. 825, 80 Misc. Rep. 90, affirmed in 141 N. Y. S. 852, 157 App. Div. 237.

Pennsylvania. *Duff v. Heppens Forge & Knife Co.*, 234 Pa. 275, 83 Atl. 204.

Texas. *Terrell v. Terrell Electric Light Co.* (Tex. Cr. App.), 187 S. W. 966.

City has general control of streets with specific power to regulate the use of them. *Buffalo v. Stevenson*, 207 N. Y. 258, 100 N. E. 798.

"The power to control and supervise the streets and highways of the city is comprehended in the grant of police power to the municipality." *Lee v. Leitch*, 131 Md. 30, 101 Atl. 716, 720.

Statute grants to towns the exclusive control over county roads and declares them to be streets, etc. *Gaston v. Thompson*, 89 Or. 412, 174 Pac. 717.

Creation of public utility commission and conferring on it specific powers, held not to supersede statute giving cities control of

streets, alleys and public grounds thereon. *Wilson v. Weber*, 101 Kan. 425, 166 Pac. 512.

Under statutes the care and control of the highways, streets, side walks within cities are given to the proper governing body of the municipality, to the end that they may secure to the inhabitants and the general public convenient and unobstructed use and enjoyment of those thoroughfares for their appropriate purpose. *Pugh v. Des Moines*, 176 Iowa 593, 156 N. W. 892.

When the care of highways and bridges comes under the sovereign governmental power of the state, the state may delegate it to municipal corporations and when so delegated there is an implied undertaking on the part of the municipality to perform these duties with fidelity. *Henry v. Saratoga Springs*, 115 N. Y. S. 942, 171 App. Div. 827.

<sup>96</sup> Right to exercise all powers of local self-government under the constitution of Ohio confers full power on the municipality relating to the control of street and public ways within its limits. *Froelich v. Cleveland* (Ohio 1919), 124 N. E. 212.

<sup>97</sup> *Ex parte Smith*, 26 Cal. App. 161, 146 Pac. 82, 84.

<sup>98</sup> Subject to the paramount authority of the state, cities, towns and villages have control of their streets and alleys for the purpose of preserving them for and promoting their intended use. Gen-



streets upon municipalities.<sup>99</sup>

The power to control streets gives authority to set aside a portion for vehicles and a portion for pedestrians,<sup>1</sup> to regulate the use of streets by vehicles of all kinds,<sup>2</sup> and to exclude vehicular traffic from designated streets.<sup>3</sup>

erally express power is given to local corporations to regulate the use of their streets and to prevent encroachments upon or obstruction of them. *Sullivan v. Best*, 286 Ill. 315, 121 N. E. 565.

Under power to regulate streets and the general welfare clause a municipality is authorized not only to establish and improve its streets but to prescribe the terms and conditions upon which they may be used, subject only to the constitution and laws of the state. *Ex parte Lerner* (Mo. 1920), 218 S. W. 331, 333.

<sup>99</sup> Park boards have control over certain public way exclusive or concurrent with that of the municipality. *South Park Comrs. v. Chicago City Ry. Co.* (Ill. 1919), 122 N. E. 89.

<sup>1</sup> *Home Laundry Co. v. Louisville*, 168 Ky. 499, 182 S. W. 645.

"The control of streets is in the governing authority of the city who can decide when and how the streets shall be improved, what part is required for travel of vehicles, and what part, if any, shall be divided off as a pavement for the use of pedestrians solely. Courts can interfere only in case of fraud and oppression constituting manifest abuse of discretion." *Crotts v. Winston-Salem*, 170 N. C. 24, 86 S. E. 792, L. R. A. 1916B, 1049, following *Tate v. Greensboro*,

114 N. C. 392, 19 S. E. 767, 24 L. R. A. 671; *Rosenthal v. Goldsboro*, 149 N. C. 128, 62 S. E. 905, 20 L. R. A. (N. S.) 805, 16 Ann. Cas. 639; *Wood v. Duke Land Imp. Co.*, 165 N. C. 367, 81 S. E. 422.

<sup>2</sup> Law vests in council exclusive power to regulate operation of vehicles in streets. *Harding v. Cavanaugh*, 155 N. Y. S. 374, 91 Misc. Rep. 511.

City may regulate use of streets for automobiles. *Ex parte Wright*, 82 Tex. Cr. App. 247, 199 S. W. 486; *St. Louis v. Hammond* (Mo. 1917), 199 S. W. 411.

City may regulate use of automobile and the speed thereof, etc., on the streets. *Ex parte Shaw*, 53 Okl. 654, 157 Pac. 900.

City may regulate the use of streets for vehicles as motor buses or jitneys. *Houston v. Des Moines*, 176 Iowa 455, 156 N. W. 883; *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190; *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 840.

Ordinance may provide for governing and regulating traffic on the streets; regulate vehicles when standing, how the vehicle shall be operated, turning at street intersections, crossing from one side of a street to the other side. *Withey v. Fowler Co.*, 164 Iowa 377, 145 N. W. 923.

<sup>3</sup> City may confine the passage of

Municipal control and regulation of streets must harmonize with the laws and policy of the state.<sup>4</sup>

heavily loaded traffic to certain streets and exclude it from others. *Brown v. Nichols*, 93 Kan. 737, 145 Pac. 561, *arguendo*.

Forbidding use of a street for hauling traction engines and heavy vehicles to and from a shop, and cutting off business, held ordinance void and unreasonable. One is entitled to reasonable use of street. *Ib.*

"The power of the legislature to authorize municipal corporations to regulate the use of streets by vehicles even to the extent of excluding vehicular traffic is established. *Barnes v. Essex County, Park Com.*, 86 N. J. L. 141, 91 Atl. 1019. The power to regulate the use by automobiles and motor vehicles is also settled. *Univen v. State*, 73 N. J. L. 529, 64 Atl. 163, affirmed *State v. Univen*, 75 N. J. L. 500, 68 Atl. 110; *Cleary v. Johnston*, 73 N. J. L. 49, 74 Atl. 539; *Kane v. State*, 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912D, 237; *Hendrick v. Maryland*, 235 U. S. 610, 35 Sup. Ct. 140, 59 L. ed. 385." *West v. Asbury Park*, 89 N. J. L. 402, 99 Atl. 190.

<sup>4</sup>"It is common knowledge that all public highways are under the control of the state; that all power of lesser municipalities over such streets is simply delegated power from the state whether exercised by the county, the city, or the town. It follows therefore that no municipality has power to make any law affecting public highways or their use which contravenes the policy of the state touching such control

and use. Streets are for the public use, but do not exist for the use of the municipality in which they are situated alone or its inhabitants. The municipality in which the public highway is located is vested with the supervision and control of such highway for public use. The supervision and control to be exercised over them is subject to the control of the legislature of the state from which such power is derived. The municipal corporation can exercise only such power as is conferred upon it and such as is incidental to the exercise of its governmental function and then in the manner only prescribed by the statute. It cannot by any legislation of its own make that use of the highway unlawful which by the statutes of the state is lawful. That is where the state by its statutes when fairly construed gives to the public a certain right in the use of the streets generally and undertakes only to delegate or permit the exercise of the right the municipality cannot by its own act prohibit or delegate the exercise of the right which is delegated or inferentially granted to the citizens of the state without limitations or such limitations fixed by statute. The power to delegate the use of public highways so as to reserve for all the rights of all must not be exercised in contravention of the laws of the state touching the same matter." *Hedrick v. Lanz*, 170 Iowa 437, 152 N. W. 610, holding an ordinance requiring planks to be kept under

A municipality in its control of highways acts for the state and has no right to the possession or use of the easements for the purposes of travel other than the public generally. It takes the burden of maintaining such easements fit for public travel. These easements belong to the state.<sup>5</sup>

Whatever the nature of the title of the municipality in streets and alleys whether a fee simple or only a conditional fee or a perpetual easement, it is such as to enable the public authorities to devote them to public purposes.<sup>6</sup>

The power to maintain and regulate the use of the streets is a trust for the benefit of the general public,<sup>7</sup> of which the city cannot divest itself, nor can it so exercise its power over the streets as to defeat or seriously interfere with the enjoyment of the streets by the public.<sup>8</sup>

wheels of traction engines when run across streets contravened a statute allowing such engines to be run across highways without putting planks under the wheels.

"That the legislature has the right to control and regulate the use or manner of use of highways of the state is generally recognized and nowhere denied, and it also is equally true that the powers which it possesses in this respect may be delegated to cities and towns within their terminal limits. Municipal corporations in the exercise of the powers thus delegated are held to the strict observance of the terms of the grant of statute and may not exceed them. The right of control of the streets of cities and towns has been conferred by the legislature and as a limitation upon the right of full and possibly injurious grants of the right of occupancy and use of the streets to public service corporations and bodies of like character

there has been enacted Code § 776, which places the right of ultimate control in the legal voters." *East Boyer Telephone Co. v. Vail*, 166 Iowa 266, 147 N. W. 327.

<sup>5</sup> *Graham v. Detroit*, 174 Mich. 538, 140 N. W. 949.

<sup>6</sup> *Edison Illuminating Co. v. Misch* (Mich.), 166 N. W. 944, 947, approving *Wayne County v. Miller*, 31 Mich. 447.

Town controls streets; authorized to grant use of by permit not inconsistent with public purpose of street. *Berwyn v. Berglund*, 255 Ill. 498, 99 N. E. 705, 707.

<sup>7</sup> *Lee v. Leitch*, 131 Md. 30, 101 Atl. 716, 720.

<sup>8</sup> *State v. Burkett*, 119 Md. 609, 87 Atl. 514, 520, holding market purpose a proper use.

"The improvement, regulation and control of highways within the municipality calls for the exercise of the delegated governmental power, the function of which the municipality itself, neither by ordi-

### § 1312. Right of officers of county to control city streets.

Streets are usually controlled by the municipal, rather than the county, authorities,<sup>9</sup> unless the applicable law otherwise provides.<sup>10</sup>

### § 1317. Power to permit encroachments in general.<sup>11</sup>

### § 1319. Right of municipality to revoke permit.

A right granted to a private person to use a street for a private purpose is a mere license revocable at any time.<sup>12</sup>

nance nor by contract, can surrender or impair. \* \* \* It is its duty to exercise those powers upon every proper occasion. It could as well attempt to surrender all or part of its police powers as to attempt to bind itself not to perform the administrative duty and trust in regard to its public streets imposed upon it by general law. So fundamental is this proposition, so universal in its application, that it is sufficient to refer'' to only a few cases on the subject. *McNeil v. Pasadena*, 166 Cal. 153, 135 Pac. 32.

<sup>9</sup> *Ryan v. Goodrich & Crinkley* (Ala.), 75 So. 17, following *Wiggins v. Skeggs*, 171 Ala. 492, 495, 54 So. 756; *Hendricks v. Carter*, 121 Ga. App. 527, 94 S. E. 807; *Northfolk Southern R. Co. v. Morehead City*, 167 N. C. 118, 83 S. E. 259.

<sup>10</sup> *Martens v. Brady*, 264 Ill. 178, 106 N. E. 266, particular laws as to control of roads and bridges.

County court may vacate. *Bingham v. Kollman*, 256 Mo. 573, 591, 165 S. W. 1097.

County commissioners have power to determine that an obstruction existed in a street and to order its removal. *New York Cen-*

*tral & Hudson R. R. v. County Commissioners*, 220 Mass. 569, 108 N. E. 506.

County road may be within the limits of a municipality. That fact does not make it a city street. *Cole v. Seaside* (Or. 1919), 182 Pac. 165.

See § 1283, ante.

<sup>11</sup> "Minor privileges" connected with or relating to buildings, as show windows, bay windows, porticos, porches, marquees, permitted. *Baltimore v. Nirdlinger*, 131 Md. 600, 102 Atl. 1014.

Permit to operate steam engine on street, valid. *Municipal Paving Co. v. Donovan Co.* (Tex. Civ. App.), 142 S. W. 644.

Requiring permit and reasonable fee to open street valid, where city has control of streets. *Buffalo v. Stevenson*, 129 N. Y. S. 125, 145 App. Div. 117.

No excavation in street without permission and deposit to cover cost of inspection and restoring street to former conditions. *Ex parte Reppelmann*, 166 Cal. 770, 138 Pac. 346.

<sup>12</sup> *Union Institution for Savings v. Boston*, 224 Mass. 286, 287, 112 N. E. 637, citing § 1319, vol. 3, ante; *Keyser v. Boise*, 30 Idaho

In the absence of evidence to the contrary the court will presume that permits were duly obtained for the erection of minor privileges. Revocation can only be exercised by virtue of the police power. When parties pay for such minor privileges they are entitled to a hearing (whether they obstructs the streets, etc., or constitute a nuisance) and the privileges can not be revoked unless under all the circumstances in the particular case, that is shown to be just and equitable, or to be done in the exercise of the police power.<sup>13</sup>

V. ABUTTING OWNERS, THEIR RIGHTS AND LIABILITIES.

§ 1321. General considerations as to rights of abutting owners.<sup>14</sup>

Streets are public ways for use by the public who have the right to have them maintained free from obstructions

440, 165 Pac. 1121, 1122, citing § 1319, vol. 3, ante; Warden v. Elroy, 162 Wis. 495, 156 N. W. 466; Murden v. Sewers, 6 Boyce 48 (Del. Super.) 96 Atl. 506.

<sup>13</sup> "If the board is authorized to revoke thus summarily such privileges even though they be treated as mere licenses, and then require as a condition of entertaining applications for new grants that the applicants waive all rights they have, gross injustice may be done to the applicants if not great injury to the city. No one would expend any considerable sum of money for the ornamentation of his property, and benefit his business and pay for the privilege if he supposed it could be taken from him the next day, month or year unless he paid such additional sum as that or some other board exacted." Baltimore v. Nirdlinger, 131 Md. 600, 102 Atl. 1014, 1021, 1022.

<sup>14</sup> California. San Francisco v. Main, 23 Cal. App. 86, 137 Pac. 281.

Iowa. Wegner v. Kelley (Iowa), 157 N. W. 206.

Michigan. Crosby v. Greenville, 183 Mich. 452, 150 N. W. 246.

New York. McCutcheon v. Buffalo Terminal Station Com., 154 N. Y. S. 711, affirming 150 N. Y. S. 850, 88 Misc. Rep. 148.

North Dakota. Gram Const. Co. v. Minneapolis St. P. & S. S. M. Ry. Co., 136 N. D. 164, 161 N. W. 731.

Texas. Galveston Commercial Assn. v. Ort (Tex. Civ. App.), 165 S. W. 907; Spencer v. Levy (Tex. Civ. App.), 173 S. W. 550; Bowers v. Machir (Tex. Civ. App.), 191 S. W. 758.

Lot owner may prevent partial vacation of public street for private purpose. Bostwick v. Hosier (Or. 1920), 190 Pac. 299.

One entitled to direct access

or unreasonable encroachments so that they may freely travel thereon by day or night in the usual modes, in vehicles or on foot, crossing and recrossing them at any place, subject it is true, to reasonable police regulations forbidding or restricting the use. In addition to this public right which as a member of the community an abutting property owner has in the streets, he has as such abutting owner limited, common law rights or easements (sometimes called property rights) in the street adjacent to his property peculiar to himself, not enjoyed by others, with which statutes and ordinances have not interfered,<sup>15</sup> as the right of ingress to and egress from

though not an abutter specially damaged may have a right of action due to obstruction. *Bourne v. Blue Points Co.*, 156 N. Y. S. 466, 172 App. Div. 891; *Hard v. Blue Points Co.*, 156 N. Y. S. 465, 170 App. Div. 524.

A lot owner may lawfully erect a building to the full size of his lot, and subject only to municipal control he may discharge the water falling from his roof into a public street or alley. *Reynolds v. Union Savings Bank*, 155 Iowa 519, 136 N. W. 529, denying an injunction, on authority of *Phillips v. Waterhouse*, 69 Iowa 199, 28 N. W. 539, 58 Am. Rep. 220.

<sup>15</sup> Have a right to a reasonable temporary obstruction of a street for appropriate purposes. *Jones v. Ft. Dodge* (Iowa 1919), 171 N. W. 16.

Abutting property owners have easements or rights in street which are valuable, and are in addition to those which they have with the general public. *Walters v. Baltimore*, 120 Md. 644, 88 Atl. 47, 51, 46 L. R. A. (N. S.) 1128.

Abutting owners are entitled to

have the highway maintained in front of their premises with the roadway upon which they can freely and without obstruction travel, crossing and recrossing such highway at any place thereon, and in vehicle or on foot, or in any other usual method of travel in public highways. *Bradley v. Degnon Contracting Co.*, 140 N. Y. S. 825, 832, 80 Misc. Rep. 90, affirmed in 141 N. Y. S. 852, 157 App. Div. 237, stating that the construction of a railroad on the highway would create an additional burden thereon not for a street use, but for a municipal use or public use, and such additional burden cannot be placed upon the highway either by the legislature or municipal authority without making compensation therefor to the abutting owners.

"It is well settled that an abutting owner has two distinct kinds of rights in a highway or street, resulting from such contiguity and not resting on any grant—a public one which he enjoys in common with all other citizens and a certain private right which arises from the ownership of the prop-

the street to the premises and vice versa, air, light and view<sup>16</sup> (although the doctrine of ancient lights or the right to light and air does not obtain in some states),<sup>17</sup> and lateral support.<sup>18</sup>

The abutting property owner may make any reasonable use of the street which will not interfere with the enjoyment of the use of it by the public and as the public interest increases his rights may grow less. What may be

erty contiguous to the highway or street by virtue of such contiguity. These so called private rights increase the value of the abutting property, are private property, and, if they are destroyed or greatly injured without due process of law, damages may be recovered for the injury." *Re Olinger*, 145 N. Y. S. 173, 179, 160 App. Div. 96.

<sup>16</sup> *Crotts v. Winston-Salem*, 170 N. C. 24, 86 S. E. 792, L. R. A. 1916B, 1049; *Post v. Clarksburg*, 74 W. Va. 39, 81 S. E. 562, 564, citing § 1334, et seq., vol. 3, ante.

<sup>17</sup> "The doctrine of ancient lights does not obtain in this state," denying injunction against the erection of a fence cutting off view from a lot. *Fort Worth & D. C. Ry. Co. v. Ayers* (Tex. Civ. App.), 149 S. W. 1-68.

"As a rule, the occupant of an adjoining building has no absolute right to use the street for areaways to afford either access or light; and the doctrine of ancient lights, or the right to light and air, does not obtain in this state. Cities in the exercise of their proper functions may grant a permit for the use of its streets, for ingress and egress to floors below the level of their street; but such a permit is revocable at any time in the

sound discretion of the proper governing body." *Callahan v. Nevada*, 170 Iowa 719, 153 N. W. 188, L. R. A. 1916B, 927, 931.

<sup>18</sup> Abutters rights include "the easements of light, air and access and under a recent decision of this court in matter of *Rapid Transit R. R. Comrs.*, 197 N. Y. 81, 90 N. E. 456, 18 Ann. Cas. 366, lateral support, except as to excavations made for street purposes." *Lincoln Safe Deposit Co. v. New York*, 210 N. Y. 34, 103 N. E. 768, affirming 132 N. Y. S. 1135, 148 App. Div. 895.

"The rights of an owner of adjoining land are merely those of an abutter. As such the adjoining owner would be entitled to protection or compensation for certain ancient and established easements which are based upon necessity such as the easement of light, air, and access, and also another easement lately recognized of subjacent support against the dangers of subway excavations. *Matter of Rapid Transit Commissioners*, 197 N. Y. 81, 90 N. E. 456, 36 L. R. A. (N. S.) 647, 18 Ann. Cas. 366." *Hall v. House of St. Giles the Cripple*, 154 N. Y. S. 96, 98, 91 Misc. Rep. 122, affirmed in 158 N. Y. S. 1117.

deemed a reasonable use must depend much on the local situation and much on public usage.<sup>19</sup>

In any event his rights must be held subservient to and in recognition of the dominant rights of the public for all street purposes.<sup>20</sup>

Under the power to maintain and care for streets which is continuous property once acquired for street purposes may have added burdens and limitations within the category of street purposes placed thereon, even though a private detriment to the abutting owner should result. The principal of *damnum absque injuria* controls.<sup>21</sup>

<sup>19</sup> *Home Laundry Co. v. Louisville*, 168 Ky. 499, 182 S. W. 645, 649.

<sup>20</sup> "The use to which an abutter may lawfully put a street varies with the size of the municipality in which the street is situated. An abutter upon a street in a small village may lawfully use the street for purposes which would be unlawful in a city. The dominant right in a street is the right of the public, but the extent of that right depends upon the needs of the public. The surface of the street, in all places, great and small, must be kept open for the lawful uses of the public, unless, indeed, there is some temporary paramount need of the abutting owner for a part of it. Each step in the growth of such municipality increases the public demands and thus in fact broadens the rights of the public in both the surface and the subsurface use of the streets and the authority of the abutter to use either the surface or the subsurface portions of such streets diminishes as the rights of the public increase." The abutter's rights must

be held subservient to and in recognition of the dominant rights of the public for all street purposes. *Cloverdale Homes v. Cloverdale*, 182 Ala. 419, 62 So. 712, 717, 47 L. R. A. (N. S.) 607.

Restrictions as to the erection of building for specified trades, etc., may be abolished as abutters have no property rights therein. *Hall v. House of St. Giles the Cripple*, 154 N. Y. S. 96, 91 Misc. Rep. 122, affirming 158 N. Y. S. 1117, denying injunction against erecting Hospital for cripples.

<sup>21</sup> *Hall v. House of St. Giles the Cripple*, 154 N. Y. S. 96, 91 Misc. Rep. 122, affirmed 158 N. Y. S. 1117.

Withdrawal of portion of street permitted, but courts do not sanction "a material invasion of property rights of an abutting owner without just compensation. If he is to suffer for the good of the public he is entitled to compensation for his loss. Moreover, no invasion of the property rights of another is, in law, deemed trivial." *Hel'inger v. New York*, 160 N. Y. S. 741, 743, 95 Misc. Rep. 394, approving *Robert v. Sadler*, 104



## § 1322. Same—right to prevent improper use of streets.

By reason of his ownership or possession of the property adjoining the street involved, irrespective of where the fee of the street may be vested, the abutting property owner may by appropriate action prevent such improper uses of streets as unreasonably interfered with any of his recognized rights regarded either as easements or property rights.<sup>22</sup>

On the other hand, certain rights of the abutter according to some judicial decisions are made to depend in part at least upon his ownership of the fee of the street.<sup>23</sup>

N. Y. 229, 10 N. E. 428, 58 Am. Rep. 497; *Covert v. Brooklyn*, 43 N. Y. S. 310, 13 App. Div. 188.

Approach to bridge over railroad, to abolish grade crossing. Right to use thoroughfare in common with all others "and for any infringement upon this which he suffers in common with all other members of the community he has no right of action." *Walters v. Baltimore & O. R. Co.*, 120 Md. 644, 88 Atl. 47, 51, 46 L. R. A. (N. S.) 1128, following *Lake Roland Co. v. Webster*, 81 Md. 535, 32 Atl. 186. Damages for change of grade of street although abutter suffers additional inconvenience, are regarded as *damnum absque injuria*. *Ib.*

Vacation, not damages, when. *Hacker Co. v. Joliet*, 196 Ill. App. 415.

<sup>22</sup> Whether the fee is in abutter or in municipality is not important. *Re Olinger*, 145 N. Y. S. 179, 160 App. Div. 96.

Abutting owners have an easement in the public way not possessed by the public in common. "In addition to their right to passage over the highway which they

hold in common with all other citizens they have a special right of access to their property from the highway and the right to the light and air from it. These rights exist independent of the owner of the fee in the highway." *Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 652, citing in support *Barnett v. Johnson*, 15 N. J. Eq. 481; *Dill v. Camden Board of Education*, 47 N. J. Eq. 422, 20 Atl. 739, 10 L. R. A. 276.

<sup>23</sup> It appears that certain New York decisions make a difference as to certain rights of abutting property owners respecting the ownership of the fee in the street involved. *Waldorf-Astoria Hotel Co. v. New York*, 212 N. Y. 97, 105 N. E. 803, 805; *McCaffney v. Smith*, 41 Hun. (N. Y.) 117; *Forbes v. Rome, W. & O. R. R. Co.*, 121 N. Y. 505, 515, 24 N. E. 919, 8 L. R. A. 453; *Malady v. Bishvick R. R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661; *Story v. N. Y. Elevated R. R. Co.*, 90 N. Y. 122, 69 Am. Dec. 146.

"Whatever may be said as to the right of an abutter to bring an action to enjoin an encroachment upon a street for purposes

**§ 1324. Sidewalks, rights in and use of.**

Generally it is within the discretion of the municipality to prescribe the width of the roadway and sidewalk, to set aside such portion as may not be needed for public travel as park strips, with grass plots, flower beds and shade trees, and when required to permit the construction of a retaining wall and ornamental posts to support such lawn or park strips and the sidewalk. Such structures are not to be regarded as obstructions or unreasonable encroachments.<sup>24</sup>

**§ 1325. Right of access.**

The right protected by the constitution because it pertains to the property of the abutting owner "is the right of access to the street or free passage between his property and the street so that he may go upon it to exercise his public right of travel and when he has done so return to his own grounds."<sup>25</sup>

inconsistent with those uses to which the streets have ordinarily been subjected it is perfectly clear that an abutting owner who also has the ownership of the bed of the highway, has the right to maintain such action." *Bradley v. Degnon Contracting Co.*, 140 N. Y. 825, 80 Misc. Rep. 90, (affirmed in 141 N. Y. S. 852, 157 App. Div. 237), following *Buffalo v. Pratt*, 131 N. Y. 293, 298, 30 N. E. 233, 234, 15 L. R. A. 413, 27 Am. St. Rep. 592.

"Where an abutting owner on a street in Baltimore City (Md.) does not own bed of the street the placing of an obstruction on the street is not a taking on his property within the meaning of the constitution." *State v. Burkett*, 119 Md. 509, 87 Atl. 514, 520.

<sup>24</sup> *Harmon v. Parsons*, 81 W. Va. 197, 94 S. E. 135.

As the sidewalks belong to the public an abutter has no right to go upon the sidewalk and make or force a person to leave it although such person is guilty of conduct equivalent to a breach of the peace. *Hixson v. Slocum*, 156 Ky. 487, 161 S. W. 522.

<sup>25</sup> *Gorman v. Chicago, B. & Q. R. R. Co.*, 255 Mo. 483, 491, 492, 174 S. W. 509; *Home Laundry Co. v. Louisville*, 168 Ky. 499, 182 S. W. 645, 649.

Right of access, what is. *Hacker Co. v. Joliet*, 196 Ill. App. 415, 423.

*Walters v. Baltimore & O. R. R. Co.*, 120 Md. 644, 88 Atl. 47, 52, 46 L. R. A. (N. S.) 1128, quoting with approval part of § 1325, vol. 3, ante, and holding that an approach to a bridge over railroad tracks, to abolish a grade crossing authorized by ordinance, in view

While an abutting owner has the unquestioned right to use the street as a means of ingress and egress, etc., that right is subject to such reasonable use of the street not inconsistent with its maintenance as a public highway, as may be necessary for the public good and convenience and which does not seriously impair his right, e. g., use of street for a market.<sup>26</sup>

A city may construct and maintain a railing or barrier on a public way or street for the ordinary exigencies of travel, to safeguard the traveling public even if the entrance of an abutter may be obstructed.<sup>27</sup>

### § 1326. Shade and ornamental trees.

Except as against the superior rights of the public by its proper authorities to improve and maintain the streets for public purposes, an abutting owner has without the aid of statute or ordinance, an equitable easement, or as sometimes said, a property right, in trees planted within the bounds of a street fronting upon his premises and can lawfully maintain them where they

of the particular conditions, was a taking of property without compensation, etc.

"Owners of property bordering upon a street have, as an incident of their ownership, a right of access by way of the streets which cannot be taken away or materially impaired without compensation." *Illinois Malleable Iron Co. v. Lincoln Park Comrs.*, 263 Ill. 446, 105 N. E. 336, 51 L. R. A. (N. S.) 1203.

Abutter may prevent persons from congregating upon the sidewalk in front of his premises interfering with his business and stopping access to and from his business to street. *Strike of employees. Re Heffron*, 179 Mo. App. 639, 654, 162 S. W. 652.

"An encroachment upon a public alley of a municipality is a public nuisance. One whose property will be injuriously affected by the unauthorized obstruction of a street which furnishes an avenue of approach to his place of business, and which will render the same less valuable and less remunerative, can maintain an action to prevent the infliction of such special injury." *Hendricks v. Jackson*, 143 Ga. 406, 84 S. E. 440, approving *Coker v. A. K. & N. Ry. Co.*, 123 Ga. 483, 51 S. E. 481.

<sup>26</sup> *State v. Burkett*, 119 Md. 509, 87 Atl. 514, 521.

<sup>27</sup> *Thompson v. Boston*, 212 Mass. 211, 98 N. E. 700.

stand, and this right the courts are required to recognize and protect.<sup>28</sup>

In accordance with the sounder rule the principle is not affected by the fact that the ultimate title to the street is in the municipality.<sup>29</sup>

**§ 1327. Same—control of municipality and its right to cut and remove trees.**

Subject to the requirement that it must act in good faith and not abuse its exercise of power, the city has the power of control over its streets including parks and all spaces occupied by both the trees and wires thereon; and this power is paramount to any right that either the grower of trees or the owner of wires may acquire thereon.<sup>30</sup>

<sup>28</sup> Moore v. Carolina Power & Light Co., 163 N. C. 300, 79 S. E. 596; Newlands v. Iowa Ry. & Light Co., 178 Ia. 228, 159 N. W. 244, sustaining action for damages for destruction of trees in front of plaintiff's premises by wire using company.

"An abutting lot owner, even though the fee of the street and general ownership of the trees be in the city, has, without the aid of statute, an equitable easement and therefore a special ownership in the trees which will enable him to maintain an action of wrongful injury thereto which depreciates the value of his lot." Norman Milling & Grain Co. v. Bethurem, 41 Okl. 735, 139 Pac. 830, 832, citing Section 1326, vol. 3, ante.

Streets may be used for the purpose of moving buildings (New York Telephone Co. v. Dittman, 159 N. Y. S. 625, 96 Misc. Rep. 60), but in so doing, shade trees along the street cannot be injured or destroyed. "The plain-

tiff, as an abutting owner, has a right to object to this permanent and irreparable injury to the appearance and ornamentation of the highway in front of his premises." Richards v. Dauch, 162 N. Y. S. 193, 194, following doctrine of Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549, and sustaining an injunction at the suit of an abutting property owner.

<sup>29</sup> Moore v. Carolina Power & Light Co., 163 N. C. 300, 79 S. E. 596, approved in Wheeler v. Norfolk Carolina Tel. & Telegraph Co., 172 N. C. 9, 89 S. E. 793; Donahue v. Keystone Gas Co., 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549; Norman Milling Co. v. Bethurem, 41 Okl. 735, 139 Pac. 830, 51 L. R. A. (N. S.) 1082.

<sup>30</sup> Norman Milling & Grain Co. v. Bethurem, 41 Okl. 735, 139 Pac. 830, 832, citing Section 1327, vol. 2, ante.

When necessary the city may cut and remove trees,<sup>31</sup> e. g., to improve and render a highway safe and convenient,<sup>32</sup> to carry out a plan or system of street improvements,<sup>33</sup> or to prevent roots from clogging a city sewer.<sup>34</sup>

Unnecessary destruction of trees will be enjoined. "Municipal authorities should not act ruthlessly or without regard to the injuries likely to be sustained by abutting owners, and it is a wise rule adopted by some courts which requires them to give an owner of trees planted in a highway an opportunity to remove them, or if possible, protect and save them, if that can be done without interference with the proper use of the highway." <sup>34a</sup>

**§ 1328. Same—rights of abutters against third persons including public service corporations.**

An abutting owner may recover damages for cutting shade trees on the sidewalk which afford protection to his property where such cutting is done in furtherance of some private interest, individual or corporate; and this though the act complained of may have been sanctioned by the municipal authorities.<sup>35</sup>

<sup>31</sup> Munday v. Newton, 167 N. C. 656, 83 N. E. 695.

Whiting v. Woods, 222 Mass. 22, 109 N. E. 726, construing power to remove shade trees under particular statutes.

Ordinance as to cutting, etc. Humphreys v. Dunnells, 21 Cal. App. 312, 131 Pac. 761.

City may cut the limbs of or remove trees which constitute a public nuisance. Lundy v. Sedalia, 162 Mo. App. 218, 144 S. W. 889.

<sup>32</sup> Abutting owner may not recover for removal of shade trees if removal was necessary to improve the highway and render it a convenient and safe passageway. Durant v. Castleberry, 106 Miss. 699, 64 So. 657.

<sup>33</sup> Robinson v. Spokane, 66 Wash.

527, 120 Pac. 101; Easton v. Turner, 117 Md. 111, 83 Atl. 42.

<sup>34</sup> City not liable for damages for cutting down trees where such action was necessary to prevent roots of the trees from clogging a city sewer. Schaller v. Tacoma, 99 Wash. 166, 168 Pac. 1136.

<sup>34a</sup> Easton v. Turner, 117 Md. 111, 83 Atl. 42.

<sup>35</sup> Wheeler v. Norfolk Carolina Tel. & Tel. Co., 172 N. C. 9, 89 S. E. 793; Brown v. Asheville Electric Co., 138 N. C. 535, 51 S. E. 62, 69 L. R. A. 631, 107 Am. St. Rep. 554; Wood v. Duke Land & Imp. Co., 165 N. C. 371, 81 S. E. 422.

If persons seek to destroy trees or shrubs in a parkway without the authority of the city an abut-

While wire using public service companies may trim or sever branches of trees to avoid wire contact therewith or interference with the operation of their service,<sup>36</sup> liability often arises due to placing wires and poles through trees which injure them,<sup>37</sup> or in trimming or severing the branches thereof, in part destroy them.<sup>38</sup>

ting owner has redress either by enjoining the threatened acts or an action for damages if they had taken place. *Kingsley v. Pounds*, 160 N. Y. S. 228, 96 Misc. Rep. 27; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549.

<sup>36</sup> *Altpeter v. Postal Telegraph-Cable Co.*, 32 Cal. App. 738, 164 Pac. 35.

Action for damages for destruction of trees by wire using company. *Newlands v. Iowa Ry. & Light Co.*, 179 Ia. 228, 159 N. W. 244.

The authorities illustrate "the widely divergent views of the courts and authors of text books upon the question of the rights and duties of owners of trees and owners of wires upon the same street under authority express or implied from the city, and of the liability of the latter owners for damages to the former for cutting back such trees, to sever or prevent contact with the wires." *Norman Milling & Grain Co. v. Bethurem*, 41 Okl. 735, 739, 139 Pac. 830, 831, citing Section 1652, page 3473, vol. 4, ante, and Section 1326, vol. 3, ante.

<sup>37</sup> In front of a residence in the parkway between the sidewalk and pavement were located large and beautiful shade trees which the defendant practically

destroyed in placing its wires and poles through the tops of the same. *Reinhoff v. Springfield Gas & Electric Co.*, 177 Mo. App. 417, 162 S. W. 761, sustain action in behalf of abutting owner for damages.

<sup>38</sup> "The city for the purpose of its government and management can, in its discretion, cut down or trim up the trees bordering the streets, and cannot be restrained unless in case of wilfulness or oppression. \* \* \* But subject to such right of the city government the abutting owner has an easement or property in the shade trees standing along the sidewalk which the law will protect. The city cannot transfer to any individual or to a quasi public corporation for its convenience and profit this superior right which it can exercise only for the public benefit." *Moore v. Carolina Power & Light Co.*, 163 N. C. 300, 79 S. E. 596, sustaining action for damages by abutter against wire using company for cutting limbs from and disfiguring an ornamental shade tree which stood on the sidewalk in front of plaintiff's premises against the contention, that the cutting was necessary to make a way for the wire and that the fee simple of the street and sidewalk was in the state and that the abutter had no property right in the tree.

## VI. ENCROACHMENTS ON STREETS AND USE THEREOF OTHER THAN FOR TRAVEL.

## § 1333. General consideration.

It is axiomatic that the law requires municipal corporation to exercise ordinary care to maintain their streets and sidewalks in a reasonably safe condition for travel in the usual modes by day and night.<sup>39</sup>

This obligation is permanent, and cannot, either directly or indirectly, be shifted or abrogated, in whole or in part. The right of the public to use the streets in a proper manner is absolute and paramount.<sup>40</sup>

It thus follows that these public ways must be kept free from obstructions, nuisances, or unreasonable encroachments which destroy in whole or in part or materially impair their use as public thoroughfares.<sup>41</sup> When the appropriate use of any of these public ways is unreasonably prevented, the obligation on the part of the municipality to abate or remove the cause, on notice, becomes fixed.<sup>42</sup>

All unauthorized obstructions or unreasonable encroachments are public nuisances and generally subject to summary abatement.<sup>43</sup>

<sup>39</sup> Johnson v. Huntington, 80 W. Va. 178, 92 S. E. 344, 346.

<sup>40</sup> Acme Realty Co. v. Schinasi, 215 N. Y. 495, 109 N. E. 577, 579; Deshong v. New York, 176 N. Y. 475, 483, 68 N. E. 880.

Public entitled to use entire sidewalk free from unauthorized obstructions irrespective of whether the fee to the street is in the municipality or abutting owner. Sufferance on part of city will not preclude it from removing obstructions, e. g., areaways encroaching upon sidewalk. Kennedy v. Fargo (N. D.), 169 N. W. 424, 427, quoting with approval part of Section 1333, p. 2873, vol. 3, ante, and approving Chapman

v. Lincoln, 84 Neb. 534, 121 N. W. 596, 25 L. R. A. (N. S.) 400, which holds that the public have the right to use a public sidewalk in its entirety free from unauthorized obstructions.

<sup>41</sup> City must keep its thoroughfares free from obstruction which are unauthorized and must remove unnecessary obstructions. Stern v. International Ry. Co., 153 N. Y. S. 520, 526, 167 App. Div. 503; Berger v. Solvay, 141 N. Y. S. 995, 156 App. Div. 440; Jones v. Clarksburg (W. Va. 1919), 99 S. E. 484.

<sup>42</sup> Berger v. Solvay, 141 N. Y. S. 995, 156 App. Div. 440.

<sup>43</sup> An unauthorized encroach-

Minor privileges, so called, such as bay, oriel, show, etc., windows, porticos, stoops, awnings, etc., within specified areas, although such structures encroach to some ex-

ment upon a public alley of a municipality is a public nuisance. *Hendricks v. Jackson*, 143 Ga. 106, 84 S. E. 440.

Any unauthorized and illegal obstruction of the free use of the public way is a nuisance, e. g., a street carnival and shooting gallery. *Augusta v. Jackson*, 20 Ga. App. 710, 93 S. E. 304.

"Any unlawful encroachment upon or over a public highway, whether actually interfering with travel by the public or not, is a purpresture and a nuisance per se, and the jury are not at liberty to determine whether such encroachment amounts to a public nuisance by the measure of inconvenience the public may suffer from it. 2 Elliott on Roads and Streets, Section 828. This rule is abundantly supported by adjudicated cases." *Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 652.

"An obstruction in a city street rendering it dangerous and unfit for the use of the traveling public is a prima facie and unlawful obstruction and in itself constitutes a nuisance," e. g., tool cart and can of gasoline. *Cuilo v. New York Edison Co.*, 147 N. Y. S. 14, 85 Misc. Rep. 6.

"A legally created highway cannot be occupied by other people's adjuncts, gates and fences, ditches or other permanent structures or improvements, which interfere with the primary purpose of the way." *Bradley v. Dignon Con-*

*tracting Co.*, 140 N. Y. S. 825, 831, 80 Misc. Rep. 90, affirmed in 141 N. Y. S. 852, 157 App. Div. 237.

Pile of scrap iron in street. *Feldman v. Riccordini*, 58 Pa. Super Ct. 114.

Power to license or forbid gasoline storage tanks under sidewalks. *New Orleans v. Shuler*, 140 La. 657, 73 So. 715.

Concrete sidewalk lower than those at either end, held public nuisance. *Carlisle v. Pirtle* (Ind. App.), 114 N. E. 705.

Fence as nuisance. *Midleton v. Glenn*, 278 Ill. 149, 115 N. E. 847.

Stairway and balcony supported on sidewalk, held unlawful obstruction. *Hausman v. Brown* (Ala.), 77 So. 993.

Building encroaching upon a street. *Close v. Chicago*, 257 Ill. 47, 100 N. E. 215.

Houseboat on street as an obstruction and nuisance. *Murden v. Lewes*, 6 Boyce (Del. Super.) 48, 96 Atl. 506.

Embankment of earth entirely blocking up a street, public nuisance. *Porche v. Barrow*, 134 La. 1099, 64 So. 918.

Embankment on highway. *Dickinson v. Delaware L. & W. R. Co.*, 90 N. J. L. 158, 100 Atl. 203.

May require removal of trolley poles and wires where the poles are in center of street, and dangerous to public travel. *Stern v. International Ry. Co.*, 153 N. Y. S. 520, 167 App. Div. 503.



tent upon the public way;<sup>44</sup> and temporary obstructions in the moving of articles to and from premises,<sup>45</sup> in the construction and repair of buildings and other structures,<sup>46</sup> and in the legitimate use of the streets and sidewalks for the numerous recognized urban purposes, are necessary, of course, and are generally sanctioned.<sup>47</sup>

The construction of railroad tracks and the operation of trains and cars of the several kinds thereover,<sup>48</sup> and the placing of poles and the stringing of wires thereon and on buildings and other structures,<sup>49</sup> are recognized

<sup>44</sup> Section 1349, post; § 1349, vol. 3, ante.

<sup>45</sup> Section 1339, post; § 1339, vol. 3, ante.

<sup>46</sup> Section 1340, post; § 1340, vol. 3, ante.

Authority to allow temporary obstructions during repair of buildings, ornamental projections (limited), is not authority to permit stone stairway of solid masonry leading to building entrance, six feet beyond building line, in street sixty-five feet wide. Removal may be ordered, though constructed by city. *Hellinger v. New York*, 160 N. Y. S. 743, 95 Misc. Rep. 394.

<sup>47</sup> For more than a century it has been the practice of the municipal authorities to permit the erection and maintenance of bay windows, oriel windows, show windows, stoops and porticoes within specified areas. This is generally sanctioned by charters and ordinances. Laws forbid power to authorize encroachments or obstructions upon streets and sidewalks except for temporary purposes, during erection or repair of buildings. Power is given to prevent encroachments and obstructions and to authorize and require re-

moval. *Acme Realty Co. v. Schinasi*, 215 N. Y. 495, 109 N. E. 577, affirming 139 N. Y. S. 266, 154 App. Div. 397.

<sup>48</sup> Railroad tracks in streets. *United Railroads of San Francisco v. San Francisco*, 239 Fed. 987; *South Atlantic Waste Co. v. Raleigh, C. & S. Ry. Co.*, 167 N. C. 340, 83 S. E. 618, holding abutter entitled to damages for construction in street; additional servitude. Railroad tracks, exclusive right in perpetuity to occupy sidewalk cannot be granted so as to preclude subsequent order of removal if such is in public interest. *Seaboard Air Line Ry. Co. v. Raleigh*, 219 Fed. 573.

Operation of a commercial railroad in a public street imposes an additional servitude which a municipality as against private rights cannot authorize. *Drake v. Chicago, R. I. & P. Ry. Co.*, 136 Minn. 366, 162 N. W. 453.

<sup>49</sup> Poles and wires, etc., proper street use. *Sullivan v. Cloe*, 277 Ill. 56, 115 N. E. 135; *Springfield v. Postal Telegraph-Cable Co.*, 253 Ill. 346, 97 N. E. 672, affirming 164 Ill. App. 276.

If no franchise, may be compelled to be removed. People ex

as proper street uses, and such authority is generally granted by the state directly with the consent of the local authorities, or by the municipality by virtue of delegated power. This subject is treated in another Chapter.<sup>50</sup>

The use of the public ways for either of these or like purposes, without authority, is unwarranted, and constitute such structures public nuisances per se.<sup>51</sup>

rel. v. Williams, 166 N. Y. S. 560, 100 Misc. Rep. 569.

City may grant right to use street in reasonable manner to string wires, etc. *Alpeter v. Postal Telegraph-Cable Co.*, 32 Cal. App. 738, 164 Pac. 35.

Poles and wires for telephones; considering whether grant to erect was revokable. *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, 33 Sup. Ct. 988, 57 L. ed 1389.

Poles and wires of electric light company; city may permit erection of. *Williamson v. Clay Center*, 237 Fed. 329, 150 C. C. A. 343.

<sup>50</sup> "For ordinary and general transportation and traffic the streets and highways are free and common to all citizens. This much is conclusively implied in their acquisition and maintenance and their regulation for such purpose is, speaking generally, imposed upon the local municipal authorities. The construction and operation of a railroad upon the street is not within that purpose. It is an occupation of a part of the street with privately owned permanent structures, the operation of cars and the transportation of persons thereon for fares or tolls. It is use of the street for a distinct and exclusive purpose. It is the exercise of exclusive interest in or occupation of the

street. The authorization of it is one of pre-recognized sovereignty and derived only through the act of the legislature. \* \* \* The legislature may, unless forbidden by the constitution, delegate to the municipality or an agent for such purpose the power to authorize it but the delegation must be in clear and unmistakable language. It does not exist through unavoidable implication. Authority, to delegate the use of the streets will not constitute it." *People ex rel. v. New York Railways Co.*, 217 N. Y. 310, 112 N. E. 49, 51.

<sup>51</sup> Street railway operated without authority is illegal and public nuisance. *Manhattan Bridge Three-Cent Line v. Third Avenue Ry. Co.*, 139 N. Y. S. 34, 154 App. Div. 704.

Where railroad tracks cross a public street, city may compel separation of the grades and authorize a change in the street for this purpose. Any change in the street so necessitated is a public use. *Spokane v. Spokane & T. E. R. R. Co.*, 75 Wash. 651, 655, 656, 135 Pac. 636; *Spokane v. Thompson*, 69 Wash. 650, 126 Pac. 47.

Overhead railroad tracks supported by piers at the curb-lines and in the center of the street, leaving ample roadway and sidewalk spaces, held not a public

**§ 1334. Nature and extent of encroachment as decisive.<sup>52</sup>**

Obviously no absolute rule can be stated concerning what encroachments or obstructions can or should be permitted by the municipality. What the municipality is authorized to permit is to be determined mainly by the proper construction of the applicable local laws. Apart from such consideration what the municipality should permit is to be ascertained from the view point of the public interest having regard to the local conditions. The final question is: Are the obstructions or encroachments involved unreasonable and against the public rights and general welfare? <sup>53</sup>

nuisance, and denying mandamus directing removal of piers, etc. *Detamore v. Hindley*, 83 Wash. 322, 145 Pac. 462.

<sup>52</sup> *Post v. Clarksburg*, 74 W. Va. 39, 81 S. E. 562, 564, citing Section 1334, vol. 3, ante; *People v. Western Cold Storage Co.* (Ill. 1919), 123 N. E. 43.

<sup>53</sup> "No absolute or ironclad rule can be laid down with reference to what encroachments or obstructions upon the streets can be permitted by the municipality. The question by the great weight of authority always comes back to the point: Are these obstructions or encroachments unreasonable and against the public interests?" *People ex rel. v. Marshall Field & Co.*, 266 Ill. 609, 618, 107 N. E. 864, 867, citing Section 1334, vol. 3, ante, saying: "The courts in applying the rules of law to questions of this nature should not permit the streets to be used in such a manner as to prejudice the rights of abutting owners while at the same time fully safeguarding all the rights of the public therein. These public rights do

not depend upon the method of travel recognized at the time the streets were opened or such public uses as have been sanctioned by long continued custom and acquiescence. The use of streets must extend to meet the new methods of locomotion, both above and below the surface of the ground. The public uses to which the city street may be applied cannot be limited by arbitrary rules, but must be extended to meet public wants and necessities occasioned by the enlarged uses to which the abutting property is devoted. The rights of the public in the city streets necessarily includes every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper. The original owners of land in the great cities of our country did not foresee the growth of population and business which has caused property owners in such cities to erect buildings twenty stories or more in height and to excavate under them basement, cellars and sub-cellars; nor was it

### § 1335. Effect of municipal acquiescence or laches.<sup>54</sup>

### § 1337. Classification of encroachments.<sup>55</sup>

anticipated that the surface of the streets would be insufficient for the use of the people either in the transaction of business or in the pursuit of pleasure." *People v. Marshall Field & Co.*, 266 Ill. 609, 618, 107 N. E. 864, 867, approving *Sears v. Crocker*, 184 Mass. 586, 69 N. E. 327, 100 Am. St. Rep. 577.

If the street is sufficiently wide that enough will remain unobstructed for public travel "a municipality may maintain or permit to be maintained park strips between the curbing and the paved street and the pavement of the sidewalk in which grass, flowers and trees may be grown for the purpose of beautifying and ornamenting the streets of the city and contributing to the pleasure and comfort of its citizens and may, if it be deemed necessary, construct or permit to be constructed, proper barriers around the same to prevent travel thereon, and such trees, grass and flowers growing upon such park strips and the proper barriers placed around the same to protect them are not obstructions or nuisances within the meaning of the statute requiring the city council to keep the streets of a municipality in repair, open for travel and free from nuisances." *Barnesville v. Ward*, 85 Ohio 1, 96 N. E. 937.

Railroad tracks may be unreasonable or unlawful obstruction. Question: Whether tracks materially interfere with abutting owner's right to access to his prop-

erty and business? *Wright v. Wabash R. R. Co.*, 174 Mo. 446, 160 S. W. 549.

Railroad tracks in street, held lawful. *Moore Mfg. Co. v. Springfield Southwestern Ry. Co.*, 256 Mo. 167, 165 S. W. 305.

Spur track which does not interfere with travel or unreasonably obstruct the street, held proper use. *Harrold Bros. v. Americans*, 142 Ga. 686, 83 S. E. 534.

"The construction and operation of a railroad upon a street is not within the contemplated street purposes, it is an occupation of a part of the street with privately owned permanent structures, the operation of cars and the transportation of persons or freight or both thereon for fares; the use of the street for a distinct and exclusive purpose; the exercise of an exclusive interest in or an appropriation of the street; the creation of a private easement in an easement granted or acquired for and vested in the whole public; it is to subject without compensation a granted or acquired right of a particular use to a use other than that particular use." *Bradley v. Degnon Contracting Co.*, 224 N. Y. 60, 120 N. E. 89, 92 affirming 141 N. Y. S. 852, 157 App. Div. 237, affirming 140 N. Y. S. 825, 80 Misc. Rep. 90.

<sup>54</sup> When laches will be imputed to a municipality. *Pittsburgh v. Pittsburgh & L. E. R. Co.* (Pa. 1919), 106 Atl. 724.

<sup>55</sup> After quoting the classifica-

**§ 1338. Right of an abutter to encroach temporarily.**

To promote the interest and welfare of the abutter the municipality may permit a temporary obstruction of a street, but not, it is true, a permanent occupancy for a private purpose, since such act would be clearly *ultra vires*.<sup>56</sup>

**§ 1339. Same—obstructions connected with delivery or removal of goods.**

The reasonable temporary use of the streets and sidewalks in the delivery and receiving of goods and articles of merchandise is recognized as a proper use on the ground of custom and necessity.<sup>57</sup>

tion made of encroachments or obstructions from Section 1337, vol. 3, ante, the court observes: "This court has never classified encroachments on the streets in just this way although the decisions have often distinguished between temporary and permanent obstructions. It is obvious from the authorities already cited that the decisions of this court run more strictly with reference to encroachments on the streets above the surface of the ground than to encroachments beneath the surface. *People v. Marshall Field & Co.*, 266 Ill. 609, 107 N. E. 864, 869.

<sup>56</sup> *Lynch v. Northview*, 73 W. Va. 609, 81 S. E. 833, 836, 52 L. R. A. (N. S.) 1038.

Placing empty chicken coops on the outer part of a sidewalk, close to the curbing to be taken away by a merchant whose place of business abutted thereon, held not an unauthorized obstruction. *Whittle v. Southern Express Co. (La.)*, 76 So. 623.

<sup>57</sup> Only temporarily permitted,

not continuously. *Mackenzie v. Frank M. Pauli Co. (Mich.)*, 174 N. W. 161.

"An abutting owner has peculiar, limited, common law rights in highways not enjoyed by others, with which statutes and city ordinances have not interfered. A merchant may load and unload goods back and forth between his store and trucks and other vehicles across the sidewalk by means of skids and other suitable devices, provided such obstruction is temporary and reasonable. An abutting owner may temporarily deposit building materials in the streets to a reasonable extent. He has a peculiar right of ingress and egress and others incidental to his ownership and occupancy of the abutting land." *Post v. Clarksburg*, 74 W. Va. 39, 81 S. E. 562, 564, citing Section 1334, et seq., vol. 3, ante.

Pedestrians have the right to the use of public streets to the entire width. "This rule is subject, however, to certain reason-

The necessity which justifies temporary encroachment upon a public street need not be absolute. It is sufficient that it be reasonable. This does not mean reasonable with reference to the peculiar situation of a particular person or business, but reasonable according to the usage of reasonable men, having due regard to the public convenience.<sup>58</sup>

A permanent structure for receiving and unloading articles which hamper to an unreasonable extent the free and proper use of the public way by the public cannot be lawfully allowed.<sup>59</sup>

able and necessary limitations, among them the right of an abutting property owner to use the sidewalk in front of his premises when reasonably necessary for the purpose of loading or unloading his goods and merchandise." *Walker v. Smith* (Ala.), 74 So. 451, quoting from with approval *Garibaldi v. O'Connor*, 210 Ill. 284, 71 N. E. 379, 66 L. R. A. 73.

Unloading of goods in street during business hours in transit to storeroom, usually allowed by virtue of permit. "Custom and necessity demand such use of the street." "While the streets are designed primarily for traveling and transporting goods to and from thereon, it is quite as lawful for both persons and property to be temporarily at rest upon them as it is to be in motion. Indeed, otherwise, the streets would be of little use to the abutting property owners, since in transporting goods and freight to and from his storeroom it is absolutely necessary to deposit the same for an appreciable period of time upon the street \* \* \* If the use be in

accordance with the manner in which reasonable men use the street such use is not a nuisance." *Fisher v. Los Angeles Pacific Co.*, 21 Cal. App. 677, 132 Pac. 767, 769.

<sup>58</sup> *Longnecker v. Wichita R. R. & Light Co.*, 80 Kan. 413, 420, 102 Pac. 492; *Commonwealth v. Passmore*, 1 Serg. R. (Pa.) 217, 219; *O'Linda v. Lathrop*, 38 Mass. 292, 298.

<sup>59</sup> Platform. Obstruction of full width of passageway by platform from freight cars to factory building from two to eight hours at a period, held unlawful. *Stratum & Terstegge Co. v. Meriwether*, 154 Ky. 829, 159 S. W. 613.

Loading docks or platforms erected by virtue of ordinance extending over the sidewalk and preventing its use by pedestrians. Held, public nuisance, that city exceeded its authority in allowing them to be constructed and maintained, and that a suit by the prosecuting officer at the relation of an abutting property owner would lie to abate the same. *State ex rel. v. Graham Paper Co.*, 173 Mo. App. 718, 160 S. W. 9.

**§ 1340. Same—building materials in street.**

Temporary obstructions and encroachments of streets to a reasonable extent in connection with the erection and repair of buildings and other structures, are sanctioned.<sup>60</sup>

Thus an abutting owner may deposit building materials on the street in front of his property for building purposes and keep it there until with ordinary diligence in the prosecution of his work it is consumed. Such an appropriation of the street is exceptional and is justified on the ground of necessity.<sup>61</sup>

Ordinances frequently confer this privilege under permit,<sup>62</sup> but in the absence of such ordinance a license therefor may be implied.<sup>63</sup>

**§ 1341. Overhead encroachments in general.**

“The public right to use the streets goes to the full

<sup>60</sup> *Johnson v. Huntington*, 80 W. Va. 178, 92 S. E. 344; *Hunt v. St. Louis* (Mo. 1919), 211 S. W. 673.

In a suit for damage due to injury from a gravel pile on a sidewalk an instruction in substance was approved: That defendant had a right to make such use as was reasonably necessary of the street or sidewalk for the purpose of placing material for improvements of his property but in so doing it was his duty not so to place the gravel as to make the sidewalk not reasonably safe for pedestrians to travel. *De Garmo v. Vogt*, 151 Ky. 847, 152 S. W. 969.

Storing lumber on a strip between a fenced lot and the sidewalk, held unlawful obstruction. *Dougherty v. St. Louis*, 251 Mo. 514, 158 S. W. 326, 46 L. R. A. (N. S.), 330.

Unreasonable and excessive amount of building material on the sidewalk extending into the street, held unlawful. *Daneschocky v. Sieble*, 195 Mo. App. 470, 479, 193 S. W. 966, approving *Christman v. Meierhoffer*, 116 Mo. App. 46, 92 S. W. 141.

<sup>61</sup> *Longnecker v. Wichita R. R. & L. Co.*, 80 Kan. 413, 420, 102 Pac. 492, 495, per Burch, J.

<sup>62</sup> “We know as a matter of common knowledge, that in the congested conditions that exist in the cities, it is often necessary to use some part of the highway temporarily for building materials used in constructing or repairing buildings and an ordinance granting such reasonable temporary use is entirely proper.” *De Garmo v. Vogt*, 151 Ky. 847, 152 S. W. 969.

<sup>63</sup> *Longnecker v. Wichita R. R. & L. Co.*, 80 Kan. 413, 420, 102 Pac. 492, 495.

width of the street and extends indefinitely upward and downward.”<sup>64</sup>

Thus an ordinance may forbid under penalty the erection of sheds, signs, etc., above and over sidewalks.<sup>65</sup>

### § 1343. Use of subsurface of street and excavations.<sup>66</sup>

That an abutting owner has special rights in the street and sidewalk is settled. He has not only the common right of passage but also other rights not shared in by the public at large, rights peculiar to himself, arising out of the relation of his property to the adjacent street. Whether these rights are property rights or mere easements, they are co-extensive to the use to which the street may by law be devoted, and become integral parts of the estate of the abutting owner.<sup>67</sup>

Subject, it is true, to the easement therein of the municipality for laying water, gas, sewer pipes, etc., an abutting owner has a right to use the subsurface of the street, provided he does not materially interfere with the use of the surface of the street by the public.<sup>68</sup>

But in order to reach the subsurface he must dig up a part of the surface, and thereby create a temporary obstruction. Such temporary obstruction if not unreasonable is not unlawful.<sup>69</sup>

Obviously the larger and more congested the urban

<sup>64</sup> *New Orleans v. Kaufman*, 138 La. 897, 70 So. 874, citing Section 2775, vol. 6, ante; *Nessen v. New Orleans*, 134 La. 462, 64 So. 286, 51 L. R. A. (N. S.) 324.

<sup>65</sup> *New Orleans v. Kaufman*, 138 La. 897, 70 So. 874.

<sup>66</sup> *S. H. Kress & Co. v. Miami* (Fla. 1919), 82 So. 775, 776, quoting with approval the greater part of Section 1343, vol. 3, ante.

<sup>67</sup> “In cities and towns the streets are commonly devoted to the conveyance of water, gas and sewerage, and the abutting owners’ property is essentially depend-

ent upon the use of the streets for connections with the appropriate means of conveyance.” *Birmingham Waterworks Co. v. Hernandez*, 196 Ala. 438, 71 So. 443, 446, per Sayre, J.

<sup>68</sup> *Lynch v. Northview*, 73 W. Va. 609, 81 S. E. 833, 836, 52 L. R. A. (N. S.), 1038, quoting with approval from Section 1343, vol. 3, ante.

<sup>69</sup> *Lynch v. Northview*, 73 W. Va. 609, 81 S. E. 833, 836, 52 L. R. A. (N. S.), 1038, quoting with approval part of Section 1343, vol. 3, ante.



center there is more need for the full width of the street unobstructed by openings or other impediments.<sup>70</sup>

The tendency of both legislative enactments and judicial decisions is to limit the abutter more and more, especially where such obstructions are likely to hamper to an unreasonable extent pedestrians in the free use of a much traveled street.<sup>71</sup>

Abutting owners may maintain vaults under the surface of the street. In the absence of proof to the contrary especially where it has existed for many years, it will be presumed that a vault is a lawful structure, and this, it has been held is true, even where the city owned the fee of the street.<sup>72</sup>

A vault which is lawful when maintained in a safe condition is not an encroachment upon the street.<sup>73</sup>

The municipality may require permits to construct and maintain vaults under the streets and forbid them without permits, and limit them to prescribed areas,<sup>74</sup> al-

<sup>70</sup> Jorgensen v. Squires, 144 N. Y. 280, 39 N. E. 373.

<sup>71</sup> Callahan v. Nevada, 170 Ia. 719, 153 N. W. 188, 190 L. R. A. 1916B, 927, 931, citing Section 1343, et seq., vol. 3, ante.

<sup>72</sup> Deshong v. New York, 176 N. Y. 475, 68 N. E. 880.

<sup>73</sup> "That an abutting owner has special rights in the sidewalk is settled. \* \* \* That among these rights are the rights to maintain a vault (or cellar if we choose to call it so) we think is established by the common custom. \* \* \* Since the plaintiff had a right to maintain a vault we must assume in the absence of proof to the contrary that the vault in question was rightly there. The fact that it had existed for forty years is enough to warrant a finding that the vault was a lawful structure. It has been so held in New York even where the city

owned the fee of the street. Deshong v. New York, 176 N. Y. 475, 68 N. E. 880." Bloom v. Orange, 91 N. J. L. 376, 103 Atl. 395, holding such vault lawful and, not in violation of an ordinance forbidding the making or maintenance of any encroachment upon a street, since a vault which is lawful when kept in a safe condition is not an encroachment. "An encroachment naturally means something that illegally narrows the street which the municipal authorities may remove. They cannot remove a lawful structure."

<sup>74</sup> Ordinance may forbid vaults under a sidewalk without a permit. New York v. Gerry, 165 N. Y. S. 659, 100 Misc. Rep. 297, relying on Appleton v. New York, 219 N. Y. 150, 168, 114 N. E. 73, 78.

Spaces occupied for vault purpose beyond that allowed by permit constitutes a public nuisance.

though the abutter may own the fee of the street.<sup>75</sup>

The municipality may permit areaways and entrances to basements and cellars from a public street or alley where they are properly protected and do not unreasonably interfere with the convenient use of the public way.<sup>76</sup>

So it is within the discretion of the proper municipal authorities to permit entrances to basements through sidewalks, although such privilege may restrict to some extent the free use of a sidewalk.<sup>77</sup>

### § 1344. Same—pipes and drains in streets.<sup>78</sup>

An abutting owner may use the streets to lay pipes for the conveyance of water to his premises.<sup>79</sup>

New York v. Gerry, 165 N. Y. S. 659, 661, 100 Misc. Rep. 297.

<sup>75</sup> Appleton v. New York, 219 N. Y. 150, 114 N. E. 73, affirming 148 N. Y. S. 163 App. Div. 680, reversing 144 N. Y. S. 138, 82 Misc. Rep. 258.

<sup>76</sup> Reynolds v. Union Savings Bank, 155 Iowa 519, 136 N. W. 529, denying injunction; Wendt v. Akron, 161 Iowa 338, 142 N. W. 1024, 1026.

<sup>77</sup> State ex rel. v. Armstrong, 97 Neb. 343, 149 N. W. 786, distinguishing Chapman v. Lincoln, 84 Neb. 534, 121 N. W. 596, 25 L. R. A. (N. S.) 400.

<sup>78</sup> Gas mains and pipes. People v. Kewanee Light & Power Co., 262 Ill. 255, 104 N. E. 680; Siegert v. Ottawa & Public Service Co., 200 Ill. App. 476; People ex rel. v. Connolly, 153 N. Y. S. 72, 89 Misc. Rep. 555.

Conduits for wire in alley, held proper use. Edison Illuminating Co. v. Misch (Mich.), 166 N. W. 944.

Conduits for public water sup-

ply. Exclusive franchise cannot be granted under California constitution. St. Helena v. Ewer, 26 Cal. App. 191, 146 Pac. 191.

Sewer in street. Berwyn v. Berglund, 255 Ill. 498, 99 N. E. 705.

Drainage ditch through streets, etc. (not discussed). Van de Water v. Priaham (Cal. App.), 164 Pac. 1136.

<sup>79</sup> Birmingham Waterworks Co. v. Hernandez, 196 Ala. 438, 71 So. 443.

“The abutting owner has the right of access to his premises through the street for coal or wood or other necessary things; the right of ingress for persons; and why may we not call this right to use the streets to lay his pipes for the conveyance of water a right of access constituting a property right in the street which he may use and of which he cannot be divested.” McClaugherty v. Bluefield Waterworks Co., 67 W. Va. 285, 68 S. E. 28, 32 L. R. A. (N. S.) 229.

**§ 1348. Same—effect of permit.**

The authority of the municipality to revoke permits to use the subsurface of streets for the various purposes mentioned in the preceding paragraphs, to promote public convenience or necessity, is recognized.<sup>80</sup>

A permit to build a vault within the limits of a street is not a conveyance of a title to a part of the street. Permits for vaults like those to maintain areaways, stoops, courtyards, etc., save such structures from being unlawful obstructions of the highways and nuisances, but are subject to abrogation for public convenience or necessity.<sup>81</sup>

Thus in order to allow the construction of a subway, where the fee of the street was in the municipality, a permit to maintain a vault, it was held, could be revoked.<sup>82</sup>

Abandonment or non user of permission to lay electrical conductors under the street, it has been held, justified a revocation of such permission.<sup>83</sup>

The abutting owner, it is held, cannot recover damages for the loss of a vault due to a lawful change of the grade of the street, under which such structure exists, but the

<sup>80</sup> Section 1319, ante.

City may grant permits to abutters for access to floor below of building abutting on street; but such permit is revocable at any time in the sound discretion of the proper municipal authorities. *Callahan v. Nevada*, 170 Ia. 719, 153 N. W. 188, L. R. A. 1916B, 927, 931, refusing injunction against city to prevent closing area or open stairway leading to barber-shop.

<sup>81</sup> "It would be unreasonable to assume that the city after acquiring the land for public use, should immediately proceed to alien parts so acquired and that when under change of circum-

stances the public require or desired either the whole of the land or the use of some part of it which hitherto the abutter had been permitted to enjoy for his private benefit the city should be put to another condemnation proceeding." *Lincoln Safe Deposit Co. v. New York*, 210 N. Y. 34, 103 N. E. 768, affirming 132 N. Y. S. 1135, 148 App. Div. 895.

<sup>82</sup> *Lincoln Safe Deposit Co. v. New York*, 210 N. Y. 34, 103 N. E. 768, affirming 132 N. Y. S. 1135, 148 App. Div. 895.

<sup>83</sup> *New York Electric Lines Co. v. Gaynor*, 218 N. Y. 417, 113 N. E. 519, affirming 153 N. Y. S. 244, 167 App. Div. 314.

rule has been declared otherwise, if the change of grade is unlawful.<sup>84</sup>

**§ 1349. Awnings, signs, billboards, steps, bay and oriel windows and other like projections from buildings.**

Awnings, signs, and like projections into the public ways, it is clear, may be permitted and regulated by ordinance;<sup>85</sup> and awnings supported by posts may be required to be removed.<sup>86</sup>

A sign overhanging a public street, so placed as likely to fall, is, of course, a public nuisance, since as applied to a public way, such nuisance is any act or omission which unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, a public street or highway.<sup>87</sup>

Steps leading to a sidewalk that do not unreasonably obstruct public travel thereon may be permitted.<sup>88</sup>

Courtyard privileges may be granted to abutting own-

<sup>84</sup> The abutting owner cannot recover damages as if it were his private property, but the vault is to be treated as any other convenience of a temporary character which he was rightfully enjoying and had the right to enjoy until such time as the city, representing the state in its paramount right to the use of the street should by proper ordinance or resolution terminate his right of enjoyment. Such right is not terminated by an unlawful change of grade, and because of an unlawful change of grade he is entitled to damages caused thereby so far as his property with its lawful appurtenances is diminished in value by such change and offer due allowance of benefits. *Burnham v. Milwaukee*, 155 Wis. 90, 143 N. W. 1067, 1070.

<sup>85</sup> Ordinance permitting awnings of the folding or hinged class or metal awnings to be erected beyond the building line at least eight feet above the sidewalk was sustained. *Indianapolis v. Central Amusement Co.* (Ind. 1918), 119 N. E. 481.

<sup>86</sup> *Etchison v. Frederick City*, 123 Md. 283, 91 Atl. 161.

<sup>87</sup> *McNulty v. Ludwig & Co.*, 138 N. Y. S. 84, 87, 153 App. Div. 206.

<sup>88</sup> *Rogers v. New London*, 89 Conn. 364, 94 Atl. 364.

Porch, cellar door or step extending six feet into street may be permitted: Meaning of "porch" in an ordinance. *Reading City v. Yeager*, 62 Pa. Super. Ct. 268.

ers by ordinance conferring the right to lay off court-yards and erect stairways or stoops to give access to their residences.<sup>89</sup>

Supporting columns or pilasters encroaching upon a street, although a public nuisance, cannot be abated at the suit of a private person unless he suffers some private, direct and material damage beyond that which is suffered by the public at large, and which but for the interference of equity will be an irreparable injury to him.<sup>90</sup>

Show cases and sign boards located in a public street, it has been held, constitute a public nuisance unless the city permits their maintenance by general ordinance, and where they obstruct the entrance to a building cutting off the view, etc., the occupant thereof may compel removal by mandatory injunction.<sup>91</sup>

### § 1350. Buildings in street.<sup>92</sup>

### § 1351. Docks and wharves.<sup>93</sup>

It has been held that neither trespass nor ejectment will lie at the suit of a private person against an occupant of a wharf and building, the title of which was in

<sup>89</sup> *New York v. Masten*, 161 N. Y. S. 196, 174 App. Div. 661.

<sup>90</sup> *Van Marter v. First National Bank*, 87 N. J. Eq. 500, 100 Atl. 892, denying injunction, and distinguishing *Ackerman v. True*, 175 N. Y. 363, 67 N. E. 629.

<sup>91</sup> *Green & Green Co. v. Thresher*, 244 Pa. 169, 83 Atl. 711.

<sup>92</sup> Building encroaching on street. *Lewis v. Pingree National Bank*, 47 Utah 35, 151 Pac. 558.

Injunction to prevent continuing the erection of building on street dismissed for failure to show place on street. *Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481.

Columns or pilasters supporting upper stories of building and encroaching on street. *Van Marter*

*v. First National Bank*, 87 N. J. Eq. 500, 100 Atl. 892, refusing injunction to abate at suit of property owner on ground of failure to show substantial, direct and private damage to him; moreover, if a public nuisance, remedy by indictment would be efficacious.

Elevator used to lower goods from sidewalk to basement, held not a public nuisance or obstruction to sidewalk. *Post v. Clarksburg*, 74 W. Va. 39, 81 S. E. 562, 564.

<sup>93</sup> Action by people to recover possession of lands alleged to be portions of a public street and property of the state. *People ex rel. v. Southern Pacific Co. (Cal.)*, 171 Pac. 294.

the state and constructed by authority of a town, where the rights of plaintiff were not encroached upon.<sup>94</sup>

**§ 1352. Fences, gates and doors.<sup>95</sup>**

**§ 1353. Fairs and carnivals.<sup>96</sup>**

**§ 1355. Goods on sidewalks, fruit and news stands, lunch wagons, etc.**

The maintenance of a fruit stand under lease with the owner of a building fronting on a street, without consent of the corporate authorities, constitutes an unlawful obstruction, and where in violation of an ordinance, a public nuisance per se, authorizing summary abatement.<sup>97</sup>

**§ 1357. Hackstands.**

The use of streets for hackstands is generally recognized as a proper street use, but such stands must not interfere unreasonably with the rights of abutting property owners.<sup>98</sup>

<sup>94</sup> "We find \* \* \* that the wharf and building rest upon soil flowed by the tide below high-water mark and the fee of such soil is in the state; that the plank approach to such wharf and building as a means of ingress thereto and egress therefrom is a part of the public highway which the defendants in common with the public have the right to use, and that so far as the evidence shows such plank approach is no obstruction either to the public or to the plaintiff in the use of any of the land owned by it." *Narragansett Real Estate Co. v. Machenzie*, 34 R. I. 103, 82 Atl. 804, 809, 810.

<sup>95</sup> *Narrowing street by railroad tracks and fences, etc.* *New York Central and H. R. R. Co. v. Middlesex County Comrs.*, 220 Mass. 569, 108 N. E. 506.

<sup>96</sup> *Street carnival*, consisting in part of numerous tents, shows and exhibitions, with various other stands, booths and structures, a Ferris wheel, a merry-go-round, a shooting gallery and other devices, is an unlawful obstruction and a public nuisance. *Augusta v. Jackson*, 20 Ga. App. 710, 93 S. E. 304.

*Circus exhibitions in streets.* *Carlisle v. Sells-Floto Show Co.* (Ia.), 163 N. W. 380.

<sup>97</sup> *Pastorino v. Detroit*, 182 Mich. 5, 148 N. W. 231.

<sup>98</sup> If an abutting owner does not own the fee in the street he has no ground of complaint. *Waldorf-Astoria Hotel Co. v. New York*, 212 N. Y. 97, 105 N. E. 803, 805.

*McCaffrey v. Smith*, 41 Hun (N. Y.) 117, denying right to establish hack stand by village by-law in front of premises of abutter own-

Hackstands may be designated and the use thereof regulated.<sup>99</sup>

Clearly owners and operators of hacks and cabs have no property rights in the streets superior to regulations necessary under the police power for the public good.<sup>1</sup>

**§ 1359. Market places and buildings.<sup>2</sup>**

**§ 1360. Moving buildings through streets.**

Cities having control of streets with power to prescribe uses to which streets may be put, and regulate traffic thereon, etc., may allow the moving of a building along a street.<sup>3</sup>

The moving of buildings, derricks and such structures on the streets and other highways is an infrequent or uncommon use. While the use may not be regarded as ordinary, at least not so common as travel over the streets by wagons, carriages, automobiles and like vehicles, it is a frequent and proper use.<sup>4</sup>

Municipal power to regulate and prescribe the condi-

ing the fee in the highway, without his consent.

<sup>99</sup> Section 924, vol. 3, ante.

Public hack stands may be regulated; the law may provide for and prescribe the time for standing thereat by hackmen, but in so doing, cannot interfere with ingress and egress of abutting owners. *Waldorf-Astoria Hotel Co. v. New York*, 212 N. Y. 97, 105 N. E. 804.

<sup>1</sup> Statute may designate and regulate use and occupation of hack stands in a municipality and delegate the power to subordinate boards and commissioners, e. g., police commissioners as in *Baltimore, Md. Swann v. Baltimore (Md.)*, 103 Atl. 441.

<sup>2</sup> *State v. Burkett*, 119 Md. 609,

87 Atl. 514, 520, holding streets may be used for market purposes.

<sup>3</sup> *State ex rel. v. Omaha & C. B. Street Rys. Co.*, 100 Neb. 716, 161 N. W. 170.

*Kingsley v. Pounds*, 160 N. Y. S. 228, 96 Misc. Rep. 27, denying injunction at suit of an abutting owner to restrain issuance of a permit to remove buildings through the street. The relief was sought on the ground that removal would destroy or injure grass, trees and shrubs, etc.

<sup>4</sup> *Missouri Pacific Ry. Co. v. Sproul*, 99 Kan. 608, 162 Pac. 293, holding that expense in raising or removing wires in moving a building if not unreasonable interference therewith, should be borne by owning company.

tions for the moving of buildings and other like structures through the streets is undoubted.<sup>5</sup>

### § 1361. Platform in street or over sidewalk.<sup>6</sup>

### § 1363. Private railroads and switches.

Railroad tracks in streets for private purposes are generally viewed as unlawful obstructions and unreasonable encroachments thereon.<sup>7</sup>

However, where such use is public, such structures are permitted under prescribed conditions, legal restrictions and police regulations.<sup>8</sup>

### § 1364. Race course.

The use of streets for racing of any kind, of course, is

<sup>5</sup> Ordinance regulating; permit to issue only on written application showing consent of designated property owners; bond; nature of building to be removed, and forbidding without permission held valid. *Robinson v. Otis*, 30 Cal. App. 769, 159 Pac. 441.

<sup>6</sup> Trestle on which to carry railroad tracks which in effect destroyed the public use of the street of the space so occupied held unlawful obstruction. *State ex rel. v. Superior Court*, 67 Wash. 10, 120 Pac. 514.

<sup>7</sup> Private tramway to haul lumber to a sawmill, held not public use, and its operation a public nuisance. *Baines v. Marshfield Suburban R. Co.*, 62 Or. 510, 124 Pac. 672.

<sup>8</sup> Spur track to car barns of electric railway company. *Whit-meyer v. Salt Lake & O. Ry. Co.*, 46 Utah 491, 151 Pac. 48.

A spur track construction under conditions where the public are not excluded from the use of the

street or denied equal rights to use, the mere fact that it is actually used by one or two individuals does not negative the public character of the use. *Harrold Bros. v. Americus*, 142 Ga. 686, 83 S. E. 534.

Road serving one factory only, but connecting with and receiving from and delivering to trunk railways shipments, held its use of streets a "public use." *Stanley v. Jay Street, Connecting R. R.*, 169 N. Y. S. 530, distinguishing *Brooklyn Heights R. R. Co. v. Steers*, 213 N. Y. 76, 106 N. E. 919, Ann. Cas. 1915C, 791; *Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172, and *Farming v. Osborne*, 102 N. Y. 441, 7 N. E. 307.

See *Landau Cabinet Co. v. Bush*, Receiver Mo. Pac. Ry. Co., 3 Mo. P. S. C. Repts. 476, where a review of the decisions relating to public and private use is given by the author.



an improper use. Such use clearly imperils the reasonably safe use of the public way by the people.<sup>9</sup>

§ 1365. Railroad depots.<sup>10</sup>

§ 1367. Weighing scales.<sup>11</sup>

VII. REMEDIES.

§ 1368. Remedies of municipality in case of unauthorized obstructions.<sup>12</sup>

<sup>9</sup> *Burnett v. Greenville*, 106 S. C. 255, 91 S. E. 203, holding a city liable to one struck by an automobile using a street and running at a high rate of speed in practice for hill climbing, with knowledge and consent of the city.

There is no municipal liability for injury resulting from an automobile race in the streets, since the duty to forbid is governmental. *Rose v. Gypsum City* (Kan. 1919), 170 Pac. 348.

<sup>10</sup> Part of lands for streets may be used for railroad purposes. *Cleveland Terminal & V. R. Co. v. State*, 85 Ohio 251, 97 N. E. 967.

**Railroad tracks.** When franchise of company expires municipality may compel removal of railway tracks from the streets. *Detroit United Ry. Co. v. Detroit*, 248 U. S. 429, 39 Sup. Ct. 151.

<sup>11</sup> Scales in street maintained by private person as a nuisance and obstruction. *Polk City v. Gemricher* (Iowa 1919), 170 N. W. 378.

City can grant right to maintain a platform scales on a street but may give a revocable permit for such use. *Warden v. Elroy*, 162 Wis. 495, 156 N. W. 466.

Wagon scales and platforms, interfering with ingress and egress of abutting property owner. *Florence v. Woodruff*, 178 Ala. 137, 59 So. 435, 186 Ala. 244, 65 So. 326.

<sup>12</sup> *Injunction*. *Mt. Vernon v. Berman & Reed* (Ohio 1919), 125 N. E. 116.

Suit to compel removal. *Rudolph v. Birmingham*, 188 Ala. 620, 65 So. 1006.

If public service corporation uses streets without having obtained a franchise as required by law, it is nothing more than a trespasser, and cannot invoke in its favor any of the laws enacted for the protection of corporations that have observed the law. *Cumberland Tel. & Tel. Co. v. Calhoun*, 151 Ky. 241, 151 S. W. 659.

City cannot be enjoined from taking possession of part of a public street, although by permit from a city officer abutting owner was allowed to encroach thereon by a building. *Close v. Chicago*, 257 Ill. 47, 100 N. E. 215.

Fact that street vender has a license does not enable him to unduly obstruct public use of a

**§ 1369. Ejectment by municipality.<sup>13</sup>**

Although the fee of the street is in the abutting property owners, it is sometimes held that the city as trustee of the public easement therein may maintain ejectment for lands alleged to be part of a street, or this proposition may be assumed.<sup>14</sup>

In the absence of evidence to the contrary the fee of the street will be presumed to be in the municipality,<sup>15</sup> and ejectment is held as a proper remedy against one who encroaches thereon.<sup>16</sup>

But where the statute denies ejectment to recover possession of land unless at the time the plaintiff has a valid subsisting interest therein, and the municipality acquires no beneficial ownership of the land dedicated to the public use as a street, the rule obtains that ejectment in behalf of the municipality will not lie. This is the doctrine in Michigan.<sup>17</sup>

city street. *Sidelsky v. Atlantic City*, 84 N. J. L. 198, 86 Atl. 531.

See §§ 1318, 1348, ante; § 1318, and 1348, vol. 3, ante.

<sup>13</sup> Ejectment to recover land, formerly town lot or village lot or common fields or commons. *St. Louis v. St. Louis Blast Furnace Co.*, 235 Mo. 1, 138 S. W. 641.

<sup>14</sup> In such action "hearsay evidence is admissible to prove the location of ancient boundaries and monument of lands in which the public have an interest, like the boundaries of streets and highways; and for the same reason the acts of the first settlers of an ancient town in constructing improvements, would, after the death of the said first settlers be evidence that they understood the true boundaries of their property and the streets of such town." *Greenleaf on Evidence* (16 ed.), pp. 222, 223; *St. Louis Public*

*Schools v. Risley's Heirs*, 40 Mo. 356.

"It would be unsafe to assume that all the citizens of a town would become trespassers and build their houses upon and into the public streets, and it is not unreasonable to assume that the officers of a town or city would permit its streets to be closed up or partly closed for more than half a century. In the absence of evidence to the contrary the law presumes that even a private citizen proceeds by right and not by wrong." *Maysville v. Truex*, 235 Mo. 619, 628, 139 S. W. 390, wherein question of right of city to maintain ejectment was not raised, but assumed.

<sup>15</sup> See §§ 1305, 1306, ante.

<sup>16</sup> *Chester v. Wabash Co. W. R. Co.*, 182 Ill. 382, 55 N. W. 524.

<sup>17</sup> "In this state it is provided by statute that no person may

Where by statute or otherwise lands appropriated to public use can not be acquired by adverse possession,<sup>18</sup> ejectment will not be barred by the statute of limitations nor is laches available as a defense.<sup>19</sup>

In the absence of such restriction, it appears that adverse possession may be invoked as a defense.<sup>20</sup>

bring an action in ejectment to recover possession of land unless at the time he has a valid subsisting interest in the premises claimed. A municipality acquires no beneficial ownership of the land dedicated to the public use as a street. It has no title or interest in the public street of which it can divest itself by deed or other conveyance. The use of such land has already been determined by the dedication to the public use. By constitution and statute the supervision and the reasonable control of all streets are given to municipalities but such powers extend no farther. Complainant therefore has no such interest in the premises within the meaning of the statute as would authorize it to bring ejectment to oust defendant from its streets and this court has so held in *Grand Rapids v. Whittlesey*, 33 Mich. 109." *Detroit v. Detroit Rys.*, 172 Mich. 136, 137 N. W. 645, 650.

<sup>18</sup> By statute lands granted to public use cannot be acquired by adverse possession. Rule applies to preserving to cities, grounds on navigable rivers for levee, wharf and water fronts. But such land belonging to a city as a part of its "commons" may be lost by adverse possession. The rule that a municipality may not surrender possession of its de facto

streets and wharfs to private persons is not applicable to commons granted to the city by the U. S. and by legislative grants of power to sell or lease them. *St. Louis v. St. Louis I. M. & S. Ry. Co.*, 248 Mo. 10, 26, 154 S. W. 55.

<sup>19</sup> City's right to bring ejectment against one who is occupying part of a city street is not barred by the statute of limitations. By statute city's right to recover possession of its streets shall not be barred by any statute of limitations nor will defense of laches be available against such right. *Little Rock v. Jeuryens*, 133 Ark. 126, 202 S. W. 45.

<sup>20</sup> Ejectment to recover land claimed as part of a public street. Adverse possession of property designated as a street on a plat, begun by fencing the same and constructing a house thereon, etc., held recovery barred. *Harrisonville v. Foster*, 264 Mo. 82, 88, 174 S. W. 413.

Evidence of adverse possession where there are different occupants of the land. *Maysville v. Truex*, 235 Mo. 619, 139 S. W. 390; *St. Louis v. St. Louis, I. M. & S. Ry. Co.*, 248 Mo. 10, 154 S. W. 55.

*St. Joseph v. St. Joseph Terminal R. R. Co.*, 268 Mo. 47, holding equitable estoppel a complete bar to ejectment by the municipality. See Section 1398, post.

### § 1370. Summary removal by municipality.

A municipality has the undoubted right to remove summarily any obstruction in a public way which constitutes a public nuisance and unreasonably hampers or prevents the proper use of such way by the public.<sup>21</sup>

But in so doing the municipality must act within its grant of power.<sup>22</sup>

It cannot declare a given thing an obstruction or encroachment, or a nuisance per se which is not such in fact,<sup>23</sup> and proceed arbitrarily to abate it summarily, without notice, or formal authorization by ordinance or resolution.<sup>24</sup>

A city may declare lighting poles and wires of a company whose franchise has expired a nuisance and may remove same upon refusal of company to do so.<sup>25</sup>

So a city may revoke permission to maintain an area-way extending into public street and order its removal and upon failure of the owner to do so, may remove it.<sup>26</sup>

### § 1371. Action by municipality to abate or enjoin nuisance.

That a municipality may sue by injunction to abate an obstruction or an encroachment in a street constituting a

<sup>21</sup> *Jennings v. Johannott*, 149 Wis. 660, 135 N. W. 770; *Hunter v. Clark & Henry Const. Co.*, 109 Or. 34, 137 Pac. 743.

City through its authorized officers and in exercise of ordinance and charter right may remove obstructions from public wharves and does not thereby commit a wrongful entry as to persons so placing the obstruction. *Hafner Mfg. Co. v. St. Louis*, 262 Mo. 261, 172 S. W. 28.

"A municipal corporation may summarily remove from a public highway any tangible object placed there which so obstructs the public use of the highway as

to be a public nuisance." *Murden v. Lewes Comrs.* (Del. 1919), 108 Atl. 74, 77, citing Sections 904, 906, and 1370, vol. 3, ante.

<sup>22</sup> City may summarily remove an obstruction in the public highway which is a public nuisance, in a reasonable manner and after proper previous notice. *Murden v. Lewes*, 6 Boyce 48 (29 Del. 48), 96 Atl. 506; *Pastorino v. Detroit*, 182 Mich. 5, 148 N. W. 231.

<sup>23</sup> Section 901, ante.

<sup>24</sup> Section 904, ante.

<sup>25</sup> *Duncan Electric & Ice Co. v. Duncan* (Okl.), 166 Pac. 1048.

<sup>26</sup> *Callahan v. Nevada*, 170 Iowa 710, 153 N. W. 188, L. R. A.

public nuisance or an unreasonable interference with the free use of the way by the public, is well established.<sup>27</sup> This remedy, of course, is available only in the absence

1916B, 927, citing Section 1319, vol. 3, ante.

<sup>27</sup> Georgia. Harrold Bros. v. Americus, 142 Ga. 686, 83 S. E. 534.

Illinois. Law v. Noela Elevator Co., 281 Ill. 143, 117 N. E. 435; Childs v. Chicago, 198 Ill. App. 590.

Kansas. Kansas City v. Burke, 92 Kans. 531, 532, 141 Pac. 152, affirmed in 92 Kans. 236, 144 Pac. 193, citing Section 1371, vol. 3, ante.

Kentucky. Keystone Com. Co. v. Maysville, 154 Ky. 239, 157 S. W. 25.

Louisiana. Baton Rouge v. Cross (La.), 77 So. 121.

Minnesota. Jordan v. Leonard, 119 Minn. 162, 137 N. W. 740.

New York. New Rochelle v. New Rochelle Coal & Lumber Co., 144 N. Y. S. 852, 83 Misc. Rep. 194, affirmed in 158 N. Y. S. 1111; Hellniger v. New York, 160 N. Y. S. 741, 95 Misc. Rep. 394.

North Dakota. Lamoure v. La-sell, 26 N. D. 638, 145 N. W. 577.

Pennsylvania. Mt. Oliver v. Goldbach, 244 Pa. 56, 90 Atl. 435; Mill Village Boro v. Nypano R. R. Co., 254 Pa. 65, 98 Atl. 779; Philadelphia v. Teller, 50 Pa. Super. Ct. 260.

Virginia. Daniel v. Doughty, 120 Va. 853, 92 S. E. 848.

Washington. Humphreys v. Krutz, 74 Wash. 152, 137 Pac. 806.

W. Virginia. Elkins v. Donohue, 74 W. Va. 335, 336, 81 S. E. 1130, citing Sections 904, 926, 1391, vol. 3, ante.

Mandatory injunction to compel removal of obstruction in street. Brookline v. Loring, 229 Mass. 485, 118 N. E. 891.

Mandatory injunction to compel removal of obstructions and to refrain from further obstructing public way. New Rochelle v. New Rochelle Coal & Lumber Co., 144 N. Y. S. 852, 83 Misc. Rep. 194.

To restrain construction of a piazza over part of street. City is proper complainant. Montpelier v. McMahon, 85 Vt. 275, 81 Atl. 977.

To prevent closing of alley; if alley is private abutting owner may close. Smith v. Thomas Elevator Co., 278 Ill. 328, 116 N. E. 113.

To prevent city authorities from interference with the maintenance of a fence, on what was claimed as private alley denied. Hamilton v. Leon (Ia.), 164 N. W. 633.

To prevent city from wrongfully taking possession of street. Waler v. River Forest, 259 Ill. 223, 102 N. E. 290, approving Peoria v. Johnston, 56 Ill. 45, and McIntyre v. Storey, 80 Ill. 127.

City may enjoin abutting owner from building beyond the line of a fence which for more than twenty-four years has been recognized by owner and public as a boundary of the highway. Newberg v. Kienle, 60 Or. 486, 120 Pac. 3.

A municipality may maintain a bill in equity against a street railway company unlawfully occupying a highway after the expiration of its franchise to compel

of an adequate, full and complete remedy at law, which under the particular condition, might be applied.<sup>28</sup>

Statutory, charter or ordinance provisions seeking to keep streets and public ways in proper condition for public travel in the usual modes at all times, will not supplant equitable jurisdiction, but rather supplement such remedy.<sup>29</sup>

the removal of its tracks. *Detroit v. Detroit Rys.*, 172 Mich. 136, 137 N. W. 645, 650; *Bengor v. Traction Co.*, 147 Mich. 165, 110 N. W. 490, 7 L. R. A. (N. S.) 1187, 118 Am. St. Rep. 546; *Rhoades v. McNamara*, 135 Mich. 644, 98 N. W. 392.

To restrain use of streets under claim of franchise held to be illegal. *Henry v. Barthesvilles Gas & Oil Co.*, 33 Okl. 473, 126 Pac. 725.

To restrain operation of railroad on streets. *Baines v. Marshfield Suburban R. Co.*, 62 Or. 510, 124 Pac. 672.

**Mandamus** by city to compel abatement of an areaway. *Kennedy v. Fargo* (N. D.), 169 N. W. 424.

"It has been generally held that, where the duty of maintaining the streets in repair and free from obstructions is confided to municipalities, they have such interest as entitled them to maintain a suit in equity to enjoin obstructions in the streets, and to abate nuisances therein. \* \* \* The right "rests upon the same principle as the right of an individual to maintain a suit to enjoin the maintenance of a nuisance causing him special damages. \* \* \* A municipal corporation may maintain a suit in equity to abate a nuisance, even though a

summary remedy is also provided, and we see no reason why this right should be denied in this state." *Polk City v. Gemricher* (Iowa 1919), 170 N. W. 378.

<sup>28</sup> Equitable relief will be granted without first resorting to an action at law where it is evident that a nuisance per se exists or the right to relief is free from any substantial doubt. But where a highway has been for a long period abandoned and disused and it does not appear that public travel will be prevented or seriously incommoded the remedy by injunction will not be exercised to remove an obstruction on such highway. *Pana v. Washed Coal Co.*, 260 Ill. 111, 102 N. E. 992.

<sup>29</sup> *Montpelier v. McMahon*, 85 Vt. 275, 81 Atl. 977, *Eugene v. Garrett*, 87 Or. 435, 170 Pac. 731; *Carlisle v. Portle* (Ind.), 114 N. E. 705.

Remedy by abatement of the obstruction of street under municipal charter is not exclusive, but consistent with relief by injunction. *Elkins v. Donohoe*, 74 W. Va. 335, 337, 81 S. E. 1130, citing Section 904, 926, vol. 3, ante.

Held, that court of equity had jurisdiction of action in behalf of a municipality to restrain incumbering of streets, although statute provided that highway commissioners could maintain such action.

Delay or mere forbearance to enforce the removal of the obstruction involved will not work an estoppel against a municipality.<sup>30</sup>

However, when justice and equity require, certain conditions may justify the application of the doctrine of estoppel against a municipality.<sup>31</sup>

**§ 1373. Criminal prosecutions; remedy by indictment.<sup>32</sup>**

**§ 1374. Action by private persons because of street obstructions—enumeration of remedies.**

Illegal obstructions or unreasonable encroachments on streets justify action for damages or by injunction by a private person who has been or will be specially injured thereby.<sup>33</sup>

Wellsville v. Halloch, 139 N. Y. S. 961.

The fact that the obstruction violates a penal ordinance will not prevent injunction. Bernard v. Willamette Box & Lumber Co., 64 Or. 223, 129 Pac. 1039.

<sup>30</sup> Portland v. Miller, 72 Or. 317, 143 Pac. 1006; Starwich v. Ernst, 100 Wash. 198, 170 Pac. 584.

<sup>31</sup> City may be estoppel to enjoin occupation of a part of a public street. Where city induced a company to build a large plant on a certain location representing that it was doubtful whether any streets existed and if so they would never be claimed by city, city is estoppel is against such company to claim streets therein when opening of such streets is not necessary for public convenience. Portland v. Inman-Poulsen Lumber Co., 66 Or. 86, 133 Pac. 829, 46 L. R. A. (N. S.) 1211.

See § 1398, post.

<sup>32</sup> Indictment as a remedy. Birmingham, E. & B. R. Co. v. Stag,

196 Ala. 612, 72 So. 164; Troy v. Watkins (Ala.), 78 So. 50; McEniry v. Tri-City Ry. Co., 254 Ill. 99, 98 N. E. 227; State v. Burkett, 119 Md. 509, 87 Atl. 514; Van Marter v. First National Bank, 87 N. J. Eq. 500, 100 Atl. 892.

In indictment under statute providing penalty for injury to sidewalk and failure to repair it, failure to repair must be alleged as well as injury. State v. Seaman, 76 W. Va. 467, 85 S. E. 670.

<sup>33</sup> Clay v. Trimble, 165 Ky. 697, 178 S. W. 1036; Bozeman v. St. Petersburg (Fla.), 76 So. 894; Anderson v. Landers-Morrison-Christenson Co., 127 Minn. 440, 149 N. W. 669.

Injunction lies where abutter suffers injury peculiar to himself. Stratton v. Terstegge Co. v. Meriwether, 150 Ky. 363, 150 S. W. 381.

Injunction to compel removal of obstruction. Hard v. Blue Point

### § 1375. Right of abutter to bring ejectment.

Because the control of the streets is within the jurisdiction of the public and the public service is frequently involved, ejectment by a private person usually comprehend more than the infringement of individual rights, and hence such remedy is not regarded with favor by the courts.<sup>34</sup>

Co., 156 N. Y. S. 465, 170 App. Div. 524.

Injunction against obstructing alley. *Byrne v. Wheeling Can Co.*, 72 W. Va. 600, 78 S. E. 758.

Injunction to prevent closing an alley. *Bowers v. Machir* (Tex. Co. App.), 191 S. W. 758.

Injunction to prevent operation of tramway to transport material excavated from a subway pendente lite. *Bradley v. Degnon Contracting Co.*, 124 N. Y. 89, 120 N. E. 89.

Telephone poles and wires, held no additional servitude; abutter cannot enjoin. *Roaring Springs Townsite Co. v. Paducah Tel. Co.* (Tex. Co. App.), 164 S. W. 50.

Fact that plaintiff is a tax payer or alderman does not give him right to maintain an action for abatement of obstruction in street unless he is specially damaged. *Warden v. Elroy*, 162 Wis. 495, 156 N. W. 466.

Where grantor describes property as bounded by a street, his grantee can enjoin the grantor from obstructing the street although it had been vacated by the city. *Shetter v. Welzel*, 242 Pa. 355, 89 Atl. 455.

Private person may sue to cause obstructions to be removed from a public street, but "for being allowed to champion the rights of the public in that manner, the com-

plainant must show some injury peculiar to himself." *Howcott v. Ruddock-Orleans Cypress Co.* (La. 1920), 83 So. 586, per Provosty, J.

<sup>34</sup>"The streets of the city are in the possession and control of the city, and a party owning and occupying a lot abutting on such street cannot maintain an action for possession of any portion of such street, or to eject any other party therefrom who occupies by lawful consent of the city." *Dewey v. Chicago B. & Q. R. R. Co.*, 37 S. D. 390, 158 N. W. 408.

"It is well settled law in this state that if the owner of land encourages or permits a railroad company to enter and construct its road upon his lands, he cannot afterwards maintain his action of ejectment to recover possession of the part so taken for a roadbed." *Provolt v. C. R. & P. R. R. Co.*, 57 Mo. 256; *Alexander v. Kansas City, Ft. S. & M. R. R. Co.*, 138 Mo. 464, 473.

Suit for value of property appropriated will sometimes lie when ejectment will be denied. "Cases of this kind stand on a little different footing from cases where pure individual rights are involved. The public service is a proper matter for consideration in a way. Public service might be brought to naught if an individual could eject



**§ 1376. Suit by private person to enjoin or abate nuisance.**

In the absence of an adequate and complete remedy at law,<sup>35</sup> and a clear showing of special injury substantially different in kind from that resulting to the general public,<sup>36</sup> either an abutting property owner,<sup>37</sup> or a private

it (common carrier) from an eight foot strip across its right of way at a point along its line midway between the two ends. The courts have been very loath to allow ejectment in any case where the public service would be crippled by the act of ejectment. They do not put it upon the ground that the public service would be hampered, but they have been diligent in finding doctrines upon which the ends of the public would be met, without injuring the substantial rights of the individual property owner." *Second Street Imp. Co. v. Kansas City Southern Ry. Co.*, 255 Mo. 519, 525, 526, 164 S. W. 515, denying ejectment, stating that the circumstances in evidence precluded such action on the ground of estoppel, that for public reasons plaintiff was precluded from the remedy of ejectment.

<sup>35</sup> The legal remedy by action for damages is not adequate, where an alley has been completely obstructed. *Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590.

Where in an action to enjoin obstruction of an alley, the legal title sought to be protected is not doubtful, parties will not be required to resort to a court of law. *Oberheim v. Reeside*, 116 Md. 265, 81 Atl. 590.

Relief by injunction to compel city to remove a structure which

encroaches on street will not be granted where adequate relief by way of compensatory damages can be had. *Hellinger v. New York*, 168 N. Y. S. 271, 181 App. Div. 254, reversing 160 N. Y. S. 741, 95 Misc. Rep. 394.

<sup>36</sup> Abutting property owner allowed injunction to restrain closing and obstruction of street. "The obstruction of a public highway or a public street or alley is a nuisance which a court of equity will enjoin at the suit of an individual who suffers injury on account of such obstruction different in degree and character from that of the public." *Greil v. Stollenwerck* (Ala.), 78 So. 79.

Injunction to abate awning over street denied because of failure to prove special injury. *Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 652.

No cause of action exists against a city to enjoin the obstruction of a street, where city issued a license, to maintain scales but did not license the maintenance in any particular place. *Florence v. Woodruff*, 186 Ala. 244, 65 So. 326, affirming 178 Ala. 137, 59 So. 435.

Private property owner cannot maintain a bill to enjoin an encroachment on a street merely because it may be a violation of the rights of the public. Such right can only be set up by some officer

person,<sup>38</sup> may sue to enjoin the maintenance of an illegal obstruction or unreasonable encroachment on an established street, or an unauthorized use thereof.<sup>39</sup>

acting in behalf of the public. *Swedish E. L. Church v. Moline*, 179 Ill. App. 362; *Acheson v. Denison & S. Ry. Co.* (Tex. Civ. App.), 140 S. W. 467.

<sup>37</sup> Held, that abutting owners had a right to join as parties defendant with city in a suit to enjoin removal by city of obstruction in an alley, as they had special interest in use of the alley as means of access. *Allen v. Mitchell*, 143 Ga. 476, 85 S. E. 336.

Where a building which constituted a permanent obstruction of an alley was constructed pending trial of action by abutting property owner to enjoin its construction a decree forbidding maintenance of such structures was granted. *Henducks v. Jackson*, 143 Ga. 106, 84 S. E. 440.

Injunction by private person against members of labor organization and their sympathisers "congregating in large numbers in the immediate vicinity of plaintiff's property, impeding travel on the sidewalk and interfering with plaintiff and her customers in getting to and from her place of business," constituted a nuisance. "That this is true is not open to discussion." *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719.

Abutting owner may enjoin trespass by village by extending highway beyond its true boundary and over such owners' land. *Parsons v. Rye*, 140 N. Y. S. 961.

<sup>38</sup> Equity has jurisdiction to en-

force by injunction the private rights of way arising to grantees from dedications of streets or roads in agreements and deeds. *United N. J. R. & C. Co. v. Crucible Steel Co.*, 85 N. J. Eq. 7, 95 Atl. 243, affirmed in 86 N. J. Eq. 258, 98 Atl. 1087.

Relief by injunction to remove obstruction of a street may be sought by person other than an abutting property owner. Street railway company may enjoin use of street by jitneys when such use constitutes a nuisance and such company can show special damage to itself thereby. *Memphis St. Ry. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179 S. W. 635, L. R. A. 1916B, 1143.

<sup>39</sup> Alabama. *Alabama Terminal R. Co. v. Bennis*, 189 Ala. 590, 66 So. 589; *Louisville & N. W. R. Co. v. Mauter* (Ala. 1917), 74 So. 932; *Florence v. Woodruff*, 178 Ala. 137, 59 So. 435, 186 Ala. 244, 65 So. 326, weighing scales; *Greil v. Stollenwerck* (Ala. 1918), 78 So. 79; *Cassimus v. Levystein*, 176 Ala. 365, 58 So. 280.

Arkansas. *Simon v. Pemberton*, 112 Ark. 202, 165 S. W. 297.

Georgia. *Adair v. Spellman Seminary*, 13 Ga. App. 600, 79 S. E. 589.

Kentucky. *Nieten v. Kimsey*, 177 Ky. 817, 198 S. W. 203.

Montana. *Iverson v. Dilno*, 44 Mont. 270, 119 Pac. 719.

Missouri. *Guitar v. St. Clair*, 238 Mo. 676, 142 S. W. 291.

Maryland. *Baltimore & O. R. R.*

The maintenance of railroad tracks and the operation of cars thereon, without authority, has been enjoined at the suit of abutting property owners in some instances,<sup>40</sup> but where such use is duly authorized ordinarily the suit will be denied.<sup>41</sup>

Acquiescence and laches will sometimes cause a denial of an injunction in these actions.<sup>42</sup> On the other hand,

Co. v. Gilmor, 125 Md. 610, 94 Atl. 200.

New York. *Politis v. Times Square Imp. Co.*, 154 N. Y. S. 466, 168 App. Div. 814.

Oregon. *Bernard v. Willamette Box & Lumber Co.*, 64 Or. 223, 129 Pac. 1039.

Oklahoma. *Revard v. Hunt*, 29 Okl. 835, 119 Pac. 589.

Washington. *Humphreys v. Krutz*, 77 Wash. 152, 137 Pac. 806, injunction sustained to restrain threatened injury to alley.

West Virginia. *Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 652; *Davis Colliery Co. v. Harding* (W. Va. 1919), 98 S. E. 815.

Statutes authorize, suits by private persons injuriously affected by obstructions, etc., constituting nuisances. *Humphreys v. Dunnells*, 21 Cal. App. 312, 131 Pac. 761.

One property owner cannot enjoin the obstruction of a street by another property owner where street has never been so used or recognized by either of them. *Chapin v. Lake*, 116 Va. 364, 82 S. E. 89.

<sup>40</sup> Abutting property owners may enjoin construction of street railway where it appears that they are specially damaged and the railway company sought to be enjoined is not legally and properly vested with authority to lay their railroad. *International Lumber Co. v.*

*American Suburbs Co.*, 119 Minn. 77, 137 N. W. 395.

*Drake v. Chicago R. I. & P. Ry. Co.*, 136 Minn. 366, 162 N. W. 453, sustaining injunction against maintaining a commercial railroad in a public street, holding it an additional servitude "which a municipality as against private rights cannot authorize; and when a railroad, without condemnation, makes such use, one injured in his private right is entitled to relief against such use."

<sup>41</sup> *Birmingham Ry. Light & Power Co. v. Smyer*, 181 Ala. 121, 61 So. 354.

*Moore Mfg. Co. v. Springfield Southwestern Ry. Co.*, 256 Mo. 167, 165 S. W. 305, denying an injunction to prevent maintenance of railroad tracks in street and to compel their removal, mainly on ground of acquiescence and laches.

<sup>42</sup> *Moore Mfg. Co. v. Springfield Southwestern Ry. Co.*, 256 Mo. 167, 165 S. W. 305.

Injunction will not be granted at instance of adjoining owner to compel the removal of a building which encroaches on a street, when the owner stood by and permitted its construction altho he could have interfered to prevent it and his injuries can be compensated. *Lewis v. Pingree Nat. Bank*, 47 Utah 35, 151 Pac. 558.

it was held that an abutting owner was not barred by laches from suing to enjoin the maintenance of an obstruction in an alley because it was permitted to remain for some four years.<sup>43</sup>

So an injured property owner, it was held, was not prevented by prescription or estoppel because of delay in bringing an action to enjoin an obstruction of a street.<sup>44</sup>

### § 1377. Action by private person for damages.

Either an abutting owner or a private person,<sup>45</sup> may maintain an action for damages for an unlawful use or obstruction of a public way where the complainant has suffered special damages differing in kind from damages sustained by the general public,<sup>46</sup> e. g., impairment of

<sup>43</sup> *Simon v. Pemberton*, 112 Ark. 212, 165 S. W. 297.

<sup>44</sup> The same doctrine applies to a suit brought by a private person who has sustained special injuries from a public nuisance as to one brought by public authorities for the reason that a public nuisance cannot be unlawful as to the whole public and lawful as to its constituents. *Revard v. Hunt*, 29 Okl. 835, 119 Pac. 589.

<sup>45</sup> *Baines v. Marshfield & Sub. R. Co.*, 62 Or. 510, 124 Pac. 672; *Sandstrom v. Oregon-Washington Ry. & Nav. Co.*, 75 Or. 159, 146 Pac. 803.

Action by private person for destruction of trees or shrubs. *Kingsley v. Pounds*, 160 N. Y. S. 228, 96 Misc. Rep. 271; *Donahue v. Keystone Gas Co.*, 181 N. Y. 313, 73 N. E. 1108, 70 L. R. A. 761, 106 Am. St. Rep. 549.

Damages cannot be recovered where acts complained of did not increase the obstruction to travel. *Griffith v. Atchison, T. & S. F.*

*Ry. Co.*, 102 Kans. 23, 169 Pac. 546.

Compensation for injury suffered, held to be the only remedy where adjoining owner waited until structure was completed before complaining of the encroachment. *Lewis v. Pingree Nat. Bank*, 47 Utah 35, 151 Pac. 558.

<sup>46</sup> Section 1382, ante.

Private person cannot maintain action for damages from obstruction of highway unless he has sustained damages differing in kind from damages sustained by general public. *Warden v. Elroy*, 162 Wis. 495, 156 N. W. 466.

One who suffers special damage by reason of a public nuisance in a highway, and is himself free from contributory negligence may maintain a private action for such special damages. *McEniry v. Tri-City Ry. Co.*, 254 Ill. 99, 98 N. E. 227.

*Ford v. Phillips*, 159 Mo. App. 482, 141 S. W. 907, damages due to street improvements, held peti-

right of access,<sup>47</sup> of comfortable use and enjoyment of the premises,<sup>48</sup> or interference with the right to use the street as a temporary place of deposit of fuel and other articles for use on the premises, building materials, etc.<sup>49</sup>

The measure of damages will depend upon the circumstances of the given case.<sup>50</sup>

tioning for improvements would not work estoppel.

Obstructing a sidewalk so it cannot be used by placing the railing of a bridge thereon by the city, creates liability to action for damages by the abutting owner. *Russo v. Pueblo* (Colo.), 168 Pac. 649.

A railroad company cannot maintain a suit to abate the unauthorized operation of a competing railroad in the streets, since if operated unlawfully it is a public nuisance, and a private individual or corporation may maintain such action only by alleging and proving special injury. *Manhattan Bridge Three-Cut Line v. Third Avenue Ry. Co.*, 139 N. Y. S. 434, 154 App. Div. 704.

Where damage to, insignificant, injunction will be refused. *Folmar Mercantile Co. v. Luverne* (Ala. 1919), 83 So. 107.

<sup>47</sup> *Duy v. Alabama Western Ry. Co.*, 175 Ala. 162, 57 So. 724; *Maletta v. Oliver Iron Mining Co.*, 135 Minn. 175, 160 N. W. 771.

Damages by abutting property owner may be recovered for operation of a private tramway if the value of the property is decreased by interference with free access thereto. *Baines v. Marshfield & Suburban R. Co.*, 62 Or. 510, 124 Pac. 672.

Access cut off by railroad excavation allowed by city half a block

away, had approach from one side only and cut off from other, held injury peculiar to abutter justifying action for damages. "We cannot establish any hard and fast rule declaring how far along a street shall be extended an abutter's right to sue for damages to his close, resulting from obstructions not immediately in front of his building." *Sandstrom v. Oregon-Washington R. & Nav. Co.*, 75 Or. 159, 146 Pac. 803, 806, quoting from *Lewis on Eminent Domain* (3rd ed.) § 191, and *Robbins v. Scranton*, 217 Pa. 577, 66 Atl. 977, with approval, as follows: "The problem before the jury was to determine whether the effect of the improvement as a whole had been to work any proximate, immediate and substantial injury to the value of the real estate."

<sup>48</sup> *Wright v. Wabash R. R. Co.*, 174 Mo. App. 446, 454, 160 S. W. 549.

<sup>49</sup> Sections 1339, 1340, ante.

*Wright v. Wabash R. R. Co.*, 174 Mo. App. 446, 454, 160 S. W. 549.

<sup>50</sup> Damages measured by loss of profits in business due to obstruction of street may be recovered. *American Const. Co. v. Caswell* (Tex. Civ. App.), 141 S. W. 1013; *American Const. Co. v. Davis* (Tex. Civ. App.), 141 S. W. 1019.

Property owner may recover damages for interference with

### § 1380. Mandamus by individual.

If the duty of the proper officers to abate the nuisance and remove the obstruction is clear, ministerial, and not discretionary merely mandamus will usually lie.<sup>51</sup>

### § 1381. Injunction against enforcement of ordinance or interference with abutter.

A city has no right to grant an easement or right other than of a public nature in a public street. An individual who is specially damaged may enjoin the erection of an electric hoist across a public street although permission was given by the city.<sup>52</sup>

### § 1382. Necessity of special injury to entitle private person to sue and what is special injury.

As a condition precedent to an action by an abutting owner or a private person for damages or to abate an unlawful use or obstruction of a street, it must distinctly appear that he has suffered special damage or that his rights are injuriously affected<sup>53</sup> in a manner different

right of access from an abutting alley to an adjoining property and amount of damage to the depreciation in market value of the property. *Birmingham Ry. S. & P. Co. v. Long*, 5 Ala. App. 510, 59 So. 382.

<sup>51</sup> Mandamus to compel council to remove obstruction from public streets which constitute a public nuisance lies. *Harmon v. Parsons*, 81 W. Va. 197, 94 S. E. 135.

Mandamus to compel city officers to cause to be removed from streets the supports of overhead crossings maintained by railroad company under authority from the city, denied as city had not abused its discretion in permitting such obstructions. *Detamore v. Hindley*, 83 Wash. 322, 145 Pac. 462.

<sup>52</sup> *Royster Guano Co. v. The*

*Lumber Co.*, 168 N. C. 337, 84 S. E. 346. See § 1382, post.

<sup>53</sup> *People v. Harrison*, 253 Ill. 625, 97 N. E. 1092; *Lowe v. Lawrenceburg*, 177 Ind. 629, 98 N. E. 637.

*Alabama Great Southern Ry. Co. v. Barclay*, 178 Ala. 124, 59 So. 169, sustaining injunction for obstructing highway.

*Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 652, injunction to restrain maintenance of a porch or wooden awning extending to outer edge of sidewalk.

Property not abutting on street obstructed by base ball park. *Galveston Commercial Assn. v. Ort*. (Tex. Civ. App.), 165 S. W. 907, sustaining injunction.

Enjoining construction of steam railroad on showing of special

in kind from the general public,<sup>54</sup> although remote and consequential.<sup>55</sup>

The extent of the injury or damage ordinarily is not material so long as it is clearly shown that the plaintiff suffered or will suffer some substantial injury or damage which is not or will not be suffered by the community at large.<sup>56</sup>

It is sometimes a matter not entirely free from difficulty to determine what is and what is not such special injury or damage as will support an action by an individual. The true test seems to be whether the injury complained of is the violation of an individual right or merely a hindrance to the plaintiff in the enjoyment of the public right.<sup>57</sup>

damages and personal inconvenience, discomfiture, etc., irrespective of ownership of fee in street. *Orange v. Rector* (Tex. Civ. App.), 205 S. W. 503.

<sup>54</sup>*Bowe v. Scott*, 113 Va. 499, 75 S. W. 123; *Bozeman v. St. Petersburg* (Fla.), 76 So. 894; *Warden v. Elroy*, 162 Wis. 495, 156 N. W. 466.

Injury must be special and peculiar to plaintiff different in kind from that to which the public is subjected; it must be an invasion or violation of property rights of plaintiff as distinguished from that to which the public is injured. *Clough v. Sulphur*, 42 Okl. 216, 140 Pac. 1155.

Individual whose injury is different from that suffered by general public may enjoin obstruction of street. *Lewis v. Pingree Nat. Bank*, 47 Utah 35, 151 Pac. 558; *Tooze v. Willamette Valley S. Ry. Co.*, 77 Or. 157, 150 Pac. 252.

"In all cases to warrant a re-

covery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally." *Rigney v. Chicago*, 102 Ill. 64.

<sup>55</sup>No private action will lie for damages of the same kind as those sustained by the general public, but will lie for peculiar damages of a different kind, though remote and consequential. *Chicago v. Union Building Assn.*, 102 Ill. 379, 40 Am. Rep. 598.

<sup>56</sup>*Lewis v. Pingree National Bank*, 47 Utah 35, 151 Pac. 558, 561, building encroaching on street, whether a public nuisance.

<sup>57</sup>*Swain & Son v. Chicago, B. & O. R. R. Co.*, 252 Ill. 622, 97 N. E. 247, 38 L. R. A. (N. S.) 763.

### § 1383. Same—interference with right of access as special injury.

Obstructions or encroachments in streets<sup>58</sup> or alleys<sup>59</sup> which unreasonably hamper or destroy in whole or in part access are generally held to be such special injury or damage as will support a private action either at law or in equity.<sup>60</sup> Whether an encroachment or obstruction

<sup>58</sup> Greil v. Stollenwerck (Ala.), 78 So. 79; Cassimus v. Levystein, 176 Ala. 365, 58 So. 280; Porche v. Barrow, 134 La. 1090, 64 So. 918.

Adjacent property owners are particularly injured by use of street which entirely closes it to vehicles and pedestrians and they may enjoin such use. Stratton & Terstegge Co. v. Meriwether, 150 Ky. 363, 150 S. W. 381.

Action for damages due to obstruction of street by railroad and destroying plaintiff's ingress to and egress from his property. "In every case brought by an individual to recover damages for closing or obstructing a public street where a recovery has been denied the denial has been on the ground that the damages claimed was the same kind of damage that would be sustained by the general public. If the only injury appellee suffered were the inconvenience of having to travel a little further in going to and from his premises, his injury would be of the same kind though possible greater in degree than that of the general public. The right to travel the streets is one the public has a right to enjoy, but the right to use the street as a means of ingress to and egress from private property is a private right, and the property owner may maintain an action for interference

with that right." Gibbons v. Paducah & I. R. Co., 284 Ill. 559, 120 N. E. 500.

Injunction to abate embankment of earth entirely blocking a street will lie at suit of abutting owner. Poerche v. Barrow, 134 La. 1099, 64 So. 918.

<sup>59</sup> Anderson v. Landers-Morrison-Christensen Co., 127 Minn. 440, 149 N. W. 669,

<sup>60</sup> Humphreys v. Dunnells, 21 Cal. App. 312, 131 Pac. 761.

Access, held property right forbidding taking thereof without compensation. Tooze v. Willamette Valley S. Ry. Co., 77 Or. 157, 150 Pac. 252.

"Owners of property bordering on a street have, as an incident to their ownership, a right of access by way of the streets which cannot be taken away or materially impaired without compensation." Illinois Malleable Iron Co. v. Lincoln Park Comrs., 263 Ill. 446, 105 N. E. 336, 51 L. R. A. (N. S.) 1203.

"The owner of a town lot suffers peculiar and special damages, differing in kind from that to which the public is subjected by the obstruction of a part of a public street immediately in front of his premises, whereby ingress and egress, to and from such abutting property is prevented and such



which compels the abutting owner to take a more circuitous route in going to and from his property constitutes a peculiar and special damage to him is not uniformly answered by the decisions.<sup>61</sup>

**§ 1384. Same—obstruction of light, air and view as special injury.<sup>62</sup>**

owner may maintain a suit in equity to prevent or remove the common nuisance.” *Bernard v. Willametta Box & Lumber Co.*, 64 Or. 223, 129 Pac. 1039, 1041.

Right to reasonable means of ingress and egress is a private right, a right incidental to proprietorship, and therefore is different and distinct from any right enjoyed by other users of the public thoroughfare. *Wright v. Wabash R. R. Co.*, 174 Mo. App. 446, 454, 160 S. W. 549.

“Even though a public nuisance does not appear a private nuisance may be entailed, for it is clear that the right of an abutting owner, or one occupying such premises to access to and from the street is a private right in the sense that it is something different from the right which the members of the public have to use the street for public purposes. Conformably to this distinction and in part based upon it a person owning or in possession of premises abutting on the street whose right of access to the same is unreasonably or unlawfully obstructed may redress the wrong either at law or in equity.” *Re Heffron*, 179 Mo. App. 639, 654, 655, 162 S. W. 652.

<sup>61</sup> Required to take more circuitous route, as special injury. *Sandstrom v. Oregon-Washington*

*Ry. & Nav. Co.*, 75 Or. 159, 146 Pac. 803.

Obstruction in street some 250 feet from an abutting owner’s property line cannot be abated at suit of such abutting owner, notwithstanding such obstruction prevents travel on that street, and may be a public nuisance. “While some courts in other jurisdictions have held that the private right of access to the street appertaining to abutting property includes the right to travel along the street to certain other places within limits that thus far have not been satisfactorily designated, this court has consistently adhered to the doctrine that the right of access is the only right appurtenant to private property which is not included within such broad control as has been conferred upon the city to control and regulate the use of streets. We do not decide \* \* \* whether circumstances may not exist in which the right of access will be broader than the boundary lines upon the street of the private owner.” *Gorman v. Chicago B. & Q. R. R. Co.*, 255 Mo. 483, 392, 174 S. W. 509.

<sup>62</sup> *Alabama Terminal R. Co. v. Crawford*, 10 Ala. App. 296, 64 So. 650; *Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 682.

**§ 1385. Same—injury to business a special injury.**

Obstructions materially interfering with business operations on property abutting on a public way clearly constitute special injury.<sup>63</sup>

**§ 1386. Same—depreciation in value of property as special injury.<sup>64</sup>****§ 1389. Same—pleading special damages.**

The facts constituting the special injury must be pleaded.<sup>65</sup>

**§ 1389a. Action by state at relation of abutter.**

An action by a prosecuting attorney in the name of the state at the relation of an adjoining property owner to enjoin an obstruction of a sidewalk which was a public

<sup>63</sup> *Royster Guano Co. v. The Lumber Co.*, 168 N. C. 337, 84 S. E. 346; *American Const. Co. v. Caswell* (Tex. Civ. App.), 141 S. W. 1013; *American Const. Co. v. Davis* (Tex. Civ. App.), 141 S. W. 1019.

Number of persons confederated in combination, as through a conspiracy may be restrained from interfering with the business of another so as to entail a substantial injury to him, as persuading his patrons against their will or by means of violence or threats preventing them from having beneficial business intercourse with the person against whom the unlawful conspiracy is directed. *Re Heffron*, 179 Mo. App. 639, 654, 655, 162 S. W. 652.

<sup>64</sup> "It is well settled that the remedy by indictment is so efficacious that in case of public nuisances courts of equity will interfere, at the instance of a private individual, only when his private rights are so violated by such a

nuisance that he is subjected to substantial, serious and irreparable damage. He must suffer some private, direct and material damage beyond that which is suffered by the public at large and which but for the interference of equity, will be an irreparable injury to him. Mere diminution in the value of his property will not furnish a foundation for equitable relief." *Van Wegenen v. Cooney*, 45 N. J. Eq. 24, 16 Atl. 689, quoted with approval in *Van Marter v. First National Bank*, 87 N. J. Eq. 500, 100 Atl. 892, in denying injunction at suit of an abutting property owner to abate columns or pilasters encroaching on street.

<sup>65</sup> The abutter must allege special injury peculiar to him; mere inconvenience in going to and from his property is not sufficient. *Clough v. Sulphur*, 42 Okl. 216, 140 Pac. 1155.

nuisance was held to be a proper method to secure the rights of such owner.<sup>66</sup>

#### VIII. USE OF STREETS BY PUBLIC.

### § 1391. Public use is paramount: extent of use.<sup>67</sup>

Streets are among the things that are "public" and "for the common use."<sup>68</sup> The prime purpose of streets is use for travel by the public. The right of the public to the use of them is paramount to that of the abutting owner, or to that of any individual or corporation, no matter what may be the use to which he or it desires to devote a part of the street.<sup>69</sup>

The use of streets is restricted to the purposes for which they were established. They are to be so used as not to interfere unreasonably with the equal right of others to use them.<sup>70</sup>

Although as mentioned, the paramount purpose of streets is for travel, they may be used by children for

<sup>66</sup> State ex rel. Ellis v. Graham Paper Co., 173 Mo. App. 718, 160 S. W. 9.

<sup>67</sup> Dougherty v. Southern Cotton Oil Co. (Ark. 1919), 211 S. W. 179; People v. Western Cold Storage Co. (Ill. 1919), 123 N. E. 43.

<sup>68</sup> Le Blanc v. New Orleans, 138 La. 243, 70 So. 212; Daublin v. New Orleans, 1 Mart. (O. S.) 187; Shepherd v. Municipality No. 3, 3 Rob. (La.) 349, 41 Am. Dec. 269.

<sup>69</sup> Birmingham Ry. Light & Power Co. v. Smyer, 181 Ala. 121, 61 So. 354.

"The customary or usual and ordinary use of a street is for travel from one point to another by the usual and lawful modes of travel." Smiley v. East St. Louis & S. Ry. Co., 256 Ill. 157, 100 N. E. 157, affirming 169 Ill. App. 29

The public have a right to the

use of streets in the lawful and customary way, and cars should not be operated thereon at a rate of speed incompatible with such use. Savage v. Chicago & Joliet Electric Ry. Co., 238 Ill. 392, 87 N. E. 377; Chicago City Ry. Co. v. Touhy, 196 Ill. 410, 63 N. E. 997, 58 L. R. A. 270.

<sup>70</sup> Iverson v. Dilno, 44 Mont. 270, 119 Pac. 719.

"The streets and highways are for the use of all law-abiding people. To such they should be as free as the air, that whosoever will, having due regard for the rights of others, may travel them in the pursuit of his legitimate business, without hindrance or annoyance." Niles Bement Pond Co. v. Iron Moulders Union, 246 Fed. 851, 860, considering strike of workmen and picketing.

play, and drivers of vehicles especially motorcycles, automobiles and electric street cars are required to be on the lookout constantly for them.<sup>71</sup>

The use of streets for racing of any kind, of course, is an improper use.<sup>72</sup>

The public use extends to all parts of the streets; to the full width thereof,<sup>73</sup> and extends indefinitely upward and downward.<sup>74</sup>

New classes of vehicles may be used therein but they must not tend to destroy the street as a means of travel common to all.<sup>75</sup>

### § 1392. Relative rights of travelers in use of streets.

In the use of streets equality of rights obtains. The driver of a vehicle has no superior legal rights over a pedestrian in the use of a street. Each has a lawful and equal right to pass over or cross a street. In such circumstances the law imposes reciprocal obligations.<sup>76</sup>

These reciprocal obligations, as stated in a New Jersey case, are the offspring of elementary and familiar legal principles which, by reason of their soundness and wisdom, have become firmly imbedded in the law. In fact, it is a strict observance of those legal principles that tends to make our public highways passable and safe to the drivers of vehicles and pedestrians alike. The circumstance that new elements of locomotion, such as

<sup>71</sup> Section 1382C, post.

<sup>72</sup> *Rose v. Gypsum City* (Kan. 1919), 170 Pac. 348; *Burnett v. Greenville*, 106 S. C. 255, 91 S. E. 203.

<sup>73</sup> Sections 2742, 2743, post; §§ 2742, 2743, vol. 6, ante.

<sup>74</sup> *New Orleans v. Kaufman*, 138 La. 897, 70 So. 874, citing § 2775, vol. 6, ante; *Nessen v. New Orleans*, 134 La. 462, 64 So. 286, 51 L. R. A. (N. S.) 324.

<sup>75</sup> *Birmingham Ry. Light and Power Co. v. Smyer*, 181 Ala. 121, 61 So. 354.

<sup>76</sup> *Automobiles* have no greater rights in streets than pedestrians. *Terrill v. Walker*, 5 Ala. App. 535; *Kirchner v. Davis*, 183 Ill. App. 600; *Carradine v. Ford*, 195 Mo. App. 684, 700, 187 S. W. 285.

One in the management of a powerful, swift moving machine has no superior rights, to the use of a street against a pedestrian, attempting to cross it. *Jenkins v. Goodall*, 183 Ill. App. 633, 637.

electricity, steam, etc., have been added to vehicles using public highways, has not wrought any modification of those legal principles.<sup>77</sup>

Therefore, the general rule concerning the rights and reciprocal duties of travelers upon a street, the one on foot and the other in an automobile, or other vehicle, is that both have equal rights in the use of the street for travel in the usual manner, but that each in the exercise of his rights is bound to use ordinary care respecting the other, that is, such care as is commensurate with the existing conditions.<sup>78</sup>

<sup>77</sup> Pool v. Brown, 89 N. J. L. 314, 98 Atl. 262.

<sup>78</sup> United States. Patterson Transfer Co. v. Schlugleit (C. C. A.), 252 Fed. 359, 363, 364; Lane v. Sargent, 217 Fed. 237, 240, 133 C. C. A. 231.

California. Park v. Orbison (Cal. App. 1919), 184 Pac. 428; Brown v. Brashear, 22 Cal. App. 135, 133 Pac. 505.

Delaware. Brown v. Wilmington (Del. Super.), 90 Atl. 44.

Georgia. O'Dowd v. Newnham, (Ga. App.), 80 S. E. 36.

Illinois. Kercher v. Davis, 183 Ill. App. 600; Wortman v. Tratt, 202 Ill. App. 528.

Iowa. Rolfs v. Mullins (Iowa), 162 N. W. 783.

Massachusetts. Emery v. Miller (Mass. 1918), 120 N. E. 655; Crimmins v. Armstrong Transfer Co., 217 Mass. 155, 104 N. E. 257; Hennessey v. Taylor, 189 Mass. 583, 584, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396.

Michigan. Schock v. Cooling, 175 Mich. 313, 324, 141 N. W. 675.

Minnesota. Arseneau v. Sweet, 106 Minn. 257, 259, 119 N. W. 46.

New York. Baker v. Close, 214 N. Y. 92, 97 N. E. 501, affirming 121 N. Y. S. 1079, 137 App. Div. 529.

Rhode Island. Greenhalch v. Barker (R. I. 1918), 104 Atl. 769.

Texas. Vesper v. Lavender (Tex. Civ. App.), 149 S. W. 377.

Washington. Minor v. Stevens, 65 Wash. 423, 118 Pac. 313.

Wisconsin. Klokow v. Harbaugh, 166 Wis. 262, 164 N. W. 999.

The driver of a vehicle is required to use ordinary care, such care as prudent men ordinarily use in like circumstances, taking into account the time, place, the condition of the way, the possible danger, known obstructions, etc., but greater care is required where a street is crowded. Dickerson v. Brittingham, 4 Boyce (Del. Super.) 93, 86 Atl. 106.

"Travelers on our highways have mutual rights and owe mutual obligations to one another. One of those obligations is to use ordinary care to prevent collision. When a collision does occur it will not do to hold one party to a high degree of care and exempt the other from exercising any de-

The rule of equality of rights also applies to vehicles propelled by electricity or gasoline or horse,<sup>79</sup> however, if the horses should become frightened due care requires the automobile to reduce its speed or stop, if necessary, whether so required by law or not.<sup>80</sup>

The like rule also applies to automobiles and bicycles, but obviously the greater weight of the former, its capacity for high speed, etc., are elements to be considered in determining the amount of care in any given case.<sup>81</sup>

Motorcycles and pedestrians also have equal rights in the use of the street, but on approaching street intersections, turns in the street and foot crossings due care requires the former to give warning, and to run at a moderate rate of speed.<sup>82</sup>

While the rights and duties of automobiles and motorcycles are likewise reciprocal, conditions often require each to give warning at street crossings or intersections, or where the view is wholly or partially obstructed.<sup>83</sup>

gree of care whatever." *Lloyd v. Pugh*, 158 Wis. 441, 149 N. W. 150.

<sup>79</sup> Owners of motor vehicles licensed have no greater or lesser rights than owners of other vehicles used in streets. *Applewold Borough v. Dosch*, 239 Pa. 479, 86 Atl. 1070.

"The mere fact that automobiles are run by motor power and may be operated at a dangerous and high rate of speed gives them no superior rights on the highways over other vehicles, any more so than would the fact that one is driving a race horse gives such driver superior rights on the highway over his less fortunate neighbor who is pursuing his journey behind a slower horse. Highways are established and maintained at public expense, for the mutual benefit of all, and all persons have

a right to use them subject only to the duty which the law imposes upon them that they shall at all times exercise ordinary care and caution for their own safety and also for the safety of all others who are traveling thereon in the exercise of their lawful rights." *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; *Baker v. Close*, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487.

<sup>80</sup> *Tyler v. Hoover*, 92 Neb. 221, 138 N. W. 128.

<sup>81</sup> *Luther v. State*, 177 Ind. 619, 98 N. E. 640.

<sup>82</sup> *Wine v. Jones* (Iowa 1918), 168 N. W. 318.

<sup>83</sup> *Larsh v. Strasser* (Iowa 1918), 168 N. W. 142.

Vehicles of the several kinds and street railroad cars have equal rights in the use of streets.<sup>84</sup>

This equality of rights of the general or common law, of course, may be changed or modified by statute, charter, ordinance or street traffic regulations.<sup>85</sup>

Thus a municipality may prescribe locations for street crossings,<sup>86</sup> and give foot passengers in crossing streets or alleys at regular crossing so prescribed precedence or right of way over all vehicles.<sup>87</sup>

And laws may and generally do wisely exact of drivers of automobiles and motor vehicles a higher amount of watchfulness than drivers of horse-drawn vehicles.<sup>88</sup>

Although the rights of a pedestrian and a vehicle are equal and the duty to exercise due care according to the existing conditions in protecting the rights of the other is legally imposed,<sup>89</sup> which means that both driver

<sup>84</sup> Louisville and S. I. Traction Co. v. Lottich (Ind. App.), 106 N. E. 903, 905.

**Vehicle and street car.** "The street car, in its use of the street, is a part of the public, and every user, whether street car, vehicle or pedestrian, has the same equal and reciprocal right. Each is bound to take into consideration the rights of the other, and each is bound to exercise ordinary care for his own safety, and to prevent injury to others. \* \* \* While the driver of a vehicle and a pedestrian have an equal right with a street railway company upon a public street they have not at all times the same right upon the tracks of the street car company, and the use of the public must be such as not to hinder or interfere with the cars operated thereon." Lucas v. Omaha & Council Bluffs St. Ry. Co. (Neb. 1920), 177 N. W. 786; McKennar v. Omaha & C. B. St.

R. Co., 97 Neb. 281, 149 N. W. 826.

<sup>85</sup> Carson v. Turrish (Minn. 1918), 168 N. W. 349.

<sup>86</sup> Leach v. Asman, 130 Tenn. 515, 172 S. W. 303.

<sup>87</sup> Patterson Transfer Co. v. Schlugleit (C. C. A.), 252 Fed. 359, 363, 364; Leach v. Asman, 130 Tenn. 510, 515, 172 S. W. 303.

<sup>88</sup> Sections 1394, 1394A, post.

<sup>89</sup> Failure of pedestrian to get on curb, to avoid passing vehicle, held not negligence, per se. Brown v. Roberts & Bros., 138 N. Y. S. 833, 154 App. Div. 280, reversing 137 N. Y. S. 1112, 152 App. Div. 937.

A pedestrian on the sidewalk may assume an automobile will avoid striking him. Murray v. Liebmann (Mass. 1918), 120 N. E. 79.

Pedestrians not required to anticipate that automobile will go at unlawful and dangerous speed, yet

and foot passenger must be on the alert at all times and make reasonable use of all their senses,<sup>90</sup> the pedestrian has no right to obstruct street traffic.<sup>91</sup>

Thus a pedestrian traveling in the middle of the street must step to one side to permit a vehicle approaching from the front or rear to pass.<sup>92</sup>

It is sometimes apparent in view of existing exigencies that the driver is charged with a greater amount of care or the exercise of more vigilance than the pedestrian in order to have the former bound to a like standard of ordinary care, as the latter.<sup>93</sup>

#### § 1392a. Same—due care in general.

The obligation to refrain from endangering others entitled equally to use the streets is constant and can in no event be avoided.<sup>94</sup>

Thus leaving horses unfastened and unattended in the street clearly disregards the equal rights of others

if he knows this, he must use greater care to avoid being struck. *Rump v. Woods*, 50 Ind. App. 347, 98 N. E. 369.

Blind pedestrians, of course, must exercise ordinary care yet it may be the circumstances will require the automobile to slow down or stop to prevent injury and thus exercise the ordinary care, required by law in the exigencies. *McLaughlin v. Griffin*, 155 Iowa 302, 135 N. W. 1107.

Team driving on wrong side of street, without notice, at increase of speed, hit pedestrian, fixes liability. *Talbot v. Ginochio*, 18 Cal. App. 390, 123 Pac. 223.

Driving in excess of legal speed limit, held negligence. *Denver Omnibus & Cab Co. v. Mills*, 21 Coló. App. 582, 122 Pac. 798.

Negligently driving into pedestrian establishes liability. *Mugge*

*v. Brackin*, 63 Fla. 229, 234, 58 So. 128; *Goldring v. White*, 63 Fla. 298, 58 So. 367.

<sup>90</sup> *Livingstone v. Dale* (Iowa 1918), 167 N. W. 639.

<sup>91</sup> *Locke v. Greene* (Wash. 1918), 171 Pac. 245.

Pedestrian may cross between streets at pleasure, but cannot obstruct traffic by arbitrarily standing an unreasonable time, and requiring vehicle to get out of his way. *Bruce's Admr. v. Callahan* (Ky. 1919), 213 S. W. 557.

<sup>92</sup> *White v. Metropolitan Street Ry. Co.*, 195 Mo. App. 310, 191 S. W. 1122.

<sup>93</sup> *Weibe v. Rathjen Mercantile Co.* (Cal. App.), 167 Pac. 287.

<sup>94</sup> Operation of motorcycle at street intersection at a speed higher than permitted by ordinance, is negligence. *Dowdall v. Beasley* (Ala. App. 1919), 82 So. 40.



in the street, and is usually *prima facie* evidence of negligence.<sup>95</sup>

Likewise is the discharge of a solid substance, as a bundle from a moving vehicle in a careless manner, which strikes and injures a pedestrian.<sup>96</sup>

In the use of street so as not to interfere unreasonably with the equal rights of others to use them due care must be observed at all times. Thus where the street is narrow, or the traffic thereon is heavy, each traveler is obligated to exercise a high amount of care and be on the alert constantly to prevent collisions or blocking the way or crowding others unreasonably.<sup>97</sup>

So on approaching a street intersection or crossing that the traveler may not hamper unreasonably the proper use of the street by other travelers or injure any of them, a higher amount of care is demanded, especially where the traffic is heavy, than is required in traveling between streets or in districts where the traffic is light.<sup>98</sup>

That is to say, the amount of care to be invoked in the use of streets for travel in deference to the equal rights of others, is dependent chiefly upon the existing conditions:<sup>99</sup> the condition of the particular way, the surface thereof, its width, the amount and kind of traffic thereon, its relation to other streets, or private ways connecting and intersecting therewith; the movements of other travelers thereon at the time in question, whether on foot or in vehicles, the kind of vehicles, whether horse-drawn, manpushed, or propelled by electricity or gasoline, whether heavy or light vehicles, trucks heavily

<sup>95</sup> *Dooling v. New York*, 132 N. Y. S. 1012.

Failure to fasten horse left standing on public thoroughfare, when not proximate cause of injury. *Newman v. Barber Asphalt Paving Co.*, 190 Ill. App. 636.

<sup>96</sup> *Alexander v. Star-Chronicle Pub. Co.*, 197 Mo. App. 601, 198 S. W. 467.

<sup>97</sup> *Hackett v. Alamito Sanitary Dairy Co.*, 90 Neb. 200, 133 N. W. 227.

<sup>98</sup> *Heidenreich v. Bemmer*, 260 Ill. 439, 103 N. E. 275, affirming 176 Ill. App. 230.

<sup>99</sup> *Winner v. Linton*, 120 Md. 276, 87 Atl. 674.

loaded with goods and merchandise, or articles extending beyond the front or the rear, like lumber or iron rails; the weather conditions, whether clear or foggy, snowing or raining, rendering the surface of the street slippery; whether pedestrians are crossing at established crossings or unlooked for points, whether the foot passengers on the street are old or young, male or female, careful, on the alert, or indifferent to danger, whether singly or in groups, and accompanied by children being led, etc.; whether there are children at play tossing balls, hoops, on bicycles, etc., unmindful of the presence of danger. All such conditions should be carefully noted, to constitute due care, so that appropriate signals may be given when necessary, and the vehicle, particularly if an automobile, should be kept under constant control so that it may be slowed down or stopped if necessary in the shortest possible space and time, to avoid danger.<sup>1</sup>

In an effort to express a formula of due care of general application statutes and ordinances often recite, in substance, that every person shall ride or drive, or drive a vehicle in a careful manner with due regard for the safety and convenience of pedestrians and all other vehicles;<sup>2</sup> that no one shall drive at a greater rate of speed than is reasonable and proper, having regard to the traffic and the use of the public way. Nor shall one drive so as to endanger the life or limb or injure the property of any person.<sup>3</sup>

At crossing the traveler shall sound a signal to give warning to other vehicles and to pedestrians of his approach and shall not move at a greater rate of speed than is reasonably safe and proper, having regard to the rights of pedestrians and to the traffic and the use of intersecting ways.<sup>4</sup>

<sup>1</sup> Section 1394, post.

Automobile to stop on signal from horse drawn vehicle. *Union Transfer & Storage Co. v. Westcott Express Co.*, 140 N. Y. S. 98, 79 Misc. Rep. 408.

<sup>2</sup> *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155.

<sup>3</sup> *Berg v. Michell*, 196 Ill. App. 509, 513.

<sup>4</sup> *Switzer v. Baker*, 178 Iowa 1063, 160 N. W. 372, 374; *Weid-*

**§ 1392b. Same—law of the road—street traffic regulations.**

Reasonable regard for the rights of others in the proper use of the streets implies that the law of the road and all reasonable street traffic regulations designed for safety of travel should be observed,<sup>5</sup> as the speed limit,<sup>6</sup> lights at night, or when dark,<sup>7</sup> driving on the proper side of the way,<sup>8</sup> (which is usually practicable on city and town streets, but not always so on country roads),<sup>9</sup> except in certain contingencies where it may be necessary to turn to the left temporarily to avoid collisions.<sup>10</sup>

Vehicles going in opposite directions on meeting should seasonably pass to the right of the middle of the traveled

ner v. Otter, 171 Ky. 335, 188 S. W. 335.

<sup>5</sup> "Observance of the rule of the law of the road is becoming more important with the increasing use of steam, electric, and motor vehicles in the public highways." Morrison v. Clark (Ala.), 72 So. 305, 307, citing Berry on Automobile Law, (2nd ed.) § 119.

<sup>6</sup> Speed, as not faster than a named number of miles per hour within a district named, usually the business district, where the traffic during business hours is generally heavy; nor faster than a named number of miles in the residence district, where ordinarily greater speed is allowed, as the traffic in such district is not so heavy. Shilliam v. Newman, 94 Wash. 637, 162 Pac. 977, L. R. A. 1917D, 690.

Laws prescribe that a speed in excess of that provided shall be prima facie evidence of unreasonable speed. Berg v. Michell, 196 Ill. App. 509, 513; 514.

Speed limit of automobiles, § 935, ante; § 1394, post.

<sup>7</sup> Jacquith v. Worden, 73 Wash. 349, 132 Pac. 33, § 935, vol. 3, ante.

<sup>8</sup> Wagon on left side collided with motorcycle, held presumption of negligence against driver of wagon. Staton v. Western Macaroni Mfg. Co. (Utah 1918), 174 Pac. 821.

"A city ordinance requiring all vehicles to keep to the right of the center of the street in the direction in which they are going was properly admitted in evidence. While such ordinance is not per se evidence of negligence it may be considered in connection with the evidence of the case." Bell v. Jacobs (Pa. 1918), 104 Atl. 587.

<sup>9</sup> Bell v. Jacobs (Pa. 1918), 104 Atl. 587.

<sup>10</sup> Turning from the right hand to the left hand side of the way to avoid other vehicles, is not per se negligence. Peterson v. Pallis (Wash. 1918), 173 Pac. 1021.

part of the way, if practicable and no obstructions prevent.<sup>11</sup>

Sometimes on meeting due care requires one or the other to slow down or stop, as where it is not practicable to turn to the right.<sup>12</sup>

A driver on the wrong side of the way is bound to exercise a greater amount of care, to avoid collision, than if he should be on the proper side.<sup>13</sup>

Traffic rules of public thoroughfares whether based upon the law of the road, a statute or an ordinance, of course, are not inflexible rules.<sup>14</sup>

“Emergencies may arise where in order to escape from danger to one’s self or to prevent injury to others,

<sup>11</sup> Alabama. *Morrison v. Clark* (Ala.), 72 So. 305, 308.

Arkansas. *Carter v. Brown* (Ark. 1918), 206 S. W. 71.

California. *Slaughter v. Goldberg*, 26 Cal. App. 318, 147 Pac. 90.

Delaware. *Dickerson v. Brittingham*, 4 Boyce (Del. Super.) 93, 86 Atl. 106.

Kansas. *Giles v. Ternes*, 93 Kan. 140, 145, 143 Pac. 491.

Maine. *Skene v. Graham*, 114 Me. 229, 95 Atl. 950; *Neal v. Rendall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 669.

Missouri. *Hayden v. McColly*, 166 Mo. 675, 150 S. W. 1132.

N. Carolina. *Cohoon v. Davis*, 175 N. C. 145, 95 S. E. 36.

Pennsylvania. *Hazzard v. Carstairs*, 244 Pa. 122, 90 Atl. 556; *Foote v. American Product Co.*, 195 Pa. 190, 45 Atl. 943, 49 L. R. A. 764, 78 Am. St. Rep. 806.

Washington. *Segerstrom v. Lawrence*, 64 Wash. 245, 247, 116 Pac. 876.

“Persons on horseback or vehicles meeting each other on the

public roads shall give one-half of the same, turning to the right.” *Hubbard v. Bartholomew*, 163 Iowa 58, 144 N. W. 13, 15.

On meeting, to turn to right, but if impracticable on account of a pile of bricks that driver cannot pass on the right side, he may turn to the left. *Cutright v. Adams Express Co.*, 175 Ill. App. 269.

“Laws of the road,” means a driver shall turn to the right when meeting another on a public way. *Mattern v. Jenevein* (La. 1919), 82 So. 360.

<sup>12</sup> *Edwards v. Yarbrough* (Mo. App. 1918), 201 S. W. 972.

<sup>13</sup> *Hackett v. Alamito Sanitary Dairy Co.*, 90 Neb. 200, 133 N. W. 227.

Bicycle colliding with team on wrong side of street. *Stone v. Leritz*, 182 Mo. App. 315, 170 S. W. 400.

<sup>14</sup> *Borg v. Larson* (Ind. App.), 111 N. E. 201; *Neal v. Rendall*, 98 Me. 69, 56 Atl. 209, 63 L. R. A. 668.

it will not only be excusable but perfectly proper to violate temporarily the general rule.”<sup>15</sup>

When one vehicle overtakes another vehicle, both going in the same direction, and desires to pass it, and gives a signal or warning the overtaken vehicle should turn to the right as soon as practicable so as to allow free passage on the left for the other vehicle.<sup>16</sup>

Street traffic regulations generally prescribe rules as to the right of way of vehicles.<sup>17</sup>

For example, horse-drawn vehicles shall have the right of way over power-driven vehicles, street cars excepted. In specified districts vehicles going in a direction named, e. g., north or south, shall have the right of way, except where the traffic officers are stationed.<sup>18</sup>

Public vehicles, as fire engines and ambulances, usually are given the right of way over all other vehicles.<sup>19</sup>

Although not prescribed by law, precedence at street

<sup>15</sup> Elliott on Roads and Streets (3rd ed.) § 1081.

<sup>16</sup> Automobile overtaking a horse or vehicle. In such situation laws require horse or vehicle as soon as practicable to turn to the right so as to allow free passage on the left. Where there is a free passage on the left, the horse or vehicle is not required to go over to the extreme right hand side of the highway. *Tooker v. Fowler & Sellars Co.*, 132 N. Y. S. 213, 147 App. Div. 164.

A state law requiring the driver of a motor vehicle, when overtaken, to turn seasonably to the right of the center of the highway, allowing the other vehicle free passage to the left, held not to change the law of the road, nor conflict with an ordinance requiring all vehicles to keep to the right of the center of the street in the direction in which they are

going. “A regulation requiring vehicles to keep to the right of the center of the street may be practicable in cities, but not in the country districts while the rule of turning out to the right applies to both.” *Bell v. Jacobs*, 261 Pa. 204, 104 Atl. 587.

<sup>17</sup> Right of way given by ordinance. *Freeman v. Green* (Mo. App.), 186 S. W. 1166.

<sup>18</sup> *Shilliam v. Newman*, 94 Wash. 637, 162 Pac. 977, L. R. A. 1917D, 690.

<sup>19</sup> If law giving ambulance the right of way over other vehicles does not prescribe the rate of speed, etc., a hirer of an ambulance is to observe the same degree of care, including speed, as other vehicles. *Kellogg v. Church Charity Foundation*, 203 N. Y. 191, 96 N. E. 406, reversing 120 N. Y. S. 406, 135 App. Div. 839.

crossings may be established by custom. Where a vehicle is closest to or first on a street crossing or intersection it has the right of way.<sup>20</sup>

One having the right of precedence, whether given by law or established by custom, at a street crossing, when a vehicle is approaching from the intersecting street, is authorized to continue his course, and it is the duty of the other to yield such right of way.<sup>21</sup>

However, manifestly this right has proper application only where travelers or vehicles on intersecting streets approach the crossing so nearly at the same time and at such rates of speed that, if both proceed, each without regard to the other, a collision or interference between them is reasonably to be apprehended. Therefore, if a traveler not having such right of precedence comes to the crossing and finds no one approaching it upon the other street within such distance as reasonably to indicate danger of interference or collision, he is under no obligation to stop or to wait, but may proceed to use such crossing as a matter of right.<sup>22</sup> Sometimes a vehicle is not entitled to the full benefit of such regulations, e. g., where an automobile changes its course at a street intersection and the way is occupied by another vehicle, or where such vehicle is in such close proximity as not

<sup>20</sup> *Yuill v. Berryman*, 94 Wash. 458, 162 Pac. 513; *Berry Automobiles* (2nd ed.) § 140.

The one closest to a street intersection, apparently has the right of way and may go forward unless the law provides otherwise. *Mayer v. Mellette* (Ind. App.), 114 N. E. 241, 243; *Elgin Dairy Co. v. Shepherd*, 183 Ind. 466, 474, 108 N. E. 234, 109 N. E. 353.

Vehicle on street intersection first has right of way and vehicle crossing, of course, must recognize this and drive to avoid collision.

*Jahn & Co. v. Paynter*, 99 Wash. 614, 170 Pac. 132.

First at crossing, as between automobile and a horse-drawn vehicle. *Boggs v. Jewell Tea Co.* (Pa. 1919), 106 Atl. 781.

<sup>21</sup> Where one has the right of way there rests a greater duty upon the other than upon the one having the right of way to avoid a collision. *Shilliam v. Newman*, 94 Wash. 637, 162 Pac. 977, L. R. A. 1917D, 690.

<sup>22</sup> *Barnes v. Barnett* (Iowa 1918), 169 N. W. 365, 367.

to allow it to be stopped prior to arriving at the point of contact.<sup>23</sup>

Some laws in substance provide that on all public streets, etc., every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle approaching from his right. Such right, it has been held, is not exclusive, but at all times relative and still subject to the fundamental common law doctrine, *sic utere tuo ut alienum non laedas*. The law "was not intended to provide an exclusively hard and fast rule, applicable to all hazards and in all situations regardless of actual conditions, and thus liberate from responsibility one who by fortuitously adhering to the regulation may be otherwise reckless and indifferent to the situation of others lawfully exercising equal rights upon the highway but who may be subject to untoward and unlooked for situations beyond their control."<sup>24</sup>

**§ 1392c. Same—anticipation of usual street conditions—children.**

A traveler in the street is bound to anticipate those things which ordinarily occur. For example, the presence in the streets of other travelers equally entitled to use them.<sup>25</sup> So in driving from the street into a private driveway crossing a sidewalk, he is required to anticipate the presence of pedestrians on the sidewalk.<sup>26</sup> So in driving in the streets, he is bound to anticipate children at play in them, at the crossings, and on the sidewalks,<sup>27</sup> and that pedestrians will be using streets at regular crossings and at other points and he should

<sup>23</sup> *Clark v. Fotheringham*, 100 Wash. 12, 170 Pac. 323.

<sup>24</sup> *Paulsen v. Klinge* (N. J. Sup. 1918), 104 Atl. 95.

<sup>25</sup> *Zazana v. Neve Drug Co.* (Cal. 1919), 179 Pac. 203.

<sup>26</sup> *J. F. Darmody Co. v. Reed* (Ind. App.), 111 N. E. 317.

<sup>27</sup> *Di Maio v. Yolen Bottling Works* (Conn. 1919), 107 Atl. 497; *Ferris v. McArdle* (N. J. L. 1919), 106 Atl. 460; *Cressman v. Lakoff*, 263 Pa. 567, 107 Atl. 218; *Varcoe v. Lee* (Cal. 1919), 181 Pac. 223.

give them, or be ready to give them, if necessary, reasonable warning of his approach.<sup>28</sup>

Pedestrians and drivers of vehicles in streets with railroad and street car tracks therein are bound to know that trains and street cars are passing over the tracks at intervals, more or less regular, and must be watchful for their own safety.<sup>29</sup>

In passing in front or at the rear of street car or vehicles, which obstruct the view wholly or in part, the traveler must anticipate other vehicles or moving objects in the street. In passing to the left of vehicles or street cars overtaken the traveler must anticipate vehicles or moving objects coming in the opposite direction, especially should he be on the alert where there are turns or curves in the street, and in such passing of overtaken vehicles at or near street crossings or intersections he must anticipate the presence of vehicles or pedestrians at these points. In approaching street cars slowing down or standing to drop or take on passengers, he must anticipate their presence on the sidewalk in the act of passing to the street car to board it.<sup>30</sup>

But, unusual things, he need not anticipate, as that a vehicle would enter the street from a private driveway without warning, and in disregard of street traffic regulations,<sup>31</sup> or that an automobile would back without warning,<sup>32</sup> or that an automobile parked or standing along the curb would run into the street without warning, or that a vehicle would drive on the wrong side of the street.<sup>33</sup>

Nor is a street car operator bound to anticipate that an automobile truck running in the same direction as

<sup>28</sup> Coppock v. Schlatter, 193 Ill. App. 255.

<sup>29</sup> Dewez v. Orleans, R. Co., 115 La. 432, 39 So. 4331; State v. Cumberland, etc., R. Co., 106 Md. 529, 68 Atl. 197, 16 L. R. A. (N. S.) 297.

<sup>30</sup> Section 1394D, post.

<sup>31</sup> Hunter v. Mountfort (Me. 1918), 102 Atl. 975.

<sup>32</sup> Enstrom v. Neumoegen, 126 N. Y. S. 660.

In backing, driver should look backward and give warning. Shamp v. Lambert, 142 Mo. App. 567, 121 S. W. 770.

<sup>33</sup> Tront Auto Livery Co. v. People's Gas, Light & Coke Co., 168 Ill. App. 56.



the street car would without warning suddenly turn in front of the street car, and attempt to cross the car tracks.<sup>34</sup>

Nor is a driver after dark bound to anticipate a child of tender years (five) alone on the street and unprotected.<sup>35</sup>

Nor is a chauffeur ordinarily required to anticipate that a child would run into the street in front of his machine.<sup>36</sup>

While in the use of streets equality of rights obtains the duty of vehicle drivers to look out for children cannot be disregarded. The immaturity of the child, its lack of discretion and knowledge of danger and judgment to avoid it, impose such obligations.<sup>37</sup>

True, children in the street must exercise due care,<sup>38</sup> and such due care is to be measured by the existing condition and the prudence reasonably expected to be exercised by a child of the age of the one in question.<sup>39</sup>

<sup>34</sup> *Regan v. John L. Kelly Contracting Co.* (Mass.), 114 N. E. 726.

<sup>35</sup> *Pastore v. Livingston*, 131 N. Y. S. 971, 72 Misc. Rep. 555.

<sup>36</sup> *Sullivan v. Smith*, 123 Md. 546, 91 Atl. 456.

<sup>37</sup> *Mulhern v. Philadelphia Home-Made Bread Co.*, 257 Pa. 22, 101 Atl. 74; *Ehrlich v. New York*, 138 N. Y. S. 294, 78 Misc. Rep. 373.

Running over child in street. *Flood v. Keeley Brewing Co.*, 175 Ill. App. 441; *Long v. Ottumwa Ry. & L. Co.*, 162 Iowa 11, 142 N. W. 1008.

Rear wheels of reach wagon loaded with street track rails struck child, 3½ yrs. old. Held, no negligence in failing to have men to protect child. *Stuart v. Holyoke St. Ry. Co.*, 210 Mass. 240, 96 N. E. 683.

Vehicle struck child. *Schechter*

*v. Berger Mfg. Co.*, 131 N. Y. S. 1013, 147 App. Div. 733; *Bohringer v. Campbell*, 137 N. Y. S. 241, 154 App. Div. 879.

Running over baby in alley by wagon, held negligence was question of fact. *Troll v. Ehrler Drayage Co.*, 254 Mo. 332, 162 S. W. 185.

Failure to ascertain presence of children in street. *Herron v. High Ground Dairy Co.*, 138 N. Y. S. 3.

Automobile approaching children playing cannot expect them to exercise care that adults would exercise. *Rotchffe v. Speith*, 95 Kan. 823, 149 Pac. 740.

Automobile striking child at street crossing. *Moran v. Smith*, 114 Me. 55, 95 Atl. 272.

<sup>38</sup> *Marins v. Motor Delivery Co.*, 131 N. Y. S. 357, 146 App. Div. 608.

<sup>39</sup> *Shipelis v. Cody*, 214 Mass.

### § 1392d. Same—assumption that the other will exercise due care.

In the observance of due care in conformity to the rights of others, a traveler may rely in part on the assumption that others on the street will use due care,<sup>40</sup> and observe the law of the road and the street traffic regulations,<sup>41</sup> including the speed limit,<sup>42</sup> at least until it becomes apparent that negligence is shown.<sup>43</sup>

For example, one has a right to anticipate that a motor truck will continue on the proper side of the street;<sup>45</sup>

452, 101 N. E. 1071; Lucarelli v. Boston Elevated Ry. Co., 213 Mass. 454, 100 N. E. 632.

Child held to exercise such care as children of like age and intelligence are accustomed to exercise under like circumstances. Levesque v. Dumont, 117 Me. 262, 99 Atl. 719, following Moran v. Smith, 114 Me. 55, 95 Atl. 272, and Colomb v. Portland & Brunswick St. Ry., 100 Me. 418, 61 Atl. 898.

Whether a girl six years of age exercised the care and caution required who was struck by an automobile while crossing the street, held a question for the jury. Meserve v. Libby, 115 Me. 282, 98 Atl. 754.

<sup>40</sup> Di Iori v. Jordan Marsh Co., 211 Mass. 280, 97 N. E. 905.

One on sidewalk may assume automobile will avoid striking him. Murray v. Liebman (Mass. 1918), 120 N. E. 79.

Pedestrian may anticipate driver of an automobile will observe the law. Kaminski v. Fournier (Mass. 1920), 126 N. E. 279.

<sup>41</sup> Morrison v. Clark, 196 Ala. 670, 72 So. 305, 308.

<sup>42</sup> Pilgrim v. Brown, 168 Iowa 177, 150 N. W. 1; Park v. Orbison (Cal. App. 1919), 184 Pac. 428.

<sup>43</sup> As where pedestrian knows an automobile is running at an unlawful and dangerous rate of speed, when he must then use greater care to avoid being struck. Rump v. Woods, 50 Ind. App. 347, 98 N. E. 369.

"In the absence of knowledge to the contrary, one who is lawfully using a public street has a right to presume that others using it in common with him will use ordinary care to avoid injuring him, and in the absence of information or notice to the contrary, may presume that persons driving upon the street will not in so doing violate any law or ordinance, but will conform thereto." Cole Motor Car Co. v. Ludorff (Ind. App.), 111 N. E. 447, 449; Indianapolis St. R. Co. v. Hoffmann, 40 Ind. App. 508, 82 N. E. 543; Indianapolis St. R. Co. v. Bolin, 39 Ind. App. 169, 178, 78 N. E. 210; Louisville & S. Traction Co. v. Lottich (Ind. App.), 106 N. E. 903, 906.

<sup>45</sup> Elgin Dairy Co. v. Shepherd, 183 Ind. 446, 108 N. E. 234, 236, 237.

a pedestrian may assume the driver of an automobile will observe the law, e. g., in approaching street corners;<sup>46</sup> a bicycle rider has a right to anticipate that the law will be observed, and that a vehicle will not suddenly and without warning turn into his path;<sup>47</sup> a passenger about to board a street car may assume that an automobile driver will observe an ordinance requiring him to stop his machine when a street car is receiving and discharging passengers;<sup>48</sup> a pedestrian struck by an automobile when passing from in front of a standing street car had a right to assume the driver would observe the traffic regulation and keep on the proper side of the street, unless and until, in the reasonable use of his faculties he had reasonable cause to believe otherwise.<sup>49</sup>

So where a motorcycle overtakes a motor wagon and on the left side there is ample space to pass, the driver of the motor wagon may assume that the ordinance requiring passing on the left side will be obeyed and need not be on the alert to avoid a collision in expectation that the motorcycle would attempt to pass on the right when the motor wagon turned off on that side resulting in a collision.<sup>50</sup>

A traveler may reasonably expect that danger from vehicles arising only from due conformity with the law of the road.<sup>51</sup>

Hence, one on a motorcycle who fails to anticipate that on meeting an automobile at an intersecting street it would turn on the wrong side of the intersection in violation of law is not guilty of negligence.<sup>52</sup>

<sup>46</sup> *Off v. Crump* (Cal. App. 1919), 180 Pac. 360.

<sup>47</sup> *Vanneman v. Walker Laundry Co.*, 116 Mo. App. 685, 150 S. W. 1128.

<sup>48</sup> *Zimmermann v. Mednikoff*, 163 Wis. 333, 162 N. W. 349, 351.

<sup>49</sup> *Harris v. Johnson*, 174 Cal. 55, 161 Pac. 1155; *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078.

<sup>50</sup> *Borg v. Larson* (Ind. App.), 111 N. E. 201.

<sup>51</sup> *Trzetiatowski v. Evening American Pub. Co.*, 185 Ill. App. 451.

<sup>52</sup> *Heryford v. Spiteaufsky* (Mo. App. 1918), 200 S. W. 123.

So a pedestrian need not anticipate that an automobile driver will ignore due care, drive at an excessive rate of speed and approach on the wrong side of the street.<sup>53</sup>

So a pedestrian leaving the curb to board a street car need not anticipate that an automobile would attempt to pass the street car in violation of an ordinance.<sup>54</sup>

A traveler in the street may assume that other travelers therein will observe the law, e. g., one first reaching a crossing may assume that an automobile approaching on an intersecting street will run at a moderate speed, and be under full control. He is not required to anticipate and guard against the want of ordinary care on the part of another.<sup>55</sup>

One need not be on the alert for the violation of traffic regulations by other travelers.<sup>56</sup>

However, it is a sound rule that no one is entitled to rely wholly upon the duty cast upon others to exercise care and caution for his safety.<sup>57</sup>

The obligation to exercise due care is mutual and correlative. One may not disregard all the laws of prudence and at the same time require of his neighbor to observe caution in protecting him against his own imprudence. "If a traveler may rely to some extent on the assumption that care will be taken by the driver, the driver may also rely to some extent on the assumption that care will be taken by the traveler."<sup>58</sup> Neither a pedestrian or the driver of a vehicle "is called upon to anticipate negligence on the part of the other. It is no more the duty of a pedestrian continually to look out for approaching vehicles than it is the duty of drivers to look out for pedestrians. No pedestrian has a right to pass over a public thoroughfare without regard to approaching

<sup>53</sup> *Park v. Orbison* (Cal. App. 1919), 184 Pac. 428.

<sup>54</sup> *Ward v. Cathey* (Tex. Civ. App. 1919), 210 S. W. 289.

<sup>55</sup> *Simon v. Lit Bros.* (Pa. 1919), 107 Atl. 635; *Wagner v. Philadelphia Rapid Transit Co.*, 252 Pa. 354, 97 Atl. 471.

<sup>56</sup> *Pick v. Thurston*, 25 R. I. 36, 54 Atl. 600.

<sup>57</sup> *Roper v. Greenspon* (Mo. App.), 192 S. W. 149.

<sup>58</sup> *Knapp v. Barrett*, 216 N. Y. 226, 110 N. E. 428, reversing 144 N. Y. S. 1123, 160 App. Div. 877.

vehicles, nor has any vehicle the right to appropriate the public street for the purpose of transacting business without regard to its use by pedestrians." <sup>59</sup>

**§ 1392e. Same—pedestrians crossing streets.**

As mentioned, municipalities generally have power to prescribe the location of street crossings by pedestrians. Ordinances sometimes provide that foot passengers crossing streets or alleys at points marked out by ordinance as regular crossings shall have precedence or right of way over all vehicles. <sup>60</sup>

Pedestrians are not restricted to the use of established street crossings when they attempt to pass from one side of the street to the other. <sup>61</sup>

<sup>59</sup> *Stallman v. Shea*, 99 Minn. 422, 425, 426, 109 N. W. 824, approved in *Johnson v. Young*, 127 Minn. 462, 149 N. W. 940.

"There is no imperative duty resting upon pedestrians or upon travelers in a horse-drawn vehicle on public highways to keep a continuous lookout for automobiles, under penalty that if they fail to do so and are injured contributory negligence will be conclusively imputed to them." *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631; *Millsaps v. Brogdon*, 97 Ark. 469, 134 S. W. 632, 32 L. R. A. (N. S.) 1177.

<sup>60</sup> *Patterson Transfer Co. v. Schlugleit*, 252 Fed. 359, 364; *Leach v. Asman*, 130 Tenn. 510, 515, 172 S. W. 303; *Switzer v. Baker*, 178 Ia. 1063, 160 N. W. 372, 374; *Rolfs v. Mullins*, 179 Ia. 1223, 162 N. W. 783.

See § 2831, post; § 2831, vol. 6, ante.

Struck at street crossing by electric automobile, held negligence

of defendant a question of fact. *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

Driving at an intersection where the traffic is under the direction of a traffic policeman, in a lawful manner and as directed by such policeman is not negligence, although a pedestrian was struck while crossing the street. *Grimm v. Clark Delivery Car. Co.*, 199 Ill. App. 553.

<sup>61</sup> *Fox v. Great Atlantic & P. Tea Co.*, 84 N. J. L. 726, 87 Atl. 339.

Pedestrian may cross between streets at pleasure, but cannot obstruct street traffic. *Bruce's Admr. v. Callahan* (Ky. 1919), 213 S. W. 557.

Pedestrian crossing at point not regular crossing is not negligent as a matter of law. "A foot passenger has a right to cross a street at any point and is not restricted to the regular crossing." *Wine v. Jones*, 183 Ia. 1166, 162 N. W. 196, following *O'Laughlin v. Dubuque*, 52 Iowa 746, 3 N. W.

They have the right to cross at whatever point they elect, but in rejecting the established crossing they take upon themselves the risk of every danger arising out of municipal neglect that would have been avoided had they used the established crossing.<sup>62</sup>

One passing over a street at a point other than the regular crossing is required to exercise a greater amount of care for his own safety than if traveling over the regular crossing.<sup>63</sup>

While in one case the court did not decide whether it was negligence per se for a pedestrian to take the roadway, it said: "Nevertheless, when one does so he is bound to a high degree of care, and if a pedestrian goes further and deliberately selects the roadway of a city street for the purpose of walking longitudinally thereon, he is obligated to still greater care; in fact, one placing himself in such danger must be most vigilant to look after his own safety."<sup>64</sup>

Pedestrian's exercise of prudence in a choice of ways to escape a suddenly appearing automobile running at a high rate of speed, is to be determined by the presence of danger.<sup>65</sup>

### § 1393. No duty to stop, look and listen.

It is sometimes said that it is the duty of a foot passenger to look both ways before starting to cross a street

<sup>62</sup> modifying a ruling apparently to the contrary, 42 Iowa 539.

<sup>63</sup> *Watts v. Plymouth Borough*, 255 Pa. 185, 99 Atl. 470.

Pedestrians are not limited to a particular crossing; they may cross a street at any and all places. Have right to anticipate that drivers of vehicles—autos—will obey the law, e. g., passing vehicle going in same direction on left side. *Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961.

<sup>64</sup> *George Weidemann Brewing Co. v. Parmelee*, 167 Ky. 303, 180

S. W. 350; *Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 A. L. R. 1493; *Ferguson v. Reynolds* (Utah), 176 Pac. 267.

Newsboy struck by automobile at point not a regular street crossing. *Dougherty v. Metropolitan Motor Car. Co.*, 85 Wash. 105, 147 Pac. 655.

<sup>65</sup> *Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815.

*Citizen's Motor Car. Co. v. Hamilton*, 83 Ohio St. 450, 94 N. E. 1103.

particularly when the street over which he intends to pass is a busy thoroughfare in the heart of a business district of a populous city.<sup>66</sup>

However, it is generally held that the rule of "stop, look and listen" relating to a traveler about to cross a railroad has no application to pedestrians about to cross a street.<sup>67</sup>

Pedestrians and drivers of vehicles of all kinds, each recognizing the rights of the other, are required to exercise reasonable care, and such prudence and precaution as the attending circumstances may demand.<sup>68</sup>

Therefore, it may be affirmed that there is no invariable rule of law requiring one on foot about to cross a street to stop and look up and down such street.<sup>69</sup>

Nor is a pedestrian required as a matter of law to be constantly watching and listening for the approach of automobiles and other vehicles.<sup>70</sup>

<sup>66</sup> *Davis v. John Breuner*, 167 Cal. 683, 140 Pac. 586; *Niosi v. Empire Steam Laundry Co.*, 117 Cal. 257, 49 Pac. 185.

<sup>67</sup> Section 1393, vol. 3, ante.

<sup>68</sup> *Barbour v. Shebor*, 177 Ala. 304, 58 So. 276.

See §§ 1392D, 1392E, ante.

Pedestrian must be cautious, especially when crossing a crowded street, but need not exercise the degree of care required of footman at a railroad crossing. *Craft v. Stone* (Ind. App. 1919), 124 N. E. 473.

<sup>69</sup> *Kayser v. New York Mail Co.*, 133 N. Y. S. 440, 75 Misc. Rep. 474.

Failure of pedestrian to look the second time up and down a street he was about to cross, held not contributory negligence. *Redick v. Peterson* (Wash. 1918), 169 Pac. 804.

<sup>70</sup> *Patterson Transfer Co. v. Schlugleit*, 252 Fed. 359, 364;

*Hillebrant v. Manz*, 71 Wash. 250, 128 Pac. 892.

Pedestrians not guilty of contributory negligence for failure to look up and down the street to avoid an approaching automobile. *Johnson v. Johnson*, 85 Wash. 18, 147 Pac. 649.

Failure of one crossing street in front of street car, to look for automobile running in same direction as street car at high speed, and which was obscured by street car, is not per se negligence. *Citizen's Motor Car. Co. v. Hamilton*, 83 Ohio St. 459, 94 N. E. 1103.

"As a matter of law a pedestrian who is lawfully using a public thoroughfare need not be constantly looking or listening to ascertain if automobiles are approaching under the penalty that if he fails to do so and is injured that his failure conclusively charges him with negligence."

The extent to which one must look may not be defined in advance by any hard and fast formula, but must be measured by the circumstances of the particular case.<sup>71</sup> True, a pedestrian is not at liberty to ignore his sense of sight in crossing a street. He must use his eyes and thus protect himself from danger. The law does not say how often he must look, or precisely how far, or when or from where. If, for example, he looks as he starts to cross and the way seems clear he is not bound as a matter of law to look again. But one who crosses a city street without any exercise of his faculty of sight is negligent as a matter of law. To escape the consequences of such negligence he must prove that even if he had looked the accident would still have happened.<sup>72</sup>

A passenger alighting from a street car who fails to look for approaching vehicles, it has been held, is not negligent as a matter of law,<sup>73</sup> especially in view of a statute or ordinance forbidding vehicles from running

Harker v. Gruhl (Ind. App.), 111 N. E. 457, 549, approving and quoting from Robbins v. Springfield St. R. Co., 165 Mass. 30, 42 N. E. 334, distinguishing between the care at railroad crossing and that at street crossings.

"It is no more the duty of a pedestrian to look out continually for approaching vehicles than it is the duty of drivers to look out for pedestrians." Stallman v. Shea, 99 Minn. 422, 425, 109 N. W. 824.

<sup>71</sup> Knapp v. Barrett, 216 N. Y. 226, 110 N. E. 428, commenting on Moebus v. Herrmann, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440, and Baker v. Close, 204 N. Y. 92, 97 N. E. 501, 38 L. R. A. (N. S.) 487.

Pedestrian was struck at a crowded street crossing and the duty of the pedestrian is thus stated: "When about to attempt a street crossing at such a place

where danger is imminent and constant, pedestrians must take some precautions to guard against it. Something must be done to insure safety, and the failure to do so is such negligence as will prevent recovery in case of injury." Jones v. Wiese, 88 Wash. 356, 153 Pac. 330.

<sup>72</sup> Plaintiff was struck by a wagon after alighting from a street car. Knapp v. Barrett, 216 N. Y. 226, 110 N. E. 428, reversing 144 N. Y. S. 1123, 160 App. Div. 877.

<sup>73</sup> Wennell v. Dawson, 88 Conn. 710, 92 Atl. 663; Arseneau v. Sweet, 106 Minn. 257, 259, 119 N. W. 46, which was followed in Liebracht v. Crandall, 110 Minn. 454, 456, 126 N. W. 69.

To same effect, see Johnson v. Scott, 119 Minn. 470, 474, 138 N. W. 694.



within a prescribed distance of the steps of a street car when receiving and discharging passengers.<sup>74</sup>

### § 1393a. Persons at work on streets and policemen.

Persons working on the street are entitled to protection; the law does not require them to neglect their work to avoid the negligence of drivers of vehicles.<sup>75</sup>

The same rule is applied to policemen when on duty.<sup>76</sup>

### § 1394. Automobiles.

The automobile is recognized as an appropriate vehicle for use upon the streets,<sup>77</sup> in a proper manner, with due

<sup>74</sup> *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078; *Johnson v. Young*, 127 Minn. 462, 149 N. W. 94.

In passing street cars standing, to avoid passengers alighting therefrom, the automobile should be under control, and if necessary, it should stop. *Kerchner v. Davis*, 183 Ill. App. 600.

<sup>75</sup> *Burger v. Taxicab Motor Co.*, 66 Wash. 676, 120 Pac. 519.

Automobile backing out of garage without giving signal or warning, contrary to an ordinance, into a street sweeper; held negligence. *Ferguson v. Reynolds* (Utah), 176 Pac. 267.

It is not negligence for a street sweeper to have his eyes on his work and fail to see an automobile backing from a garage into the street, and striking him. *Ostermeier v. Kingman-St. Louis Imp. Co.*, 255 Mo. 128, 164 S. W. 218.

<sup>76</sup> Police officer, while on duty, was struck by an automobile. He was seen by the chauffeur and had the chauffeur exercised the reasonable care which the law imposed, the accident could have been avoided. The automobile was

driven at a high rate of speed and also on the wrong side of the street. The police officer "was undoubtedly required, in view of the performance of the work assigned to him to use reasonable care to prevent being run over. He was not however obligated to use the same degree of care that would be required of an ordinary pedestrian. The rule to be applied, in view of the work he was doing, is similar to that applied to persons who are employed by a municipality to work upon the public streets." *Fitzsimons v. Isman*, 151 N. Y. S. 552, 166 App. Div. 262; *O'Connor v. Union Ry. Co.*, 73 N. Y. S. 606, 67 App. Div. 99; *Volosko v. Interurban St. Ry. Co.*, 190 N. Y. 206, 82 N. E. 1090, 15 L. R. A. (N. S.) 1117.

<sup>77</sup> *Taylor v. Hoover*, 92 Neb. 221, 138 N. W. 128; *Fielder v. Davison*, 139 Ga. 509; *House v. Carmer*, 134 Iowa 374, 376, 10 L. R. A. (N. S.) 655; *Reaves v. Maybank*, 193 Ala. 614, 69 So. 137; *McCray v. Sharpe*, 188 Ala. 375.

The use of bicycles and automobiles upon streets and highways

care,<sup>78</sup> kept under control constantly,<sup>79</sup> run at a moderate, at least not excessive, rate of speed,<sup>80</sup> and operated in all respects in accordance with state and municipal police regulations.<sup>81</sup>

is a lawful means of travel. *Molway v. Chicago*, 239 Ill. 486, 88 N. E. 485, 23 L. R. A. (N. S.) 543, 16 Ann. Cas. 424.

<sup>78</sup> *Davis v. Maxwell*, 108 App. Div. (N. Y.) 128; *Murphy v. Meacham*, 1 Ga. App. 155.

<sup>79</sup> *Pool v. Brown*, 89 N. J. L. 314, 98 Atl. 262; *Baldwin's Admin. v. Maggard*, 162 Ky. 424; *O'Dowd v. Newnham*, 13 Ga. App. 220; *Larah v. Rinehart*, 243 Pa. 231; *Savoy v. McLeod*, 111 Me. 234, 88 Atl. 721.

"Automobiles are ponderous and dangerous machines possessing great power and speed, and therefore threaten imminent hurt in a highway if not properly controlled and conducted." *Bongner v. Ziegenhein*, 165 Mo. App. 328, 147 S. W. 182.

<sup>80</sup> *Grier v. Samuel*, 4 Boyce (27 Del.) 106.

"Driving a motor vehicle upon the highway in excess of the speed limit might be regarded as an unlawful use." *Smiley v. East St. Louis & S. Ry. Co.*, 256 Ill. 482, 100 N. E. 157, affirming 169 Ill. App. 29.

Nothing should be operated upon the streets incompatible with their use for travel in the usual ways. *Savage v. Chicago & Joliet El. Ry. Co.*, 238 Ill. 392, 87 N. E. 377.

Racing automobiles on streets. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237.

Laws forbid under penalty running an automobile or motor car

at a rate of speed in excess of that prescribed. *Spokane v. Knight*, 96 Wash. 403, 165 Pac. 105.

Racing in street is not proper use. *Rose v. Gypsum* (Kan. 1919), 170 Pac. 348; *Burnett v. Greenville*, 106 S. C. 255, 91 S. C. 203.

<sup>81</sup> "The use of a street by an automobile when operated with due care and caution and not in violation of state or municipal police regulations would be deemed a proper and lawful use." *Jenkins v. Goodall*, 183 Ill. App. 633, 637.

"The use of a street by an automobile when operated with due care and caution according to the police regulations of the state must be regarded as both a lawful and customary use of such street." *Smiley v. East St. Louis*, 256 Ill. 482, 100 N. E. 157, affirming 169 Ill. App. 29.

Operating automobile while under the influence of intoxicating liquor is made an offense. *Curtis v. Joyce*, 90 N. J. L. 47, 99 Atl. 932.

Drunkenness does not furnish an excuse for negligence, nor does it constitute negligence as a matter of law. *Powell v. Berry*, 145 Ga. 696, 89 S. E. 753, L. R. A. 1917A 306.

State law rendering an automobile owner liable for injuries due to the negligent operation thereof unless stolen from him, held unconstitutional. *Levyn v. Koppin*, 183 Mich. 232, 149 N. W. 993;

The automobile, therefore, not being of itself a dangerous machine,<sup>82</sup> nor classified with ferocious animals,<sup>83</sup> its mere operation or use in public streets is not a nuisance per se.<sup>84</sup>

Although regarded as a proper vehicle for use in public ways,<sup>85</sup> the automobile has no greater or less privileges and rights in the streets than other vehicles, except such as the law may ordain.<sup>86</sup>

The general recognition that unless operated with care its use in public thoroughfares introduces a new element of danger to travelers,<sup>87</sup> has led to the adoption and enforcement of certain police regulation especially applicable to motor vehicles.<sup>88</sup>

Thus laws often provide, in substance, that automobiles or motor vehicles shall be driven upon public ways in a careful and prudent manner, and at a rate of speed so as not to endanger the property of another, or the life or limb of any person;<sup>89</sup> that in the operation of these machines the greatest amount of care that a very careful person would use under like or similar circumstances must be employed.<sup>90</sup>

*Dougherty v. Thomas*, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.), 699.

<sup>82</sup> *Landry v. Oversen* (Iowa 1919), 174 N. W. 255.

*Berry, Automobiles* (2nd ed.), Section 16.

"An automobile is a dangerous instrumentality when driven upon the highways in a careless and negligent manner, at least more so than a horse drawn vehicle. \* \* \* We are not now disposed to adopt the daring innovation, as a legal principle, that an automobile is, per se, a 'dangerous instrumentality.'" *Moore v. Roddie* (Wash. 1919), 180 Pac. 879, modifying statement in 174 Pac. 648.

Automobile as a dangerous in-

strumentality. *Hays v. Hogan*, 180 Mo. App. 237, 259, per *Farrington, J.*

<sup>83</sup> *Lewis v. Amorous*, 3 Ga. App. 50.

<sup>84</sup> *Fielder v. Davidson*, 139 Ga. 509; *Gaskins v. Hancock*, 156 N. C. 56; *Indiana Springs Co. v. Brown*, 165 Ind. 465, 1 L. R. A. (N. S.) 238.

<sup>85</sup> *Berry, Automobiles* (2nd ed.), Section 14, et seq.

<sup>86</sup> *Applewood Borough v. Doseh*, 239 Pa. 479, 86 Atl. 1070.

<sup>87</sup> Section 935, vol. 3, ante.

<sup>88</sup> Section 935, ante.

<sup>89</sup> *Young v. Dunlap*, 195 Mo. App. 119, 124, 125, 190 S. W. 1041.

<sup>90</sup> Under such law the automobile driver must look out for persons who fail to observe the ap-

What constitutes a proper amount of care and prudence under such law, or even without such law, depends upon the circumstances of each particular case.<sup>91</sup>

Obviously the driver of an automobile must take notice of existing street conditions, and propel his car according to such conditions. He must keep his machine under proper control,<sup>92</sup> especially on crowded streets,<sup>93</sup> be constantly on the alert to observe persons in the streets,<sup>94</sup> or about to cross them,<sup>95</sup> and use reasonable care to avoid collisions.<sup>96</sup>

The fact that under the traffic regulation a driver of an automobile may have the right of way does not relieve him from the duty to exercise reasonable care.<sup>97</sup>

Nor does the presence of a policeman to regulate the street traffic excuse the proper degree of care according to the existing conditions.<sup>98</sup>

#### § 1394a. Same—degree of care in operating.

While the duty of a driver of an automobile to exercise reasonable care is the same as that applicable to

proach of the machine. *Aronson v. Ricker*, 185 Mo. App. 528, 172 S. W. 641.

Ordinance making it unlawful to operate an automobile on the street "in a careless or reckless manner," held too indefinite to be capable of enforcement. *Hayes v. State*, 11 Ga. App. 371, 75 S. E. 523, 527.

<sup>91</sup> *Chrestenson v. Harms*, 38 S. D. 360, 161 N. W. 343, 346; *Bongner v. Ziegenhein*, 165 Mo. App. 328, 147 S. W. 182.

In a congested street an automobile ran over a boy. "Should use the care and caution which a careful and prudent driver would have exercised under the same circumstances." *Sommerman v. Seal*, 163 N. Y. S. 770, 176 App. Div. 598.

<sup>92</sup> *Ulmer v. Pistole*, 115 Miss.

485, 76 So. 522; *Healy v. Shedaker* (Pa.), 107 Atl. 842; *Craft v. Stone* (Ind. App. 1919), 124 N. E. 473.

<sup>93</sup> *Lorah v. Rinehart*, 243 Pa. 231, 89 Atl. 967.

<sup>94</sup> *Keely v. Schmidt and Ziegler* (La.), 76 So. 250, automobile truck.

<sup>95</sup> Sections 1392E, 1393, ante.

<sup>96</sup> *Pool v. Brown*, 89 N. J. L. 314, 98 Atl. 262.

A driver who saw two boys trailing on a box behind a wagon some fifty yards ahead who ran his automobile into them, on a clear day, was properly held guilty of negligence. *Albert v. Munch*, 141 La. 686, 75 So. 513.

<sup>97</sup> *Erwin v. Traud*, 90 N. J. L. 289, 100 Atl. 184.

<sup>98</sup> *Foster v. Frank Parmelee Co.*, 179 Ill. App. 21.

the drivers of other vehicles,<sup>99</sup> apart from a specific legal requirement of the exercise of greater precaution,<sup>1</sup> it is clear that the weight of the automobile, its capacity for speed, etc., ordinarily calls for a greater amount of care.<sup>2</sup>

That is to say, the more dangerous the character of the vehicle and the greater its liability to do injury to others, the greater is the amount of care and caution to be exercised by the person charged with the duty of its operation.<sup>3</sup>

Hence, the ordinary care required in operating an automobile in the public streets is such care as a reasonably prudent person would exercise under the same conditions and circumstances.<sup>4</sup>

<sup>99</sup> *Patterson v. Wagner* (Mich. 1919), 171 N. W. 356; *Leach v. Asman*, 130 Tenn. 510; *Berry, Automobiles* (2nd ed.), Section 127.

"The duty resting upon the driver of an ordinary horse-drawn vehicle to be watchful for the approach of automobiles to prevent injury from them is no greater than the duty resting upon the driver of automobiles to be watchful for travelers in other vehicles in order to prevent injuring them. The rights and duties of each in the premises are reciprocal." *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337, affirming 189 Ill. App. 631; *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224, 3 L. R. A. (N. S.) 345, 4 Ann. Cas. 396; *Towle v. Morse*, 103 Me. 250, 68 Atl. 1044; *Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875; *Burvant v. Wolfe*, 126 La. 787, 52 So. 1025, 29 L. R. A. (N. S.) 677.

In traveling by automobile the same general principles are applicable as to other vehicles upon the public highways. The driver

must use the same degree of care and caution. *Bona v. S. R. Thomas Auto Co.* (Ark. 1919), 208 S. W. 306, 308; *Carter v. Brown* (Ark.), 206 S. W. 71.

<sup>1</sup> Section 1394, ante.

Operation, same care as other vehicles, unless changed by statute. *Mark v. Fritsch*, 195 N. Y. 282, 88 N. E. 380, 22 L. R. A. (N. S.) 632, 133 Am. St. Rep. 800.

<sup>2</sup> *Williams v. Benson*, 87 Kan. 421, 124 Pac. 531; *O'Dowd v. Newnham*, 13 Ga. App. 220; *Domke v. Gunning*, 62 Wash. 629, 114 Pac. 436.

<sup>3</sup> *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *Christy v. Elliott*, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196, 3 Ann. Cas. 487; *Simeone v. Lindsay*, 6 Pennewill (Del.) 224, 65 Atl. 778; *Minor v. Stevens*, 65 Wash. 423, 118 Pac. 313, 42 L. R. A. (N. S.) 1178.

<sup>4</sup> *Saylor v. Taylor* (Cal. App. 1919), 183 Pac. 843; *Meserve v. Libby*, 115 Me. 282, 98 Atl. 754.

Driver of an automobile failing

The reasonable care demanded by the law in the operation of an automobile in the streets is to be ascertained in like manner as in the operation of other kinds of vehicles on the public way, namely, by the existing conditions: the surface of the street, whether smooth, rough, or slippery, due to rain, sleet, snow, water, oil, etc.;<sup>5</sup> the state of the weather, whether misty, foggy, clear, etc.; the time, whether day or night; the character, amount and movements of the traffic in the streets;<sup>6</sup> and particularly the nature of the instrumentality operated, the known dangers incident thereto, and the probability of injury;<sup>7</sup> and after due consideration of all the ma-

to exercise due care ran over pedestrian crossing a street. *Jenkins v. Goodsall*, 183 Ill. App. 633, 636, 637.

In driving about place where automobiles are parked, to be measured by care according to conditions. *Webster v. Motor Parcel Delivery Co.* (Cal. App. 1919), 183 Pac. 220.

<sup>5</sup> Condition of the weather, whether raining and if street is slippery, greater vigilance is required to constitute due care, especially on approaching street intersections. *Hartwig v. Knahwurst*, 178 Ill. App. 409.

Mere skidding of automobiles resulting in colliding with another, is not necessarily proof of negligence. *Rango v. Fennell*, 168 N. Y. S. 646.

Care approaching street intersection; streets were slippery. Driver knew automobile would skid on sudden application of the brakes; must take these into account with due regard to rights of travelers. *Schoepp v. Gerety* (Pa. 1919), 107 Atl. 317.

<sup>6</sup> Connecticut. *Irwin v. Judge*, 81 Conn. 492, 501, 71 Atl. 572.

Delaware. *Hannigan v. Wright*, 5 Pennewill 537, 541, 63 Atl. 234; *Grier v. Samuel*, 4 Boyce (Del. Super.) 106, 108, 86 Atl. 209.

Georgia. *Giles v. Voiles*, 144 Ga. 853, 856, 88 S. E. 207.

Minnesota. *Liebrecht v. Crandall*, 110 Minn. 454, 456, 126 N. W. 71.

Pennsylvania. *Lorah v. Rinehart*, 243 Pa. 231, 233, 89 Atl. 967.

Tennessee. *Leach v. Asman*, 130 Tenn. 510, 514, 172 S. W. 303.

W. Virginia. *Deputy v. Kimmell*, 73 W. Va. 595, 598, 80 S. E. 919.

Wisconsin. *Lanson v. Fond du Lac*, 141 Wis. 57, 60, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30.

<sup>7</sup> Measured by danger to be anticipated, having in mind high power, speed, etc. *Carter v. Brown* (Ark. 1918), 206 S. W. 71.

**"Ordinary care, as applied to the driver of an automobile, is such as prudent men in such occupation ordinarily use, taking into consideration the time, place, condition of the highway, weather, the character of the instrumental-**

terial conditions involved the ultimate question of negligence is frequently one of fact.<sup>8</sup>

An automobile driver in observing a pedestrian seeking to pass in front of his machine, to be within the law by the exercise of the care required by the situation, must give warning by horn or bell.<sup>9</sup>

In backing in a public way, to discharge the legal duty imposed, and thus avoid actionable negligence, the automobile driver must first look backward and give due warning or signal.<sup>10</sup>

ity employed, the presence of other travelers or vehicles upon the street, the extent to which the same is lighted, and many other facts and circumstances often present and necessary to be considered. Under the doctrine of the Wisconsin and Tennessee cases the duty of the driver of an automobile is to have the same constantly under such control and driven at a rate of speed that will enable him to stop within the distance objects are visible by the rays of its headlights. A failure to do this amounts to contributory negligence and the driver could not recover in case of injury resulting from a collision of the automobile with an object thus visible to the driver. It is the general rule that the driver of an automobile is required to use reasonable and ordinary care for his own safety, and cannot be held to the absolute duty of observing all defects and obstructions in the highway but must make such observations as the circumstances reasonably require." *Kendall v. Des Moines*, 183 Ia. 866, 167 N. W. 684.

Contributory negligence as to speed of automobile, *Rockett v.*

*Philadelphia*, 256 Pa. 347, 100 Atl. 826.

<sup>8</sup> *Pool v. Brown*, 89 N. J. L. 314, 98 Atl. 262; *Erwin v. Traud*, 90 N. J. L. 289, 100 Atl. 184; *Kuehne v. Brown*, 257 Pa. 37, 101 Atl. 77.

Warning required. *Dervin v. Frenier (Vt.)*, 100 Atl. 760.

Failure to turn car, as driver could and should, held negligence. *Hubbard v. Bartholomew*, 163 Iowa 58, 144 N. W. 13.

It is not negligence per se to tow one automobile with another on the street. *Wolcott v. Renault Selling Branch*, 162 N. Y. S. 496, 175 App. Div. 858.

<sup>9</sup> *Vannett v. Cole (N. D. 1919)*, 170 N. W. 663.

<sup>10</sup> *Arkansas. Texas Motor Co. v. Buffington*, 134 Ark. 320, 203 S. W. 1013.

*California. Sheldon v. James*, 175 Cal. 474, 166 Pac. 8, 2 L. R. A. 1493.

*Idaho. Holmes v. Standpoint & Interurban R. Co.*, 25 Idaho 345, 137 Pac. 532.

*Maine. Pease v. Gardner*, 113 Me. 264, 93 Atl. 550.

*Missouri. Shamp v. Lambert*, 142 Mo. App. 567, 121 S. W. 770.

*New York. Grudberg v. Ehret*,

An automobile driver is not justified in assuming that a young child (four years old), on the street will exercise proper care for its own safety.<sup>11</sup>

It is not negligence to drive an automobile on street car tracks, especially when the streets are impassable.<sup>12</sup>

**§ 1394b. Same—same—law of the road—traffic regulations.**

All reasonable police regulations uniform and applicable to all alike with a view of rendering the streets safe for public travel at all times, of course, are required to be observed in the operation of such, high power and rapid moving vehicles on the public thoroughfares,<sup>13</sup> as registration,<sup>14</sup> license,<sup>15</sup> signal equipment, horn, lights at

140 N. Y. S. 379, 79 Misc. Rep. 627; *Enstrom v. Neumoegen*, 126 N. Y. S. 660; *Curley v. Electric Vehicle Co.*, 74 N. Y. S. 35, 68 App. Div. 18.

*Utah. Ferguson v. Reynolds* (Utah), 176 Pac. 267.

*Washington. Westervelt v. Schwabacher*, 104 Wash. 418, 176 Pac. 545.

<sup>11</sup> *Ratcliffe v. McDonald's Admr.* (Va. 1918), 87 N. E. 307.

See § 1392C, ante.

Increased exertions are often required to avoid injuring children on the street. *Sullivan v. Smith*, 123 Md. 546, 91 Atl. 456.

<sup>12</sup> *Langford v. San Diego Electric Ry. Co.*, 174 Cal. 729, 164 Pac. 398.

<sup>13</sup> *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *State v. Scheidler*, 91 Conn. 234, 99 Atl. 492; *Buffalo v. Lewis*, 192 N. Y. 193, 84 N. E. 809; *Kelly v. James*, 37 S. D. 272, 157 N. W. 990; *Seattle v. Rothweiler*, 101 Wash. 680, 172 Pac. 825; *Kalich v. Knapp*, 73 Or. 558, 145 Pac. 22, reversing 142

Pac. 594; *Ex parte Bogle* (Tex. Cr. R.), 176 S. W. 1193; *Ex parte Kneedler*, 243 Mo. 632, 641, 147 S. W. 983, 40 L. R. A. (N. S.), 622 Ann. Cas. 1913C, 923; *St. Louis v. Hammond* (Mo. 1917), 199 S. W. 411.

<sup>14</sup> *Berry Automobile* (2nd ed.), Sections 44, 65; *Atlantic Coast Line R. Co. v. Weir*, 63 Fla. 74, 58 So. 641; *Koonorsky v. Quелlette*, 226 Mass. 474, 116 N. E. 243; *Wolford v. Grinnell*, 179 Ia. 689, 161 N. W. 686.

Display of registration number. *Com v. Butler*, 204 Mass. 11, 90 N. E. 360; *Com v. Boyd*, 188 Mass. 79, 74 N. E. 255.

Requiring a general distinctive number and a separate number for each motor car. *People ex rel. v. Hanna*, 136 N. Y. S. 162, 126 N. Y. C. R. 324.

Parking regulations. *Pugh v. Des Moines*, 176 Ia. 593, 156 N. W. 892.

<sup>15</sup> *Shaw v. Thielbahr*, 82 N. J. L. 23, 81 Atl. 497; *State v. Scheidler*, 91 Conn. 234, 99 Atl. 492.



night or when the day is dark;<sup>16</sup> speed limit;<sup>17</sup> rules of operation, as direction of street traffic policemen;<sup>18</sup> the law of the road, as keeping on the proper side of the street,<sup>19</sup> and usually close to the right hand boundary thereof when running.<sup>20</sup>

The common law, it appears, does not require the vehicle when running to be kept "as near to the right hand curb of a street as possible," as exacted by certain local traffic or ordinance regulations. Therefore, aside from statutory or ordinance requirement, merely driving a vehicle in the middle of a street, it has been held, is neither negligence in itself nor a fact from which negligence can be inferred.<sup>21</sup>

Ordinarily a driver of an automobile like the driver of other vehicles may assume that travelers will exercise due care and observe well known and established traffic regulations,<sup>22</sup> as driving on the proper side of the

<sup>16</sup> *Light. Ireson v. Cunningham*, 90 N. J. L. 690, 101 Atl. 49, Section 935, ante.

Display of light. *State v. Myette*, 30 R. I. 556, 76 Atl. 664.

Lights, etc., required at dark while operating, etc. *State v. Bixby* (Vt.), 100 Atl. 42.

Requiring all automobiles operated or driven upon the streets at night to display a light on the front and one on the rear. *Harlen v. Kraschel*, 164 Ia. 667, 146 N. W. 463.

<sup>17</sup> *Adler v. Martin*, 179 Ala. 97, 59 So. 597, 602; *Baraboo v. Dwyer*, 166 Wis. 372, 165 N. W. 297; *Com v. Kingsbury*, 198 Mass. 544, 88 N. E. 848, L. R. A. 1915E, 264, 127 Am. St. Rep. 513; *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917.

<sup>18</sup> *Texas Motor Co. v. Buffington*, 134 Ark. 320, 203 S. W. 1013.

Ordinance requiring under penalty driver to comply at all times with any direction by voice or

hand of the police, as to stopping, starting, approaching or departing from any place, the manner of taking up or setting down passengers or loading or unloading goods at any place, held void as giving officer arbitrary power, etc. *St. Louis v. Allen*, 275 Mo. 501, 204 S. W. 1083.

<sup>19</sup> *Buzick v. Todman*, 179 Ia. 1019, 162 N. W. 259.

<sup>20</sup> *Mauchle v. Panama-Pacific Inter. Expo. Co.* (Cal. App.), 174 Pac. 400; *Hiscock v. Phinney*, 81 Wash. 117, 142 Pac. 461; *Kelly v. James*, 37 S. D. 272, 157 N. W. 990.

<sup>21</sup> *Linstroth v. Peper* (Mo. App.), 188 S. W. 1125, 1127; *Yore v. Mueller Coal, etc. Transfer Co.*, 147 Mo. 679, 687, 688, 49 S. W. 855; *Cool v. Peterson*, 189 Mo. App. 717, 729, 175 S. W. 244.

<sup>22</sup> Section 1392D, ante; *Towle v. Morse*, 103 Me. 250; *Hennessey v. Taylor*, 189 Mass. 583, 3 L. R. A.

street,<sup>23</sup> or turning to the left in passing an overtaken vehicle.

One driving an automobile on the wrong side of the street must exercise a greater amount of care than if he should be driving on the proper side.<sup>24</sup>

Violating the law of the road resulting in injury to some person or property in the absence of evidence of circumstances tending to excuse by making such a course reasonably necessary, is generally held to be negligence as a matter of law, e. g., driving on the wrong side of the street.<sup>25</sup>

At least such conduct raised a presumption of negligence, but, of course, one's presence on the wrong side may be explained or justified,<sup>26</sup> as turning on that side to avoid an obstruction, or a part of the way dangerously out of repair, or an imminent collision, or any other fact reasonably tending to show a necessary choice of hazards in an emergency, would be sufficient to make such conduct, whether or not negligence a question of fact.<sup>27</sup>

Motor busses or jitneys run for hire are generally specified as a distinct class, and street traffic regulations applicable thereto differ in some respects from those established for ordinary private automobiles.<sup>28</sup>

(N. S.) 345; *Hiscock v. Phinney*, 81 Wash. 117, 142 Pac. 461; *Weber v. Swallow*, 136 Wis. 46.

Driver may assume travelers on street will observe due care to protect themselves against injury. *Campbell v. Walker* (Del. Super.), 78 Atl. 601.

Traveler need not anticipate the backing of an automobile without warning. *Enstrom v. Neumoegen*, 126 N. Y. S. 660.

<sup>23</sup> Ordinary care does not require anticipation that one coming in the opposite direction will violate the law, e. g., drive on the wrong side of the street. *Trout Auto Livery Co. v. People's Gas Light & Coke Co.*, 168 Ill. App. 56.

<sup>24</sup> One on proper side need use ordinary care only in view of the statute. *Heryford v. Spiteaufsky* (Mo. App. 1917), 200 S. W. 123.

<sup>25</sup> *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331; *Lloyd v. Calhoun*, 82 Wash. 35, 143 Pac. 458; *Perez v. Hartman* (Cal. App. 1919), 179 Pac. 706.

<sup>26</sup> *Hubbard v. Bartholomew*, 163 Iowa 58, 144 N. W. 13; *Riepe v. Elting*, 89 Iowa 82, 56 N. W. 285, 26 L. R. A. 769, 48 Am. St. Rep. 356; *Johnson v. Small*, 5 B. Mon (Ky.) 27.

<sup>27</sup> *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331.

<sup>28</sup> Section 935a, ante; *Allen v.*

On approaching street crossings, intersections, turns or curves and running corners or into another street, particularly where the view is wholly or partially obstructed, the driver must be on the alert constantly for travelers in vehicles of the several kinds of slow or rapid movement, push carts, etc., passengers on foot;<sup>29</sup> maintain a moderate speed;<sup>30</sup> observe the street traffic regulations and give timely warning when necessary of his

Bellingham, 95 Wash. 12, 163 Pac. 18; *Irwin v. Atlantic City*, 90 N. J. L. 99, 100 Atl. 565; *Jitney Bus Assn. v. Wilkes-Barre*, 256 Pa. 462, 100 Atl. 954; *State v. Shiffrin* (Conn. 1918), 103 Atl. 899; *Puget Sound Traction, etc. Co. v. Grassmeyer* (Wash. 1918), 173 Pac. 504; *Le Blanc v. New Orleans*, 138 La. 243, 70 So. 212.

Jitneys may be required to run on designated streets and excluded from others. *Peters v. San Antonio* (Tex. Civ. App.), 195 S. W. 989.

<sup>29</sup> *Carter v. Brown* (Ark. 1918), 206 S. W. 71; *Shields v. Fairchild*, 130 La. 648, 58 So. 497; *Ulmer v. Pistole*, 115 Miss. 485, 76 So. 522.

Instruction where pedestrian was struck by automobile at street intersection. *Baldwin v. Maggard*, 162 Ky. 424, 172 S. W. 674; *Johnson v. Young*, 127 Minn. 462, 149 N. W. 940.

Turning to left from one street into another where right side was so crowded with freight cars being loaded, etc., was held not negligence as a matter of law; automobile was going to left of the center of the intersection of the streets as laid off, but to the right of the intersection of the streets as defined by their customary use. Owner may leave the prescribed

route to avoid obstacles otherwise unavoidable. *Karpeles v. City Ice Delivery Co.* (Ala.), 73 So. 642, 646.

Crossings. *Molin v. Wark*, 113 Minn. 190, 129 N. W. 383.

Regulation as to turning of an automobile. *Oshkosh v. Campbell*, 151 Wis. 567, 139 N. W. 316.

Should look to rear before turning. *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542.

Traveler should act as an ordinary cautious person, e. g., if in driving an automobile on the street, he could have turned his car and allow another to pass so as to avoid a collision, he, of course, should do so, and if he fails therein, he is negligent. *Hubbard v. Bartholomew*, 163 Iowa 58, 144 N. W. 13, 16.

Where an automobile is turning into a street and the driver could and should stop his car, and failed to do so, but increased his speed and attempted to pass ahead of another car which resulted in collision, he is negligent as a matter of law. *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542.

<sup>30</sup> Speed at and on approaching street intersections. *Young v. Dunlap*, 195 Mo. App. 119, 19 S. W. 1041; *Windsor v. Bast* (Mo.

approach by the customary signals;<sup>31</sup> and have his car under proper control<sup>32</sup> so that on the shortest possible notice he can slow down or stop it, if required, to avoid a collision.<sup>33</sup>

Such standard of precaution is frequently declared by statute or ordinance.<sup>34</sup>

This measure of due care and watchfulness is particularly applicable when approaching foot crossings.<sup>35</sup>

App. 1917), 199 S. W. 722; Moyer v. Reddick, 20 Ga. App. 649, 93 S. E. 256; Hood & Wheeler Furniture Co. v. Royal (Ala.), 76 So. 965.

<sup>31</sup> Major Taylor & Co. v. Harding, 182 Ky. 236, 206 S. W. 285; Sullivan v. Smith, 123 Md. 546, 91 Atl. 456.

Signal upon approaching a crossing need not be given when "on" or "upon" the crossing. Rolfs v. Mullins, 179 Ia. 1223, 163 N. W. 232.

Failure to sound horn, is not negligence when driver had no reason to anticipate a child would run into the street in front of the machine. Sullivan v. Smith, 123 Md. 546, 91 Atl. 456.

Whether he should give warning of his approach depends upon existing conditions as to speed, obstructions of view, pedestrians, presence of other vehicles in the street, weather conditions, surface of street, etc. Thompson v. Fischer, 177 N. Y. S. 491.

Failure to turn to left at intersection, and collided with motorcycle, may be negligence. Martineli v. Bond (Cal. App.), 183 Pac. 463.

<sup>32</sup> Rothfeld v. Clerkin, 162 N. Y. S. 1056, 98 Misc. Rep. 192; Simon v. Lit Bros. (Pa. 1919), 635.

<sup>33</sup> Virgilio v. Walker, 254 Pa. 241, 98 Atl. 815.

At crossing, driver of automobile must be highly vigilant, have car under control so that on the shortest possible notice the car may be stopped, since pedestrians must be looked after. Anderson v. Wood (Pa. 1919), 107 Atl. 658.

Cutting corner, in violation of law of road, especially where traffic is congested, held negligence. Stubbs v. Molberget (Wash. 1919), 182 Pac. 936.

<sup>34</sup> Mitchell v. Brown (Mo. App. 1916), 190 S. W. 354, 356, 357.

<sup>35</sup> "It is the duty of the driver of an automobile himself, independent of the conduct and in-vehicles, to exercise reasonable caution and care as respects the safety of others in approaching and passing over foot crossing of city streets; this results from the well known danger attending the movements of automobiles in crowded streets. The amount of care and caution to be exercised by the driver is, of course, to be proportioned to the amount of travel, pedestrian and vehicular alike, that usually gathers and passes over particular crossings." Patterson Transfer Co. v. Schlugleit (C. C. A.), 252 Fed. 359, 363.

Section 1392E, ante.

However, between crossings in order to exercise the reasonable care the law exacts an automobile driver is not held to the same standard of vigilance, although, it is true, he must be on the look out constantly for the safety of others.<sup>36</sup>

Automobiles in meeting and passing in the observance of reasonable care are required to obey all statutory and ordinance regulations applicable.<sup>37</sup>

Aside from statutory or ordinance regulations, automobiles are governed by the same rules of the road as apply to other vehicles using a street, and among these rules generally recognized as a measure of the common law duty to use due care, is that which requires vehicles when approaching from opposite direction to pass, to keep to the right to avoid collision, and this rule applies at a street intersection.<sup>38</sup>

In passing a vehicle on the left side the automobile driver must exercise a degree of prudence to be measured by the circumstances, having in mind the high power of his automobile.<sup>39</sup>

In passing street cars or other vehicles, moving in the same direction the left side is the one usually prescribed.<sup>40</sup>

### § 1394c. Same—speed limit.

When a speed limit is fixed by law,<sup>41</sup> driving in excess

<sup>36</sup> *Virgilio v. Walker*, 254 Pa. 241, 98 Atl. 815; *Anderson v. Wood* (Pa. 1919), 107 Atl. 658.

<sup>37</sup> Law of the road prescribed by statute where automobiles pass traveling in opposite directions. *Rice v. Lowell Brick Co.*, 229 Mass. 53, 118 N. E. 185.

Instruction as to duty of driver as to turning to right. *Shugher v. Goldberg Bowen & Co.*, 26 Cal. App. 318, 147 Pac. 90.

<sup>38</sup> *Reitz v. Hodgkins* (Ind.), 112 N. E. 386.

<sup>39</sup> *Bishard v. Engelbeck*, 180 Iowa 1132, 164 N. W. 203,

<sup>40</sup> *Foster v. Curtis*, 213 Mass. 79, 99 N. E. 961; *Marsh v. Boyden*, 33 R. I. 519, 82 Atl. 393.

<sup>41</sup> *Ex parte Smith*, 26 Cal. App. 116, 146 Pac. 82; *Dervin v. Frenier* (Vt. 1917), 100 Atl. 760; *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041; *Chicago v. Walden W. Shaw Livery Co.*, 258 Ill. 409, 101 N. E. 588; *Chicago v. Kluever*, 257 Ill. 317, 100 N. E. 917; *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 Pac. 843; *Fletcher v. Dixon*, 107 Md. 420.

Fire department vehicle, held not

thereof is often presumptive,<sup>42</sup> or prima facie evidence of negligence,<sup>43</sup> or negligence per se,<sup>44</sup> dependent always, however, on the particular circumstances.<sup>45</sup> If the excessive speed was the proximate cause of the injury, legal liability is thereby established,<sup>46</sup> otherwise not.<sup>48</sup>

Keeping within the speed limit will not uniformly preclude negligence, since due or reasonable care is to be deduced from the existing conditions.<sup>49</sup>

bound by speed limit. *Devine v. Chicago*, 172 Ill. App. 246.

Motorcycle policemen, under certain traffic ordinances, have the right of way at street intersections, and are not limited to speed limit prescribed. *Clark v. Wilson* (Wash. 1919), 183 Pac. 103.

<sup>42</sup> *Schultz v. Starr*, 180 Iowa 1319, 164 N. W. 163; *Young v. Dunlap*, 195 Mo. App. 119, 190 S. W. 1041.

<sup>43</sup> *Mayer v. Mellette* (Ind. App.), 114 N. E. 241; *Hartje v. Moxley*, 235 Ill. 164, 85 N. E. 216.

<sup>44</sup> *Opitz v. Schenck* (Cal.), 174 Pac. 40; *Whaley v. Ostendorff*, 90 S. C. 281, 73 S. E. 186; *Riser v. Smith*, 136 Minn. 417, 162 N. W. 520; *Schaar v. Conforth*, 128 Minn. 460, 151 N. W. 275; *Ware v. Lamar*, 18 Ga. App. 673, 90 S. E. 364.

<sup>45</sup> *Livingstone v. Dole* (Iowa 1918), 167 N. W. 639; *Hubbard v. Bartholomew*, 163 Iowa 58, 144 N. W. 13, 16.

Operating automobile at speed of ten miles per hour in busy street when the wind shield was dim or obscured by rain is negligence. *Park v. Orbison* (Cal. 1919), 184 Pac. 428.

Imperfect control may be negligence, irrespective of speed. Speed is one element only. *Anderson v. Wood* (Pa. 1919), 107 Atl. 658.

<sup>46</sup> *Georgia. O'Dowd v. Newnham*, 14 Ga. App. 26, 80 S. E. 36.

*Illinois. Schumacher v. Meinrath*, 177 Ill. App. 530.

*Kentucky. Major Taylor & Co. v. Harding* (Ky. 1918), 206 S. W. 285.

*Minnesota. Riser v. Smith*, 136 Minn. 417, 162 N. W. 520.

*Missouri. Rowe v. Hammond*, 172 Mo. App. 203, 157 S. W. 880.

*N. Carolina. Taylor v. Steward*, 172 N. C. 203, 90 S. E. 134.

*Ohio. Schnell v. Du Bois*, 94 Ohio 93, 113 N. E. 664, L. R. A. 1918A, 710.

*Berry, Automobile* (2nd ed.), § 145.

Driving an automobile in a dense fog which prevented seeing another car beyond the hood of his machine at a rapid speed of 12 miles per hour, although the street was lighted, is negligence as a matter of law. *Albertson v. Ansbach*, 169 N. Y. S. 188.

<sup>48</sup> *Stubbs v. Edwards* (Pa. 1918), 103 Atl. 511; *Whaley v. Ostendorff*, 90 S. C. 281, 73 S. E. 186; *Singer v. Martin*, 96 Wash. 231, 164 Pac. 1105.

<sup>49</sup> *Livingstone v. Dole* (Iowa 1918), 167 N. W. 639.

*Berry, Automobiles* (2nd ed.), § 132.

Speed is one element of negli-

For example, striking a child on the street while running at a slower speed than permitted,<sup>50</sup> or driving in a dense fog which prevented seeing any object beyond the hood of the car,<sup>51</sup> may be negligence as a matter of law. The speed fixed by law is a maximum limit not to be exceeded at any time, and not a minimum speed at which automobiles may be run under all circumstances.<sup>52</sup>

**§ 1394d. Same—street cars receiving and discharging passengers.**

In approaching or passing street cars stopped to receive or discharge passengers, laws generally require the automobile to slow down or stop, if necessary, depending on the construction of the law to be applied to the existing conditions,<sup>53</sup> and to avoid danger such regulations should never be disregarded.<sup>54</sup>

gence only. *Anderson v. Wood* (Pa. 1919), 107 Atl. 658.

The reasonableness of the speed is to be tested by circumstances. Lower speed than law allows may be excessive. *Patterson v. Wagner* (Mich. 1919), 171 N. W. 356.

Due care as to speed is controlled by particular circumstances. It must be reasonable and such speed at which a reasonably prudent operator would run under like conditions. *Delfs v. Dimshee*, 143 Iowa 381, 122 N. W. 236; *Pannell v. Allen*, 160 Mo. App. 714, 142 S. W. 482.

To be due care, if the circumstances demand, it should be less than the law permits. *Curry v. Fleer*, 157 N. C. 16, 72 S. C. 626; *Opitz v. Schenck* (Cal. 1918), 174 Pac. 40.

Even six miles per hour is unreasonable through a crowd of children at play in a street. *Haake v. Davis*, 166 Mo. App. 249, 148 S. W. 450.

Excessive and unreasonable

speed of 25 miles per hour in a much-traveled thoroughfare may be negligence per se. *Grant v. Armstrong*, 55 Wash. 365, 104 Pac. 632.

<sup>50</sup> *Ahonen v. Hryszka* (Or. 1918), 175 Pac. 616.

<sup>51</sup> *Albertson v. Ansbacher*, 169 N. Y. S. 188.

<sup>52</sup> *Chrestenson v. Harms*, 38 S. D. 360, 161 N. W. 343, 346.

<sup>53</sup> *Hartnett v. Tripp* (Mass. 1918), 121 N. E. 17; *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078; *Grouch v. Heffner*, 184 Mo. App. 365, 171 S. W. 23; *Kolan-kiewiz v. Burke*, N. J. L., 103 Atl. 249; *Zimmermann v. Mednikoff*, 163 Wis. 333, 162 N. W. 349.

State law provided that the automobile should be operated with due care, and the ordinance required the driver to stop within ten feet of the street car, held laws consistent. *Mann v. Scott* (Cal. 1919), 182 Pac. 281.

<sup>54</sup> Passing a standing street car, in violation of an ordinance, held

The purpose of such regulation is by creating a zone of safety, to protect the many who use street cars as against the comparatively few who, in driving automobiles, might render ingress and egress from the former dangerous. Such provision modifies the doctrine of reciprocal rights in the streets in all cases falling within its terms, and obviates the necessity, if any theretofore existed, on the part of those boarding or leaving standing street cars, of looking out for approaching automobiles. In such case they have the right to presume that persons using so dangerous an agency as an automobile will perform their duty and obey the law and in the absence of reasonable ground to think otherwise they are not guilty of negligence in assuming freedom from a danger which can come only from such violation. Whatever the rule may be, aside from this requirement, such law imposes the duty of looking upon the automobile driver, and that of the passenger is diminished accordingly.<sup>55</sup>

Apart from statutory or ordinance requirement, it has been judicially asserted that such is the common law duty.<sup>56</sup>

negligence. *Ward v. Cathey* (Tex. Civ. App. 1919), 210 S. W. 289.

Rapid driving close to street car, held negligence. *Minor v. Mapes*, 102 Ark. 351, 144 S. W. 219.

Care in approaching from rear of standing street car. *McConnell v. Chicago Ry. Co.*, 198 Ill. 490.

Passenger on alighting from street car, held not guilty of contributory negligence for failure to look for approaching vehicle. *Wenell v. Davison*, 88 Conn. 710, 92 Atl. 663.

Struck by automobile while passing in front of street car. *Cool v. Peterson*, 189 Mo. App. 717, 175 S. W. 244.

Striking passenger as he stepped from behind a street car after alighting, the automobile giving no

signal or warning of its approach, held negligence of automobile driver was for the jury. *Johnson v. Johnson*, 137 Minn. 198, 163 N. W. 160.

<sup>55</sup> *Johnson v. Young*, 127 Minn. 462, 149 N. W. 940, approving *Medlin v. Spazier*, 23 Cal. App. 242, 137 Pac. 1078.

The passenger has the right of way. *Kling v. Thompson-McDonald Lumber Co.*, 127 Minn. 468, 149 N. W. 947.

<sup>56</sup> *Marsh v. Boyden*, 33 R. I. 519, 82 Atl. 393; *Arseneau v. Sweet*, 106 Minn. 257, 259, 119 N. W. 46; *Liebrecht v. Crandall*, 110 Minn. 454, 456, 126 N. W. 69; *Johnson v. Scott*, 119 Minn. 470; 138 N. W. 694.



**§ 1395. Action for personal injuries.**

Actions for personal injuries arising from the use of streets are numerous and present a great variety of questions relating to the law of negligence,<sup>57</sup> which, of course, it is not within the purview of this work to consider in detail. Only a few general principles relating to the care to be exercised by travelers in the streets properly fall within its scope. Obviously, a mere accident in a street, suffered by a traveler therein due to the act or omission of another traveler in using the street does not of itself create legal liability,<sup>58</sup> e. g., a collision resulting

<sup>57</sup> Care in riding horse, as to looking, etc. *Studer v. Plumlee*, 130 Tenn. 517, 172 S. W. 305.

Collision of wagon and street car. *Condon v. Chicago Rys. Co.*, 181 Ill. App. 330.

Drivers, of course, are not insurers against accident. *Barger v. Bissell*, 188 Mich. 366, 154 N. W. 107.

Collision of automobiles. *Chase v. Tingdale Bros.*, 127 Minn. 401, 149 S. W. 654.

Pedestrian struck by automobile while passing in front of street car. *Cool v. Peterson*, 189 Mo. App. 717, 175 S. W. 244.

Automobile driver must exercise the highest degree of care of a prudent person. *Williams v. Kansas City* (Mo. App. 1915), 177 S. W. 783.

Automobile colliding with child, where two occupants had joint control of same. *Judge v. Wallen*, 98 Neb. 154, 152 N. W. 318, L. R. A. 1915E, 436.

Guest of automobile owner, not liable for negligence of owner who drives the car carelessly. *Anthony v. Kiefner*, 96 Kan. 194, 150 Pac. 524, L. R. A. 1915F, 876.

Care in leaving motor truck in street. *American Express Co. v. Terry*, 126 Md. 254, 95 Atl. 1096.

In running automobile as to duty to stop when another car is approaching rapidly on a cross street. *Brown v. Mitts*, 187 Mich. 469, 153 N. W. 714.

Automobile colliding with bicycle. *Ude v. Fuller*, 187 Mich. 483, 153 N. W. 769; *Walterick v. Hamilton*, 179 Iowa 607, 161 N. W. 684.

Burden of proof of negligence. *Blalack v. Blacksher*, 11 Ala. App. 545, 66 So. 863; *Patterson v. Milligan*, 12 Ala. App. 324, 66 So. 914; *Travers v. Hartman* (Del. Super.), 92 Atl. 855; *Chase v. Tengdale Bros.*, 127 Minn. 401, 149 N. W. 654.

Pedestrian struck by automobile cutting a street corner. *Wilson v. Johnson*, 195 Mich. 94, 161 N. W. 924.

Child struck by automobile. *Sorsby v. Benninghoven*, 82 Or. 345, 161 Pac. 251.

Automobile striking a pedestrian. Application of last chance doctrine. *Twitchell v. Thompson*, 78 Or. 285, 153 Pac. 45.

<sup>58</sup> Inevitable accident caused by

from the skidding of an automobile after the brakes had been applied.<sup>59</sup>

Certain acts or omission in the use of streets when they are the efficient and proximate cause of the injury constitute negligence as a matter of law: <sup>60</sup> Reckless and careless riding and driving on a much traveled street; <sup>61</sup> running an automobile at an excessive rate of speed in violation of law; <sup>62</sup> careless driving of an automobile on a much traveled thoroughfare of a city at a rapid speed; <sup>63</sup> turning an automobile close to a corner at a rapid rate of speed; <sup>64</sup> automobile cutting a corner on the wrong side of a street at a rapid rate of speed; <sup>65</sup> turning in on wrong side of a street when there was no emergency, and striking one alighting from a street car; <sup>66</sup> running an automobile through a crowd of pedestrians at a street crossing; <sup>67</sup> failure to look or give warning or signal in backing an automobile; <sup>68</sup> failure of driver to see a wire hanging or sagging from a trolley pole, but on the contrary, driving into it and pulling down the pole which struck and killed a pedestrian; <sup>69</sup> running over a pedestrian crossing the street, due to failure of driver to exercise ordinary care, either in observing the pedestrian or

automobile creates no liability. *Bangher v. Harman*, 110 Va. 316, 66 S. E. 86.

<sup>59</sup> *Moir v. Hart*, 189 Ill. App. 566.

<sup>60</sup> Automobile hit pedestrian on street crossing, due to fact brakes of car were not kept in proper condition to stop the machine in case of emergency. Such omission, held negligence. *Allen v. Schutz* (Wash. 1919), 181 Pac. 916.

<sup>61</sup> *Lanson v. Fond du Lac*, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30; *Simons v. Gaynor*, 89 Ind. 165.

<sup>62</sup> *Ware v. Lamar*, 16 Ga. App. 560, 85 S. E. 824; *McGinnis v. Brumbelow*, 141 Ga. 97, 80 S. E.

553; *Cohn v. W. E. Cody Sales Stable Co.*, 14 Ga. App. 234, 80 S. E. 661.

*Berry*, *Automobiles* (2nd ed.), § 145.

<sup>63</sup> *Harker v. Gruhl* (Ind. App.), 111 N. E. 457.

<sup>64</sup> *Calahan v. Moll*, 160 Wis. 523, 152 N. W. 179.

<sup>65</sup> *Wilson v. Johnson*, 195 Mich. 94, 161 N. W. 924.

<sup>66</sup> *Allen v. Schultz* (Wash. 1919), 181 Pac. 916.

<sup>67</sup> *Crawford v. McElhinney*, 171 Iowa 606, 154 N. W. 310.

<sup>68</sup> *Sheldon v. James* (Cal.), 166 Pac. 8, § 1394, ante.

<sup>69</sup> *Hott v. New Haven*, 92 Conn. 29, 100 Atl. 498.

in managing his team;<sup>70</sup> running an automobile in a heavy fog at a rapid rate of speed when the driver could not see beyond the hood of his car;<sup>71</sup> driving an automobile on the wrong side of the street;<sup>72</sup> failure to operate an automobile with due care and caution, when it could have been so operated which ran over a pedestrian crossing a street;<sup>73</sup> failure of a chauffeur to turn an automobile and allow another to pass and thus avoid a collision, when he could have done so;<sup>74</sup> driving an automobile into a narrow space, at a busy street corner between the curb and a standing street car, receiving and discharging passengers, without warning by one familiar with the conditions, at night and during the "rush" hours;<sup>75</sup> on turning into street failure of a chauffeur to stop his car when he could and should have done so, but instead, increased his speed and attempted to pass ahead of another automobile which resulted in a collision.<sup>76</sup>

Whether certain acts or omissions in the use of streets which result in injuries to others constitute actionable negligence is generally a question of fact,<sup>77</sup> as running an automobile at a high rate of speed in a street;<sup>78</sup> an auto-

<sup>70</sup> *Cooper v. Kelly*, 131 Ark. 6, 198 S. W. 94.

<sup>71</sup> *Alberton v. Ansbach*, 109 N. Y. S. 188.

<sup>72</sup> *Johnson v. Heitman*, 88 Wash. 595, 153 Pac. 331; *Lloyd v. Calhoun*, 82 Wash. 35, 143 Pac. 458.

<sup>73</sup> *Jenkins v. Goodall*, 183 Ill. App. 633, 637.

<sup>74</sup> *Hubbard v. Bartholomew*, 163 Iowa 58, 144 N. W. 13, 16.

<sup>75</sup> *Sternfeld v. Willison*, 161 N. Y. S. 472, 174 App. Div. 842.

<sup>76</sup> *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542.

<sup>77</sup> *Ford v. Deigendesch*, 261 Pa. 247, 104 Atl. 573; *Davis v. Drennen Co.*, 189 Ala. 683, 66 So. 642; *Johnson v. Dekker*, 187 Ill. App. 240; *Elgin Dairy Co. v. Shepherd (Ind.)*,

108 N. E. 324; *Rosenberg v. Dahl*, 162 Ky. 92, 172 S. W. 113; *Matlack v. Sea*, 144 Ky. 749, 139 S. W. 930; *Heartsell v. Billow*, 184 Mo. App. 420, 171 S. W. 7; *Aronson v. Ricker*, 185 Mo. App. 528, 172 S. W. 642.

Collision of team and bicycle. *Coors v. Brock*, 22 Colo. App. 470, 125 Pac. 599.

Pedestrian kicked by horse, left unattended, and tied to rear of wagon. *Hope v. Valente*, 86 Conn. 301, 85 Atl. 541.

Pedestrian struck or killed by automobile. *Brown v. Thayer*, 212 Mass. 392, 99 N. E. 237; *Johnson v. Scott*, 119 Minn. 470, 138 N. W. 694.

<sup>78</sup> *Burns v. Kendall*, 96 S. C. 385, 80 S. E. 621.

mobile violating the speed limit;<sup>79</sup> automobile running into a bicycle from the rear;<sup>80</sup> automobile striking a six year old girl while crossing the street;<sup>81</sup> an automobile approaching a street crossing or intersection at an excessive rate of speed, especially where the view was obstructed in whole or in part, or so approaching without timely warning; failure to have an automobile under perfect control so that it may be slowed down or stopped, if necessary; driving an automobile over a pedestrian at a street crossing, without slowing speed or giving warning although advancing at signal of traffic policeman;<sup>82</sup> operating an automobile by a boy under age (13 years) in violation of a statute which ran over and killed a child;<sup>83</sup> driver operating an automobile while he was under the influence of intoxicating liquor resulting in throwing boy passenger out of the car and killing him;<sup>84</sup> driving an automobile around the end of a standing street car and striking a pedestrian;<sup>85</sup> automobile cutting a corner at a high rate of speed and running into a motorcycle;<sup>86</sup> running an automobile at night without a light.<sup>87</sup>

It is familiar elementary law that contributory negligence of the one injured in person or property will preclude recovery,<sup>88</sup> provided always that such negligence is

<sup>79</sup> Section 1394C, ante.

<sup>80</sup> *Keñt v. Trewargy*, 22 Colo. App. 441, 125 Pac. 128.

<sup>81</sup> *Meserve v. Libby*, 115 Me. 282, 98 Atl. 754.

<sup>82</sup> *Melville v. Rollwage*, 171 Ky. 607, 188 S. W. 638.

<sup>83</sup> *Taylor v. Stewart*, 172 N. C. 203, 90 S. E. 134.

<sup>84</sup> *Powell v. Berry*, 145 Ga. 696, 89 S. E. 753, L. R. A. 1917A, 306.

<sup>85</sup> *Bellinger v. Hughes*, 31 Cal. App. 464, 160 Pac. 838.

<sup>86</sup> *Reitz v. Hodgkins (Ind.)*, 122 N. E. 386.

<sup>87</sup> *Buford v. Hopewell*, 140 Ky. 666, 131 S. W. 502; *Zoltovski v. Gzella*, 159 Mich. 620, 124 N. W.

527, 26 L. R. A. (N. S.) 435, 134 Am. St. Rep. 752.

<sup>88</sup> *Legendre v. Consumers S. M. W. Mfg. Co. (La. 1920)*, 84 So. 517; *Hooper v. Adams Express Co. (Ill. 1919)*, 124 N. E. 445; *Bejach v. Colby (Tenn. 1919)*, 214 S. W. 869; *Mills v. Powers*, 216 Mass. 26, 102 N. E. 912; *Willis v. Harby*, 144 N. Y. S. 154, 159 App. Div. 94; *Lloyd v. Pugh*, 153 Wis. 441, 149 N. W. 150.

Automobile colliding with pedestrian. *Ludke v. Burch*, 160 Wis. 440, 152 N. W. 190, L. R. A. 1915D, 968; *Bishop v. Wight*, 221 Fed. 392, 137 C. C. A. 200; *Johnson v.*

the proximate cause thereof.<sup>89</sup> For example, where a pedestrian "walks heedlessly into danger without taking the most ordinary precautions for his safety,"<sup>90</sup> and is struck by an automobile under perfect control,<sup>91</sup> or where he steps from a sidewalk into the path of an automobile in the daytime, with nothing to obstruct his view, although he had defective eyesight, but which was unknown to the driver.<sup>92</sup>

Whether the conduct of the person injured in the use of the street constitutes such contributory negligence on his part as will bar recovery, dependent as it is on the existing conditions and whether a reasonable and prudent person would conduct himself in like manner under similar circumstances, is generally a question of fact.<sup>93</sup>

Johnson, 85 Wash. 18, 147 Pac. 649.

One automobile colliding with another. Brown v. Mitts (Mich.), 153 N. W. 714.

<sup>89</sup> Johnson v. Kansas City Home Tel. Co., 87 Kan. 441, 124 Pac. 528; Peterson v. Ballentine & Sons, 205 N. Y. 29, 98 N. E. 202, reversing 125 N. Y. S. 1140, 141 App. Div. 920; Larner v. New York Transportation Co., 133 N. Y. S. 743, 149 App. Div. 193; Harder v. Matthews, 67 Wash. 487, 121 Pac. 983.

<sup>90</sup> Davis v. John Breuner Co., 167 Cal. 683, 140 Pac. 586.

<sup>91</sup> Braud v. Taxicab Co., 129 La. 781, 56 So. 885; Dudley v. Raymond, 133 N. Y. S. 17.

<sup>92</sup> Provinsal v. Peterson (Miss. 1918), 169 N. W. 481.

Attempting to cross a public way transversed by a street car track without looking, held negligence. Legendre v. Consumers S. & M. W. Mfg. Co. (La. 1920), 84 So. 517.

<sup>93</sup> Iowa. Pilgrim v. Brown, 168 Iowa 177, 150 N. W. 1; Menefee

v. Whisler, 169 Iowa 19, 150 N. W. 1034.

Michigan. Ottaway v. Gutman (Mich.), 174 N. W. 127; Winkowski v. Dodge, 183 Mich. 303, 149 N. W. 1061.

Minnesota. Gronlund v. Cudahy Packing Co., 127 Minn. 515, 150 N. W. 176; Daly v. Curry, 128 Minn. 449, 151 N. W. 274.

Missouri. Driscoll v. Nelson, 185 Mo. App. 300, 170 S. W. 377.

New Jersey. Pool v. Brown, 89 N. J. L. 314, 98 Atl. 262; Ireson v. Cunningham, 90 N. J. L. 690, 101 Atl. 49.

Pennsylvania. Healy v. She-daker (Pa.), 107 Atl. 842; Lewis v. Wood, 247 Pa. 545, 63 Atl. 605.

Tennessee. Leach v. Asman, 130 Tenn. 510, 172 S. W. 303.

Washington. Sheffield v. Union Oil Co., 82 Wash. 386, 144 Pac. 529; Moore v. Roddie (Wash. 1918), 174 Pac. 648.

Duty to avoid defects in highway. Geise v. Mercer Bottling Co., 87 N. J. L. 224, 94 Atl. 24.

Automobile struck pedestrian.

One who does not neglect any thing which it was his duty to perform in the particular circumstances, or one who conducts himself in the circumstances as a reasonable, prudent person would cannot be said as matter of law to be guilty of contributory negligence.<sup>94</sup>

A street car passenger in transferring from one car to another at the evening rush hour was struck by an automobile. Her view was obstructed in the direction from which the automobile approached. "She looked in every direction that she could look, she used her faculties as well as conditions would permit." As she did all the law required of her, she was not guilty of contributory negligence.<sup>95</sup>

#### § 1395a. Same—violation of law.

In actions for personal injuries occurring in the streets, a violation of a law designed to promote safety of travel is negligence per se, or prima facie evidence of negligence,<sup>96</sup> or presumptive evidence of negligence, or at least

Miller v. Tiedemann, 249 Pa. 234, 94 Atl. 835; Gouin v. Ryder, 38 R. I. 31, 94 Atl. 670; Conrad v. Green (N. J. L.), 94 Atl. 390.

Newsboy struck by automobile at a point not regular street crossing. Dougherty v. Metropolitan Motor Car Co., 85 Wash. 105, 147 Pac. 655.

Pedestrian crossing street, of course, must make reasonable use of his senses to avoid danger. Tooker v. Perkins, 86 Wash. 567, 150 Pac. 1138.

Section 1392E, ante.

Question of plaintiff's contributory negligence is one of fact, in an action for injury due to automobile colliding against him while he was a pedestrian on the street, where it appears that he prudently entered upon the street crossing.

Patterson Transfer Co. v. Schlugleit, 252 Fed. 359, 364.

<sup>94</sup> Shilliam v. Newmann, 94 Wash. 637, 162 Pac. 977, L. R. A. 1917D, 690; Johnson v. Johnson, 85 Wash. 18, 147 Pac. 649.

<sup>95</sup> Sternfeld v. Willison, 161 N. Y. S. 472, 174 App. Div. 842, distinguishing Knapp v. Barrett, 216 N. Y. 226, 110 N. E. 428.

<sup>96</sup> Driving on wrong side of street, is prima facie evidence of negligence. Frank C. Weber Co. v. Stevenson Grocery Co., 194 Ill. App. 432, 436.

Violating a statute requiring keeping to the right side of the street by veering to the left side and colliding with a vehicle, held negligence. Buzick v. Todman, 179 Iowa 1019, 162 N. W. 259.

evidence of negligence,<sup>97</sup> the consequence of the violation depending solely on the existing conditions.<sup>98</sup>

The general rule is that the violation of a statute or a municipal ordinance passed in the interest of public safety is negligence as a matter of law where it is the proximate cause of the injury. Thus exceeding the speed limit which is the proximate cause of the injury creates liability.<sup>99</sup>

The rule in some states is that the violation of an ordinance is a breach of duty towards the person injured by such violation. It is presumptive evidence of negligence which if not excused by the circumstances shown is sufficient proof of negligence to support an award of damages to the injured person in an action based on such charge of negligence.<sup>1</sup>

<sup>97</sup> Briggs v. Lake Auburn Crystal Ice Co., 112 Me. 344, 92 Atl. 185.

<sup>98</sup> Violation of ordinance as to passing vehicle, keeping to left instead of right. Hamilton v. Larimer, 183 Ind. 429, 105 N. E. 43.

To be actionable the negligence, e. g., driving on the wrong side of the street, must be the proximate cause of the personal injury. Baillargeon v. Myers, 27 Cal. App. 187, 149 Pac. 378.

Vehicles, colliding, one on wrong side of street. Terrill v. Virginia Brewing Co., 130 Minn. 46, 153 N. W. 136, L. R. A. 1915E, 1028.

Passing with automobile on wrong side of street in violation of statute, as negligence. Herdman v. Zwart, 167 Iowa 500, 149 N. W. 631.

Negligence per se does not arise by mere failure to observe a traffic ordinance. However, it is otherwise where the plaintiff is one for whose benefit the ordinance was passed. Walters v. Seattle, 97 Wash. 657, 167 Pac. 124.

Failure to obey traffic ordinance as by keeping as near right hand curb as reasonably possible, which is the proximate cause of the injury, as a collision with a vehicle passing in an opposite direction, or a fact causing or contributing to the injury, constitutes negligence. Bullis v. Ball, 98 Wash. 342, 167 Pac. 942.

It is negligence per se to drive an automobile in violation of a statute. Driver was under age. However, violation must be proximate cause to create liability. Taylor v. Stewart, 172 N. C. 203, 90 S. E. 134.

Age of chauffeur fixed, violated, actionable only in the absence of negligence on the part of the one injured. Elmendorf v. Clark (La. 1918), 70 So. 557.

<sup>99</sup> Schnell v. Du Bois, 94 Ohio 93, 113 N. E. 664, 667, L. R. A. 1917A, 710.

<sup>1</sup> Harris v. Johnson, 174 Cal. 55, 161 Pac. 1155. See § 873, ante. § 873, vol. 2, ante.

### § 1395b. Same—same—by plaintiff.

Concerning the effect of the violation of a law by the one who sues, the general rule is that the violation of a statute or ordinance in the use of streets does not bar recovery for an injury sustained due to the negligence of another, unless such violation was the efficient and proximate cause thereof.<sup>2</sup>

The rule is based on the proposition that the relation of cause and effect must exist between the violation or unlawful act and the injury, that is, a causal connection must clearly appear. Thus failure to register an automobile as required by statute will not bar recovery for personal injury due to a defective street.<sup>3</sup>

So such failure will not preclude a recovery for an injury to an automobile due to a collision by reason of the negligence of another, since it is obvious that failure to register was not the cause of the injury.<sup>4</sup> However, this rule does not obtain in Massachusetts and Maine. In those states failure to register an automobile prevents recovery for defective highways,<sup>5</sup> or the negligence of others.<sup>6</sup>

The reason advanced is that the presence of an unregistered machine in the streets and highways is per se unlawful and against the rights of all other persons law-

<sup>2</sup> Section 874, ante; § 874, vol. 2, ante.

Driver of motorcycle colliding with an automobile at a street intersection while going at a speed greater than allowed by ordinance, which was the proximate cause of the collision, cannot recover. *Dowdell v. Beasley* (Ala. App. 1919), 82 So. 40.

<sup>3</sup> There was no showing of any casual connection between the accident and failure to register. "No authority need be cited in support of this proposition. \* \* \* The law as originally announced in Massachusetts and per-

haps some other states had never been recognized in this jurisdiction." *Walford v. Grinnell*, 179 Iowa 689, 161 N. W. 686.

<sup>4</sup> *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542.

<sup>5</sup> *Feeley v. Melrose*, 205 Mass. 329, 91 N. E. 306, 27 L. R. A. (N. S.) 1156, 137 Am. St. Rep. 445; *McCarthy v. Leeds*, 116 Me. 275, 101 Atl. 448.

<sup>6</sup> Automobile was not registered as law required; held barred from recovery for negligence of another motorist. *Crompton v. Williams*, 216 Mass. 184, 103 N. E. 298.



fully using the public ways. It is outside the pale of travelers, a wrong doer, a trespasser, a creator of a nuisance, and an outlaw.<sup>7</sup>

Putting out of view the Massachusetts doctrine, the absence of a license,<sup>8</sup> or a light, etc.,<sup>9</sup> cannot be invoked as a defense, unless such infractions of the law proximately contributed to the injury. There can be no recovery for

<sup>7</sup> "Because of the damages and harm to the public which the statute relative to the registration of motor vehicles was intended to prevent the legislature has enacted that an unregistered machine cannot legally be operated upon a public street. Under such circumstances it is a trespasser." *Rolli v. Converse*, 227 Mass. 162, 116 N. E. 507.

"If the machine was unregistered by the owner or dealer, its presence on the highway was in itself unlawful and against the rights of all other persons who were lawfully using the highway. It was 'outside the pale of travelers' and was an outlaw. *Dudley v. Northhampton Street Ry.*, 202 Mass. 43, 89 N. E. 25, 23 L. R. A. (N. S.) 561; *Holden v. McGillicuddy*, 215 Mass. 563, 102 N. E. 923, and because as a wrongdoer and creator of a nuisance the defendant is liable at least for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as the probable result of the act done and therefore was not the result of an act of negligence." *Koonowsky v. Quellette*, 226 Mass. 474, 116 N. E. 243.

<sup>8</sup> *Shaw v. Thielbahr*, 82 N. J. L. 23, 81 Atl. 497.

Motorcyclist had no license for

his machine. Held, no defense in action for collision with automobile. *Marquis v. Messier* (R. I.), 99 Atl. 527, following the doctrine of *Baldwin v. Barney*, 12 R. I. 392, 34 Am. Rep. 670.

To be available it must be the proximate cause of the injury. *Armstead v. Lounsberry*, 129 Minn. 34, 151 N. W. 542, L. R. A. 1915D, 628; *Briggs v. New York Central & H. R. R. Co.*, 72 N. Y. 26.

<sup>9</sup> Wagon and automobile collided. Lights visible from front and rear required by law. Wagon had no light but automobile had warning of its presence. Unless want of light was proximate cause of injury, it was not important. Warning light would not have prevented the collision, and hence its absence was not the efficient and proximate cause of the collision. *Roper v. Greenspon* (Mo. App.), 192 S. W. 149, 154, 155.

In collision of bicycle with automobile, held defense that bicycle had no license, lights, etc., was not sound unless such infractions of the law, proximately contributed to the injury. *Anderson v. Sterritt*, 95 Kan. 483, 148 Pac. 635.

Automobile was without light. If other driver could have seen him, absence of light is not important. *Ireson v. Cunningham*, 90 N. J. L. 690, 101 Atl. 49.

exceeding the speed limit if plaintiff's negligence was the efficient and proximate cause of the injury sustained.<sup>10</sup>

#### IV. VACATION, ABANDONMENT, ADVERSE POSSESSION AND ESTOPPEL.

### § 1396. Acquiring title to streets as against municipality by adverse possession.

The prevailing rule, supported by decision and statute, is that title by prescription cannot be acquired against a municipality, and hence, the rights of the public in streets cannot be lost by abandonment or adverse possession.<sup>11</sup>

<sup>10</sup> *Davis v. John Brenner*, 167 Cal. 683, 140 Pac. 586.

<sup>11</sup> *Hall v. Olean*, 143 N. Y. S. 664, 82 Misc. Rep. 300.

"No right can be acquired against the public by adverse possession," e. g., in a street. *Daly City v. Holbrook* (Cal. App. 1918), 178 Pac. 725.

Cannot obtain right to maintain a fruit stand on a street by adverse possession and claim title by prescription, because the statute provides: "Hereafter no right as against the public shall be acquired by any person \* \* \* by reason of the occupation or use of any public highway, street or alley, etc." *Pastorino v. Detroit*, 182 Mich. 5, 148 N. W. 231.

City cannot lose title by adverse possession under Missouri statute. *Laclede-Christy Clay Products Co. v. St. Louis*, 246 Mo. 446, 461, 151 S. W. 460.

The statute applies not simply to lands acquired by the public in fee but to lands dedicated to a city for streets and alleys. *Caruthersville v. Huffman*, 262 Mo. 367, 374, 171 S. W. 323.

"The great weight of authority in the United States is to the effect that title by prescription cannot be acquired against a city. The principles upon which this rule is founded is said to be that a city merely holds title to its streets and possession of them in trust for the general public, and has no authority to dispose of them or their use for other purposes, by lease, license, sale or gift. This is recognized as a general rule of law by most of the text-writers upon municipal corporations and with due notice of and deference to conflicting views in certain jurisdiction, is well stated in *McQuillin on Municipal Corporations*, vol. 3, § 1396, as follows (quoting most of section)" *Pastorino v. Detroit*, 182 Mich. 5, 148 N. W. 231, 233.

Although the dedication of streets and alleys to the public by plat was defective, because not submitted to the council the city by opening and improving the streets indicated on the plat accepted the dedication in full, and a property owner in the addition cannot acquire to an abutting alley

§ 1398. Same—doctrine of equitable estoppel.

While the doctrine of equitable estoppel is sometimes invoked in what are termed "exceptional cases,"<sup>12</sup> it is always applied, and wisely so, with much caution to municipal corporations in matters pertaining to their governmental functions.<sup>13</sup>

And where applied something more than the mere possession of a street or a part thereof by third persons is required.<sup>14</sup> Undoubtedly in the attempt to exercise its

by adverse possession. *Caruthersville v. Huffman*, 262 Mo. 367, 376, 377, 171 S. W. 323.

<sup>12</sup> Section 1398; vol. 3, ante.

"It is a mistake to assume that the doctrine of laches or delay, or the doctrine of estoppel, does not apply to a county or other municipal corporation. Indeed, it may be said that there is no state, or any of the political divisions of a state, against which the doctrine of estoppel or laches may not in certain instances be urged. If a transaction shows all the observances of the law, then the law itself will afford all the relief necessary and estoppel or laches need not be urged. It is only where there are irregularities by the officers and agents of the state or municipalities in the performance of certain rules imposed upon them by the constitution or law, that there is reason that they should not be allowed to insist that the act was improperly or irregularly done to the prejudice of those who, in good faith, have assumed, and acted upon the assumption, that the acts of such officers and agents were within their power to perform. The doctrine of estoppel is not only a very old doctrine, but it may be said, is one that has

grown with the growth of human affairs. It is a principle whose existence is not to be depreciated, for its enforcement not only prevents the commission of a wrong upon those who are innocent, but it teaches the moral lesson to all persons that they shall not today dispute the truth of what they said yesterday to the injury of others. Its foundation is laid in the obligation which every man is under to speak and act according to the truth of the case." Quoted with approval, in applying the doctrine of laches to a county, from *Hermann on Estoppel and Res Adjudicata*, § 14, in *Simpson v. Stoddard County*, 173 Mo. 421, 463, 464, 73 S. W. 700.

<sup>13</sup> Applicable "where right and justice demand it and where it is necessary to prevent wrong and injury being done to others." *Montevallo v. School District of Montevallo*, 268 Mo. 217, 224, 186 S. W. 1078.

<sup>14</sup> *Consumers' Co. v. Chicago*, 286 Ill. 113, 108 N. E. 1017; *Booth v. Prineville*, 72 Or. 298, 143 Pac. 994; *Portland v. Inman-Poulsen Lumber Co.*, 66 Or. 86, 133 Pac. 829, 46 L. R. A. (N. S.) 1211.

Planting trees and building fences are not such improvements

lawful powers, "a municipal corporation may encounter the preclusion of an estoppel under the same conditions which would make it a defense against an individual, if it should turn out that the *act* of the corporation was *irregularly* or *imperfectly performed* and that it would be against right and justice or a fraud to permit its disavowal against one who in good faith relied upon its validity and in consequence was injured. And this is as far as the rule has been carried in this state or any correct decisions elsewhere. No estoppel of any kind can ever arise in any case where the municipal corporation undertakes to do any act in violation of the general law or in contravention of its charter. Such an act would be in a strict sense *ultra vires* and, therefore, could not be the basis of any estoppel against its repudiation."<sup>15</sup>

In an exceptional case of one class of the public against another class property designated as a "public square" was granted to a village for the "full use and enjoyment" of the entire public forever. Subsequently by affirmative action entered upon its records the village endeavored to part with its title to such public square by granting it to a school district for school purposes, that is, attempted

as will work estoppel. *Kuehl v. Bettendorf*, 179 Iowa 1, 161 N. W. 28.

A city is not estopped from asserting title in a street by a written statement of its street commissioner that the ground was not a street, nor by an ordinance condemning the right of way for sewers and water pipes. *Laclede-Christy Clay Products Co. v. St. Louis*, 246 Mo. 446, 151 S. W. 460.

Neither the failure of city to prosecute a private person who encroaches upon a public highway, nor his occupancy thereof for a period of ten or twelve years without objection from the city which succeeded to the right of the state in the road, nor the assessment and

collection of taxes from him will estop the city from claiming the land. *Wright v. Doniphan*, 169 Mo. 601, 613-615.

Assessing and collecting taxes illegally on public property, as swamp lands, cannot constitute the bases for an estoppel in pais. *Senter v. Wisconsin Lumber Co.*, 255 Mo. 590; 613, 164 S. W. 501.

<sup>15</sup> *St. Joseph v. St. Joseph Terminal Rd. Co.*, 268 Mo. 47, 60, 186 S. W. 1080, dissenting opinion of Bond J., concurred in by Walker J., which is a terse statement of the rule. See *Ralston v. Weston*, 46 W. Va. 544, 555, 33 S. E. 326, 76 Am. St. Rep. 834, set out in note 75, p. 2975, § 1398, vol. 3, ante.

to make a deed to the school district and give it possession of the property. Thereupon, on the faith of such appropriation, the school district took possession of the property and erected thereon a school building at great expense, and for nearly thirty years thereafter continued to use it for public school purposes without objection on the part of the village authorities. After a lapse of about thirty years the village instituted a suit to recover the public square which it had thus attempted to vacate to the use of the school district.

Here the doctrine of equitable estoppel was properly applied, and the village denied the right to recover it for general public uses, so long as it continued to be used for school purposes.<sup>16</sup>

On the other hand, the same court made, in the opinion of the author, an unwise application of the doctrine in a suit by a municipal corporation to enjoin the obstruction of parts of streets by railroad tracks, turntables, round houses and water tanks, and to recover possession of such portions of the streets so used. The defendant railroad owned and occupied property on the streets involved, acquired by it after a vacation of the streets running through such property by the city. The streets, the portions of which were used by the railroad company were never vacated by the city, nor did the company at any time seek to obtain their vacation. The parts of the streets in question had been in possession of the company for some twenty-five years and upon which had been erected valuable and expensive improvements which were used in connection with its railroad shops and other facilities adjacent thereto.

<sup>16</sup> "While I recognize the general rule that estoppel cannot ordinarily be invoked against a municipal corporation, yet I think there is authority abundant to the effect that there may grow up in consequence of the acts of a municipal corporation rights of more persuasive force in the particular case than those of the public, and where justice requires it an equitable estoppel will be asserted even against such corporations; particularly in cases of this character where it is one class of the public as against another class." *Montevallo v. School District of Montevallo*, 268 Mo. 217, 223, 186 S. W. 1078.

The court said: "If ever the doctrine of equitable estoppel should be applied in a case brought by a municipal corporation the one at bar is a case for such application \* \* \*. The city stood and encouraged the defendant in the expenditure of more than one-half million dollars, all to the city's benefit and up-building. The city stood silently by until this property was mortgaged to secure its bonds, and until those bonds were in the hands of innocent parties. For the city to win would be to destroy the security of those bonds. To permit the city by a recovery in this suit to destroy defendant's valuable property is inequitable in the strongest and strictest sense. The public rights should not be allowed to destroy vast private rights under the peculiar facts we have here. There are many cases where public rights through the doctrine of equitable estoppel have been forced to give way to the more equitable rights of private parties."<sup>17</sup>

It will be observed that estoppel is here applied without the existence of any affirmative action on the part of the city whatever. The streets involved had been formally dedicated to the public; they had never been vacated but continued to be public streets. Without warrant of law or right the company took possession of parts of streets, upon which it erected expensive improvements, without objection on the part of the city. The city by sufferance permitted the unlawful occupancy, and after a period of years sought as trustee of the easements of these public ways to restore their free and unhampered use to the public. Because of non-action the city as trustee was held to be barred from the assertion of the public right therein not only, but in the teeth of express statute which in emphatic terms provided that the statute of limitations should not apply to "lands given, granted, sequestered or appropriated to public use—" <sup>18</sup> thus excluding effectually the defense of adverse possession—the property is lost to the public. Not, however, by the doctrine of ad-

<sup>17</sup> *St. Joseph v. St. Joseph Terminal Rd. Co.*, 268 Mo. 47, 55, 56, 186 S. W. 1080.

<sup>18</sup> *R. S. Mo.* 1909, § 1886.

verse possession in terms, but in effect only. The company in reliance upon the city's non-action, and its occupancy is permitted to secure title as against the public because such non-action is made to constitute an indisputable admission on the part of the city that, without semblance of form of law, or consideration, or affirmative action of any character whatever the title to the parts of the streets involved was transferred to the company indirectly (although the municipality was in any event without power to alienate such property directly) by the agency of equitable estoppel, since as expressed by the court, it would be contrary to justice and good faith to hold otherwise. In the terse language of the dissenting opinion such conclusion, "contravenes the settled law conserving the rights of a city to the use of the property held by it in trust for the people of the state, and wholly misconceives the true basis upon which in exceptional instances an equitable estoppel may be invoked against it, and has undertaken to apply that rule, as against a city, to a state of facts which would not make it applicable as against an individual." <sup>19</sup>

And the same court in an earlier case said that the wisdom of the statute forbidding the acquisition of lands appropriated to public use by adverse possession "has been so thoroughly justified by experience and so often applied by this court that it is now too late to assail it. There is greater reason why city streets should not be subject to destruction by nonuse or adverse possession than can be found applicable to any other kind of property. No other kind of public property is subject to more persistent and insidious attacks or is less diligently guarded against seizure." <sup>20</sup>

<sup>19</sup> *St. Joseph v. St. Joseph Terminal Rd. Co.*, 268 Mo. 47, 64, 186 S. W. 1080, dissenting opinion of Bond J., concurring in by Walker J.

<sup>20</sup> *Laclede Christy Clay Products Co. v. St. Louis*, 246 Mo. 446, 461, 151 S. W. 460; *Caruthersville v.*

*Huffman*, 262 Mo. 367, 374, 171 S. W. 323. See *Marshall v. Springfield* (Mo. 1920), 221 S. W. 17.

As to abandonment of street, and the necessity of affirmative action, see § 1399, post.

### § 1399. Abandonment.

The settled rule is that a street once established exists as such until discontinued according to law,<sup>21</sup> and, therefore, mere nonuser is not enough to constitute abandonment,<sup>22</sup> especially if unaccompanied by affirmative evidence of an intention to abandon.<sup>23</sup> Nor will nonuser coupled with failure to remove obstructions constitute abandonment.<sup>24</sup> So permitting a railroad to occupy part of a street is not of itself sufficient to show abandonment.<sup>25</sup> Likewise the construction by a railway company of a subway over a street and acquiescence in such use of the street for a period of thirty years does not constitute an abandonment of the street.<sup>26</sup>

“The question of the abandonment of a public road or

<sup>21</sup> *Preston v. Newton*, 213 Mass. 483, 100 N. E. 641. See *Marshall v. Springfield* (Mo. 1920), 221 S. W. 17.

<sup>22</sup> *Supe v. Alley*, 117 Va. 819, 86 S. E. 122; *C. & O. Ry. Co. v. Dayton*, 177 Ky. 502, 197 S. W. 969.

Nonuser for six years, held not abandonment. *Stockwell v. Dunkel*, 159 N. Y. S. 32, 174 App. Div. 481.

<sup>23</sup> *Schultz v. Stringer*, 168 Iowa 668, 150 N. W. 1063; *Holt v. Texas Midland R. R.* (Tex. Civ. App.), 160 S. W. 327.

<sup>24</sup> *Kuehl v. Bettendorf*, 179 Iowa 1, 161 N. W. 28.

The right of the city and the public to the use of the street cannot be lost by abandonment or adverse possession. *Laclede-Christy Clay Products Co. v. St. Louis*, 246 Mo. 446, 460, 461, 151 S. W. 460.

A statute providing that “non user by the public for a period of ten years continuously of any public road shall be deemed an

abandonment,” was held not applicable to streets. “There are greater reasons why city streets should not be subject to destruction by nonuser or adverse possession than can be found applicable to any other kind of property. No other kind of property is subject to more persistent and insidious attacks or is less diligently guarded against seizure.” *Ibid.*

Sections 1886, R. S. 1909, Mo., providing that nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public use, “applies not simply to lands acquired by the public in fee, but to lands dedicated to a city for streets and alleys.” *Caruthersville v. Huffman*, 262 Mo. 367, 171 S. W. 323.

<sup>25</sup> *Holt v. Texas Midland R. R.* (Tex. Civ. App.), 160 S. W. 327; *Baker v. Chicago R. I. & P. Ry. Co.*, 154 Iowa 228, 134 N. W. 587.

<sup>26</sup> *State ex rel. v. Public Service Com.*, 271 Mo. 270, 285, 197 S. W. 56.



highway is not an issue for a chancellor or a referee, but is peculiarly one of fact for a jury and determinable by evidence of matters in pais."<sup>27</sup>

### § 1401. Same—effect of statutory provisions.<sup>28</sup>

Mere delay in opening and improving a street is usually held not to constitute an abandonment,<sup>29</sup> unless the applicable law otherwise provides.<sup>30</sup>

To establish abandonment under a statute which provides for loss of a public easement after nonuse for six years, it must be shown that all public use has ceased for

<sup>27</sup> Ibid.

In a proceeding to enforce a grading ordinance the defense that the street was not existing, but had been abandoned raises a question of fact triable by jury. Should the verdict be adverse to such defense the court may proceed to enforce the ordinance. *Kansas City v. Smith*, 238 Mo. 323, 336, 141 S. W. 1103; *State v. Culver*, 65 Mo. 607, 609.

Where street has been legally closed there are no private street easements therein. *Crossin v. Woolf*, 220 N. Y. 586, 115 N. E. 1036, affirming 160 N. Y. S. 1028.

<sup>28</sup> *Pittsburgh v. Pittsburgh & L. E. R. Co.* (Pa. 1919), 106 Atl. 724.

<sup>29</sup> *Holt v. Texas Midland R. R.* (Tex. Civ. App.), 160 S. W. 327; *Hall v. Olean*, 143 N. Y. S. 664, 82 Misc. Rep. 300.

<sup>30</sup> *Cheney v. Kind County*, 72 Wash. 490, 130 Pac. 893; *Phillips v. Interurban R. Co.*, 89 Kan. 835, 133 Pac. 429.

New York statute, providing that every public highway or road laid out and dedicated to public use that shall not have been opened and worked within six years after

being laid out shall cease to be a road, held to apply to street of New York city where an easement only and not a fee has been acquired by city. *Robins Dry Dock Co. v. New York*, 140 N. Y. S. 96, 155 App. Div. 258. Held, that above statute does not apply to streets in New York City (not determined whether city had fee or only easement) *The James McDonough*, 200 Fed. 556. Above statute applies to an easement for widening a road which was never used and was independent of the easement in the used road. *Re Ludlow Ave.*, 150 N. Y. S. 256, 164 App. Div. 839.

New York statute applies only to streets that cease to be used for their entire width, and is not applicable where there has only been an encroachment. *Bronxville v. Lawrence Realty Co.*, 143 N. Y. S. 785.

Statutory provision declaring a county road vacated if it remains unopened for public use for seven years, held not to apply to streets within a city. *Wallace v. Cable*, 87 Kans. 835, 127 Pac. 5.

six years, and hence mere encroachment on the side of a highway will not constitute abandonment.<sup>31</sup>

### § 1402. Power to vacate.

Aside from organic restrictions the plenary power of the legislature over streets which exists,<sup>32</sup> is authority to vacate them;<sup>33</sup> however, such authority is usually vested in municipal corporations,<sup>34</sup> subject to the constitutional

<sup>31</sup> *New Rochelle v. New Rochelle C. & S. Co.*, 144 N. Y. S. 852, 83 Misc. Rep. 194, affirmed in 158 N. Y. S. 1111.

Encroachment consented to by municipality will not constitute. *Shipston v. Niagara Falls*, 176 N. Y. S. 393.

Evidence in particular cases, held insufficient to show abandonment. *Scheibel v. Burr*, 177 N. Y. S. 881.

<sup>32</sup> Section 227, ante; § 227, vol. 1, ante; § 1310, ante; § 1310, vol. 3, ante.

<sup>33</sup> *Duy v. Alabama Western R. Co.*, 175 Ala. 162, 57 So. 724.

<sup>34</sup> *California. Oakland v. Oakland Water Front Co.*, 162 Cal. 675, 124 Pac. 251.

*Idaho. Canady v. Coeur D'Alene Lumber Co.*, 21 Idaho 77, 120 Pac. 830.

*Illinois. Heppes Co. v. Chicago*, 260 Ill. 506, 103 N. E. 455; *Walker v. River Forest*, 259 Ill. 223, 102 N. E. 290.

*Indiana. Windle v. Valparaiso*, 62 Ind. App. 342, 113 N. E. 429; *Falender v. Atkins*, 186 Ind. 455, 114 N. E. 965.

*Iowa. Walker v. Des Moines*, 161 Iowa 215, 142 N. W. 51; *Louden v. Starr*, 171 Iowa 528, 154 N. W. 331; *Hubbell v. Des Moines*, 173 Iowa 55, 154 N. W. 337.

*Minnesota. Empenger v. Fairley*, 119 Minn. 186, 137 N. W. 111; *Balch v. St. Anthony Park West*, 129 Minn. 305, 152 N. W. 642.

*Michigan. Michigan Central R. Co. v. Miller*, 172 Mich. 201, 137 N. W. 555; *Curtis v. Charlevoix Golf Assn.*, 178 Mich. 50, 144 N. W. 818.

*Missouri. Kingshighway Supply Co. v. Banner Iron Works*, 266 Mo. 138, 181 S. W. 30; *Gorman v. Chicago, B. & O. R. Co.*, 255 Mo. 483, 164 S. W. 509.

*Nebraska. State ex rel. Lincoln v. Chicago, R. I. & P. R. Co.*, 93 Neb. 263, 140 N. W. 147, 1136.

*New Jersey. Sherwood v. Pater-son*, 88 N. J. L. 456, 94 Atl. 311.

*New York. Re Joiner St.*, 164 N. Y. S. 272, 177 App. Div. 361.

*Pennsylvania. Eichenlaub v. Erie*, 254 Pa. 70, 98 Atl. 857.

*Washington. Rowe v. James*, 71 Wash. 267, 128 Pac. 539; *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886.

Power to close streets may by statute be vested in commissioners for a particular purpose. *Baltimore v. Brengle*, 116 Md. 342, 81 Atl. 677; *McCutcheon v. Buffalo Terminal Comm.*, 154 N. Y. S. 711, affirming 150 N. Y. S. 850, 88 Misc. Rep. 148, 151 N. Y. S. 451, 88 Misc. Rep. 601.

inhibition against taking or damaging private property for public use without compensation.<sup>35</sup> Ordinarily such power is full and complete constituting the proper municipal authorities the sole judges as to when streets shall be opened and closed by due observance of all applicable legal provisions.<sup>36</sup>

As a municipality has no inherent power to vacate streets,<sup>37</sup> the grant of authority to do so must be given in express terms or by necessary implication.<sup>38</sup>

But under the general welfare clause,<sup>39</sup> or the police

Right to vacate is not dependent on method of establishment. *Sherwood v. Paterson*, 88 N. Y. S. 456, 94 Atl. 311.

<sup>35</sup> *Kingshighway Supply Co. v. Banner Iron Works*, 266 Mo. 138, 148; 181 S. W. 30; *Polk v. Hattiesburg*, 109 Miss. 872, 69 So. 675, affirmed in 110 Miss. 80, 69 So. 1005.

New York street crossing law does not apply to private ways and owner of property on such way is not entitled to compensation for closing thereof. *Matter of Wallace Ave.*, 222 N. Y. 139, 118 N. E. 506.

Under statutory authority city may vacate an alley as a public alley of the city, but it cannot destroy the special property rights of abutting owners therein without making itself liable for compensation therefor. *Bowers v. Machir* (Tex. Civ. App. 1916), 191 S. W. 758.

City may vacate streets originally laid out by it and does not thereby violate any implied covenant by the original grantor to future owners of lots abutting on said streets; distinguished from case where owner of land cuts it up into lots and sells them according to a map

showing streets and alleys with implied covenant that such street shall continue to be used as public highway in which case municipality cannot extinguish easement acquired by private contract with original owner. *Tesson v. Porter Co.*, 238 Pa. 504, 86 Atl. 278.

Where city accepts streets dedicated to public use by owner it may subsequently vacate such streets as to public rights therein. *Chambersburg Mfg. Co. v. Cumberland Valley R. R. Co.*, 240 Pa. 519, 87 Atl. 968.

<sup>36</sup> *Gorman v. Chicago, B. & Q. Rd. Co.*, 255 Mo. 483, 491, 164 S. W. 509.

<sup>37</sup> *Hill v. Kimball*, 269 Ill. 398, 403; 110 N. E. 18, 21, citing § 1402, vol. 3, ante; *Bernitt v. Marshfield*, 89 Or. 556, 174 Pac. 1153; *Bingham v. Kollman*, 256 Mo. 573, 165 S. W. 1097.

City cannot without express authority vacate half of a highway which lies within its limits, the center of the highway being a boundary line of the city. *Gary v. Much*, 180 Md. 26, 101 N. E. 4.

<sup>38</sup> *Bingham v. Kollman*, 256 Mo. 572, 165 S. W. 1097.

<sup>39</sup> *Batson v. Southern Ry. Co.*, 106 S. C. 307, 91 S. E. 310.

power,<sup>40</sup> for the good and safety of the public, municipal power to close a dangerous street undoubtedly exists. In the vacation of streets the public interest and convenience, of course, is the prime consideration.<sup>41</sup>

The exercise of such power should not be conferred by law upon private individuals, even to vacate streets or alleys lying wholly within a site owned by such individuals.<sup>42</sup>

Sometimes by statute, under specified conditions, part of a plat or subdivision may be vacated by the owner after acceptance by the municipality. But such power cannot be exercised after lots have been sold and owners thereof have acquired rights and easements in the streets.<sup>43</sup>

### § 1403. Motives and purpose of vacation.

While the vacation of a street for a private use purely is not authorized, that is, such use should not be the purpose of official action;<sup>44</sup> however, where this result fol-

<sup>40</sup> *Eichenlaub v. Erie*, 254 Pa. 70, 98 Atl. 857.

<sup>41</sup> City cannot vacate a street which is necessary for public use and convenience. *Walker v. Des Moines*, 161 Iowa 215, 142 N. W. 51; *Goldfield v. Golden Cycle Mining Co.*, 60 Colo. 220, 152 Pac. 896.

City may waive its right to part of street which has never been used as a street and as to which there is a dispute. *Haughton v. Barton*, 49 Utah 611, 165 Pac. 471.

City cannot authorize closing of portion of street, extending between two blocks of land used for school purposes, as this would not be a reasonable measure required in the interest of the general public. *Stevens v. Dublin* (Tex. Civ. App.) 169 S. W. 188, 190, quoting with approval part of § 1391, vol.

3, ante, also parts of § 229, vol. 1, ante, and § 893, vol. 3, ante.

<sup>42</sup> Statute conferring authority on private individuals to vacate streets or alley lying wholly within a site owned by such private person, held invalid, as such vacation may be made without regard to interests and convenience of the public. *Goldfield v. Golden Cycle Mining Co.*, 60 Colo. 220, 152 Pac. 896.

<sup>43</sup> *Consumers Co. v. Chicago*, 268 Ill. 113, 108 N. E. 1017.

<sup>44</sup> *Byrne v. Wheeling Can Co.*, 72 W. Va. 600, 78 S. E. 758; *Bronxville v. Lawrence Realty Co.*, 143 N. Y. S. 785.

Forbidden to serve a purely private use. *People v. Corn Products Refining Co.* (Ill. 1919), 121 N. E. 574.

lows, the vacation is not necessarily void.<sup>45</sup> And the fact that the vacation was at the instigation of abutting owners to enable them to use the land vacated, without a further showing of abuse of official discretion, will not vitiate the proceedings.<sup>46</sup>

The motive of the public authorities in vacating streets is usually not subject to judicial inquiry.<sup>47</sup>

#### § 1404. Same—discretion as reviewable.

Apart from pure arbitrary action or clear abuse of discretion,<sup>48</sup> or fraud or collusion,<sup>49</sup> the propriety, or necessity of vacating the given street, vested in the municipal authorities, will not be inquired into by the courts.

#### § 1405. Whether persons damaged may in any event recover damages for vacation.

Aside from statute, special injury to an abutter due to vacation will support a claim for damage,<sup>50</sup> irrespective

<sup>45</sup> *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886.

<sup>46</sup> *Canady v. Coeur D'Alene Lumber Co.*, 21 Idaho 77, 120 Pac. 830; *Sherwood v. Paterson*, 88 N. Y. S. 456, 94 Atl. 311; *Curtis v. Charlevoix Golf Assn.*, 178 Mich. 50, 144 N. W. 818.

<sup>47</sup> *Windle v. Valparaiso*, 62 Ind. App. 342, 113 N. E. 429; *Indianapolis v. Maag*, 57 Ind. App. 493, 107 N. E. 529.

<sup>48</sup> *Curtis v. Charlevoix Golf Assn.*, 178 Mich. 50, 144 N. W. 818; *Walker v. Des Moines*, 161 Iowa 215, 142 N. W. 51; *Louden v. Starr*, 171 Iowa 528, 154 N. W. 331; *Canady v. Coeur D'Alene Lumber Co.*, 21 Idaho 77, 120 Pac. 830.

Closing of a used street, held not an abuse of discretion on part of

city authorities where another street was to be established to take its place before old street was closed. *People v. Gokey*, 163 N. Y. S. 693, 177 App. Div. 61.

<sup>49</sup> *Windle v. Valparaiso*, 62 Ind. App. 342, 113 N. E. 429.

<sup>50</sup> *McCutcheon v. Buffalo Terminal Station Comm.*, 217 N. Y. 127, 111 N. E. 661, affirming 154 N. Y. S. 711, 168 App. Div. 30; *Baltimore v. Brengle*, 116 Md. 342, 81 Atl. 677; *Lockwood v. Chicago*, 279 Ill. 445, 117 N. E. 81, reversing 203 Ill. App. 336.

Abutting property owner cannot recover damages unless specially injured by vacation of part of street. *Walker v. Des Moines*, 161 Iowa 215, 142 N. W. 51; *Krueger v. Ramsey* (Iowa 1919), 175 S. W. 1.

of whether the abutter has a fee or easement only in the street.<sup>51</sup>

**§ 1406. Same—right of city to compensation.**

A municipality is not entitled to compensation for loss of a public easement in streets in which it does not own the fee.<sup>52</sup>

**§ 1408. Kind of injury sustained by land owner as determining right to recover damages.<sup>53</sup>**

**§ 1409. Same—cutting off access in one direction.<sup>54</sup>**

**§ 1412. Procedure to vacate.**

Laws usually prescribe with more or less detail the procedure for the vacation of streets.<sup>55</sup> Sometimes such ac-

<sup>51</sup> *Hubbell v. Des Moines*, 173 Iowa 55, 154 N. W. 337.

See § 1981, post; § 1981, vol. 4, ante.

Payment by a company to a city of a certain sum or an indemnity for damages the city may be required to pay to property owners on account of vacation of street cannot be construed as a conveyance to the company of the vacated street where city had no right to convey. The company is entitled to recover the money if no damages are paid by the city within the statutory period. *Lockwood v. Chicago*, 279 Ill. 445, 117 N. E. 81, reversing 203 Ill. App. 336.

<sup>52</sup> *McCutcheon v. Buffalo Terminal Comm.*, 154 N. Y. S. 711, affirming 150 N. Y. S. 850, 88 Misc. Rep. 148.

<sup>53</sup> *Falender v. Atkins*, 186 Ind. 455, 114 N. E. 965, 968, citing §§ 1408, 1409, vol. 3, ante; *Indianapolis v. Maag*, 57 Ind. App.

493, 107 N. E. 529; *Hill v. Kimball*, 269 Ill. 398, 406, 110 N. E. 18, 22, citing § 1408, vol. 3, ante.

Property which forms the end of an alley does not abut and owner has no interest in or to the alley and sustains only general damages. *Kingshighway Supply Co. v. Banner Iron Works*, 266 Mo. 138, 181 S. W. 30.

Construction of street closing Act of New York, held that act provides that when a street is discontinued all easements therein, both public and private are destroyed. The abutting owner being compensated for loss of his private easements. *Barber v. Woolf*, 216 N. Y. 7, 109 N. E. 868, affirming 153 N. Y. S. 139, 167 App. Div. 627, 90 Misc. Rep. 106.

<sup>54</sup> *Freeman v. Centralia*, 67 Wash. 142, 120 Pac. 886; *Re Joiner St. in Rochester*, 164 N. Y. 272, 177 App. Div. 361.

<sup>55</sup> Construction of New York

tion may be taken either under the municipal charter or a general statute, but whichever method is adopted it must be followed throughout and requirements under the other method, it is clear, have no application.<sup>56</sup>

Vacation can be effected only by a substantial observance of all mandatory legal requirements.<sup>57</sup>

However slight irregularities, it is true, will not render such action void.<sup>58</sup>

If the statute provides an exclusive method, such method, it is plain, and no other should be followed.<sup>59</sup>

An ordinance dealing with the subject must, of course, observe the mandatory requirements of the applicable law, whether contained in statute or charter, otherwise the proceeding will be invalid.<sup>60</sup>

Some statutes authorize a discontinuance of streets by filing a map omitting such streets.<sup>61</sup>

statute. *Re West 151st. St.*, 149 N. Y. S. 972, 87 Misc. Rep. 632.

By statute in Indiana circuit courts have concurrent jurisdiction with city council to vacate streets and alleys. *Richmond v. Miller*, 58 Ind. App. 20, 107 N. E. 550.

<sup>56</sup> *State ex rel. Manitowoc Sand & Fuel Co. v. Kelley*, 167 Wis. 91, 166 N. W. 782.

<sup>57</sup> *Seattle v. Hineckley*, 67 Wash. 273, 121 Pac. 444.

In passing an ordinance repealing an ordinance for opening a street, council need not follow procedure for vacating a street. *Re Black Street*, 236 Pa. 395, 84 Atl. 918.

An ordinance authorized a railroad company to use part of a street for railroad purposes, but did not expressly vacate such part, held that ordinance could not have the effect of vacating the street. *Seneca v. St. Joseph & Grand Island Ry. Co.*, 94 Kan. 323, 146 Pac. 1168.

<sup>58</sup> For example, taking acknowledgment of abutting owners by notary public instead of a justice of the peace, as the controlling law provided. *Bingham v. Kollman*, 256 Mo. 573, 165 S. W. 1097.

<sup>59</sup> *Heuston v. Tacoma*, 67 Wash. 92, 120 Pac. 872.

<sup>60</sup> Ordinance, providing method of vacating streets and assessing damages which does not strictly follow state statute on the subject, held invalid; it provided for assessment by householders instead of freeholders. *Jones v. Aurora*, 97 Neb. 825, 151 N. W. 958.

<sup>61</sup> Private easements can be extinguished before compensation is made therefor in proceeding to close street by filing map omitting such street. *Re Newton Avenue*, 159 N. Y. S. 484, 173 App. Div. 15.

Action of abutting owner for damages due to vacation of street is not barred by statute of limitations where vacation was effected

Frequently the proceedings are inaugurated by petition signed by a designated number of abutting owners of property on the street to be vacated.<sup>62</sup>

Vacation on specified conditions are sometimes sanctioned, e. g., that the street shall not be closed until a new street shall be opened.<sup>63</sup>

### § 1413. Remedies; injunction; certiorari.

The regularity of the proceedings or the existence of an adequate remedy at law for damages will defeat the remedy by injunction.<sup>64</sup> On the other hand, if unlawful

by filing of map and he had no notice thereof. *Matter of City of New York*, 219 N. Y. 399, 114 N. E. 837, affirming 159 N. Y. S. 478, 173 App. Div. 32.

<sup>62</sup> A majority only of the owners of land abutting on part of street to be vacated need sign petition therefor. *Tiedt v. Argyle*, 129 Minn. 259, 152 N. W. 412; *Minneapolis Brewing Co. v. East Grant Forks*, 118 Minn. 467, 136 S. W. 1103; *Eugene v. Garrett*, 87 Or. 435, 169 Pac. 649.

Petition, plat and notice, to comply with law. Sufficient to attach names of signers to vacate to petition, showing number of feet of land owned by each. Owners of property abutting on street are the only necessary parties. City is not. County court had jurisdiction. *Bingham v. Kollman*, 256 Mo. 573, 165 S. W. 1097.

In construction of provision relating to filing of a remonstrance. Held, that a demurrer is permissible means of objecting to sufficiency of petition and not inconsistent with provisions of statute for filing remonstrance. Property owners owning property on part of

street other than that to be vacated may object under statute. *Southern Ry. Co. v. French Lick*, 52 Ind. App. 447, 100 N. E. 762.

<sup>63</sup> Statute vacating a street for the benefit of railroad company expressly provided that the street should not be closed until the company opened a new street. *Central Georgia Ry. Co. v. Bibb Buck Co.*, 145 Ga. 149, 88 S. E. 676.

<sup>64</sup> *Harrison Land Co. v. Crucible Steel Co.*, 82 N. J. Eq. 414, 89 Atl. 41, affirmed in 86 N. J. Eq. 249, 98 Atl. 1085; *Hill v. Kimball*, 269 Ill. 399, 413, 110 N. E. 18, 23, 24, citing § 1413, vol. 3, ante.

Abutting owner cannot enjoin obstruction of street which has been vacated by the city where the city had complete control over the street. *Duff v. Heppenstall Co.*, 234 Pa. 275, 83 Atl. 204.

Vacation of street by city will not divest right of abutting owner to an easement over the street which is paramount to right of city to vacate and he may enjoin obstruction thereof. *O'Donnell v. Porter Co.*, 238 Pa. 495, 86 Atl. 281.



and such adequate remedy is absent injunction will lie<sup>65</sup> at the suit of one who will suffer special injury due to the vacation.<sup>66</sup>

In some jurisdiction certiorari will lie to review vacation proceedings.<sup>67</sup>

### § 1415. Effect of vacation and reversion of title.

Upon the vacation of a public street or alley the general rule is the fee of the land involved reverts to the owner thereof,<sup>68</sup> whether the municipality,<sup>69</sup> the abutting

<sup>65</sup> *Windle v. Valparaiso*, 62 Ind. App. 342, 113 N. E. 429; *Illinois Western Elec. Co. v. Cicero*, 282 Ill. 468, 118 N. E. 735; *Indianapolis v. Maag*, 57 Ind. App. 493, 107 N. E. 529.

Property owner may enjoin municipality from wrongfully vacating a public street and converting it into a public cemetery. *Troy v. Watkins* (Ala.), 78 So. 50.

Council will not be enjoined from paying money to a property owner for the opening of a street across his property unless facts are alleged which show the action to be unlawful. *Tiedt v. Argyle*, 129 Minn. 259, 152 N. W. 412.

<sup>66</sup> *Swanteck v. Detroit*, 196 Mich. 307, 162 N. W. 1020; *Jaunesson v. S. & N. R. Co. & Beattyville*, 176 Ky. 654, 197 S. W. 386.

See § 1382, et seq., ante; § 1382, et seq., vol. 3, ante.

<sup>67</sup> Under New Jersey practice where the validity of an ordinance is attacked, because of fraud, improper motive or abuse of legislative discretion certiorari lies. *Harrison Land Co. v. Crucible Steel Co.*, 82 N. J. Eq. 414, 89 Atl. 41, affirmed in 86 N. J. Eq. 249, 98 Atl. 1085.

Question as to whether district

court exceeded its jurisdiction in entering a modified decree which was in excess of or contrary to the order of the supreme court, held could be reviewed by certiorari. *West Davenport Imp. Co. v. Theplulus*, 177 Iowa 353, 158 N. W. 689.

<sup>68</sup> *Waller v. River Forest*, 259 Ill. 223, 102 N. E. 290.

Public and private easement extinguished. *Scheibel v. Burr*, 177 N. Y. S. 881.

<sup>69</sup> By city charter, fee remains in city. *Van Valkenberg v. Rutherford*, 92 Neb. 803, 139 N. W. 652.

City cannot dispose of reversionary rights, whether it was the fee or merely an easement, in an alley which it was vacated. *Lockwood v. Chicago*, 279 Ill. 445, 117 N. E. 81, reversing 203 Ill. App. 336.

If city owns the fee in a vacated street and has not abused its discretion in vacating the street, it may devote the ground to any legitimate use it may elect or otherwise dispose of same. *Walker v. Des Moines*, 161 Iowa 215, 142 N. W. 51; *Louden v. Starr*, 171 Iowa 528, 154 N. W. 331.

If the title is vested in the municipality upon vacation the municipality may deed the property so

property owner,<sup>70</sup> or the original dedicator, or proprietor,<sup>71</sup> unless modified by statute or charter,<sup>72</sup> or by the deed of dedication or that of the original proprietor or that of the grantor to the abutting property owner.<sup>73</sup>

vacated, although the public right to use them is thereby destroyed. *Krueger v. Ramsey* (Ia. 1919), 175 N. W. 1, 2.

<sup>70</sup> Florida. *Smith v. Horn*, 70 Fla. 484, 70 So. 435.

Illinois. *Waller v. River Forest*, 259 Ill. 223, 102 N. E. 290, following *Bell v. Mattoon Waterworks Co.*, 245 Ill. 544, 92 N. E. 352, 137 Am. St. Rep. 338, 19 Ann. Cas. 153; *Chicago & Eastern Illinois R. Co. v. Clapp*, 201 Ill. 418, 66 N. E. 223.

Missouri. *Second Street Imp. Co. v. Kansas City S. Ry. Co.*, 255 Mo. 519, 525, 165 S. W. 515.

Michigan. *Edison Illuminating Co. v. Misch* (Mich.), 166 N. W. 944, 947; *Michigan Central R. Co. v. Miller*, 172 Mich. 201, 137 N. W. 555.

Washington. *Hagen v. Balcom Mills*, 74 Wash. 462, 133 Pac. 1000.

Upon vacation of public alley fee was held to revert to abutting owners, notwithstanding that alley had not been used but was occupied by another for 15 years, as during that time public right had not been barred. *Wallace v. Cable*, 87 Kans. 835, 127 Pac. 5.

<sup>71</sup> Upon vacation of street or alley, the fee will revert either to the dedicator or the owner of abutting property dependent upon whether city received same by common-law or statutory dedication. *Lockwood v. Chicago*, 279 Ill. 445, 117 N. E. 81, reversing 203 Ill. App. 336.

<sup>72</sup> By statute in **Oklahoma**, when

any street or alley is vacated, the title to the same reverts to owners of real estate thereto adjacent, on each side. *Edwards v. Smith*, 42 Okl. 544, 142 Pac. 302; *Arkansas Valley & W. Ry. Co. v. Buller*, 31 Okl. 36, 119 Pac. 414; *Arkansas Valley & W. Ry. Co. v. Johnson*, 31 Okl. 41, 119 Pac. 416.

By statute, above rule prevails in **Idaho**. *Canady v. Coeur D'Alene Lumber Co.*, 21 Idaho 77, 120 Pac. 830.

By statute above rule prevails in **Kansas**. *Haseltine v. Nuss*, 97 Kans. 228, 155 Pac. 55.

Charter provided that fee to street (which has been vacated for purpose of constructing a viaduct) shall remain in city, upon vacation of the street. *Albi Mercantile Co. v. Denver*, 54 Colo. 474, 131 Pac. 275.

Where public streets were vacated to be used for railroad purpose, the act therefor provided that city be compensated for streets in which it owned the fee—where it did not own the fee—the abutting owners of the fee must be compensated. *McCutcheon v. Buffalo Terminal Comm.*, 154 N. Y. S. 711, affirming 150 N. Y. S. 850, 88 Misc. Rep. 148.

Where statute provides that no vested rights shall be affected by vacation of street, the land reverts to the owner of the fee. *Rowe v. James*, 71 Wash. 267, 128 Pac. 539.

<sup>73</sup> Dedication expressly declared

**§ 1418. Irregularity in vacation; estoppel of municipality to urge.<sup>74</sup>**

on vacation title should revert to  
platter. *Drake v. Chicago R. I.*  
& P. Ry. Co., 136 Minn. 366, 162  
N. W. 453.

See § 1415, vol. 3, ante.  
<sup>74</sup>*Seneca v. St. Joseph & Grand*  
*Island Ry. Co.*, 94 Kan. 323, 146  
Pac. 1168.

## CHAPTER 31.

### SEWERS AND DRAINS.

- § 1421. Sewer defined.
- § 1425. Classification of sewers—public and private—trunk line.
- § 1427. Private sewers and drains and private rights therein.
- § 1428. Municipal power to construct and maintain sewers.
- § 1430. Same — interfering with private property.
- § 1431. Same—right to contract for sewers.
- § 1432. Same—authorities empowered to construct.
- § 1434. Sewer outlet beyond corporate limits.
- § 1435. Nature of power to construct sewers—discretionary.
- § 1436. Use of streets and alleys for sewers and drains.
- § 1437. Natural watercourses.
- § 1445. Mode of exercise of power—discharge of sewers—polluting stream.
- § 1446. Same—injunction.
- § 1448. Municipal power to control and regulate—sewer connections.
- § 1449. Same—permit to make connections.
- § 1451. Duty to keep sewers in proper condition.

#### § 1421. Sewer defined.<sup>1</sup>

#### § 1425. Classification of sewers—public and private—trunk line.<sup>2</sup>

<sup>1</sup>“The construction of the gutter and catch-basin for the drainage of surface water into the brook did not make it a sewer or drain under” the statute. *Blaisdell v. Stoneham*, 229 Mass. 563, 118 N. E. 919, stating that cases like *Bates v. Westborough*, 151 Mass. 174, 23 N. E. 1070, 7 L. R. A. 156, and *Diamond v. North Attleborough*, 219 Mass. 587, 107 N. E. 445, were not applicable.

<sup>2</sup> District distinguished from

public sewer. *Newcombe v. Kramer*, 189 Mo. App. 538, 176 S. W. 1072.

Public sewer described. *Schwabe v. Moore*, 187 Mo. App. 74, 79, 80, 172 S. W. 1157, following *State ex rel. v. Wilder*, 217 Mo. 261, 269, 116 S. W. 1067, and *Southworth v. Glasgow*, 232 Mo. 108, 128, 132 S. W. 1168, set out in Section 1425, vol. 4, ante.

An ordinance cannot by mere name make a district sewer out of what is, in reality, a public or

**§ 1427. Private sewers and drains and private rights therein.**

An ordinance may authorize private individuals to construct a sewer and provide that any person desiring to connect with such sewer may do so on paying his proportionate share of the cost.<sup>3</sup>

**§ 1428. Municipal power to construct and maintain sewers.<sup>4</sup>**

All persons hold their property subject to the law

main sewer. *Newcombe v. Kramer*, 189 Mo. App. 538, 541, 176 S. W. 1072, following *Hill v. Swingly*, 159 Mo. 45, 49, 60 S. W. 114, set out in Section 1425, vol. 4, ante.

**Establishment of sewer district.**

It is not necessary that a general sewer system be established for the whole city before a sewer district is established and district sewer constructed. It is only necessary that such district sewer be effective for the purpose for which it is created. *Lasse v. Barkwell* (Mo. App.), 195 S. W. 542.

Question as to whether council complied with the statute relating thereto, in establishing sewer districts and subdistricts. Held, that property owner cannot avoid payment of assessment for sewer, on ground that council did not comply with requirements of statute in establishing sewer districts and construction of sewer, after improvement is completed and he has received the benefit. *Haggart v. Aton*, 38 S. D. 527, 162 S. W. 158.

**Trunk line intercepting sewer** defined by charter as one the principal object of which shall be of general benefit to the health of

the city. *Berston v. Flint*, 176 Mich. 266, 142 N. W. 576.

Where council has discretion to determine the part of the expense of a public improvement to be borne by persons immediately benefited and what part by city, its determination as to the part of the expense of a trunk line sewer to be assessed against the district specially benefited will not be disturbed where mistake or abuse of discretion is not manifest. *Berston v. Flint*, 176 Mich. 266, 142 N. W. 576.

<sup>3</sup> City could give private parties the privilege of furnishing a service necessary for the convenience and welfare of the citizens of the locality. As to the contention that the ordinance was void on the ground it gave the grantees therein named the power to levy and collect assessments for the sewer, it was said that the ordinance does not purport to confer any such power. It names the condition for the privilege of connection. "No one is under any obligation to pay unless he uses the sewer and he may use it or not as he elects." *Lee v. Seriver* (Minn. 1919), 172 N. W. 802.

<sup>4</sup> Ample power exists. *Heman*

## providing for the public health and general welfare and

*Constr. Co. v. Lyon* (Mo. 1919), 211 S. W. 68; *Red Wing Sewer Pipe Co. v. Pierre*, 40 S. D. 42, 166 N. W. 164; *Kilcullen v. Webster*, 260 Pa. 263, 103 Atl. 592; *Lyon v. Hyattsville*, 125 Md. 306, 93 Atl. 919.

May levy special assessments on property benefited. *McGhee v. Walsh*, 249 Mo. 266, 155 S. W. 445.

In Pennsylvania municipal corporations have power to construct without express authority. *Kilcullen v. Webster*, 260 Pa. 263, 103 Atl. 592, citing *Fisher v. Harrisburg*, 2 Grant Cas. 291, set out in Section 1428, vol. 4, ante.

Construction of New York City charter provisions relating to establishing sewers and fixing area of assessment. *Re Sewer in Kissel Avenue*, 143 N. Y. S. 467, 81 Misc. Rep. 541.

Under New York State law sewers may be constructed either upon petition of a majority of property owners along a street or by act of sewer commissioners, with or without a petition. *Harris v. Churchill*, 152 N. Y. S. 73.

Law authorizing joint action by city and county in construction of sewers which is not mandatory, but permissive only, need not be observed by city, but city may proceed under its charter power. *Jennings Heights L. & I. Co. v. St. Louis*, 257 Mo. 291, 299, 165 S. W. 741.

Under power to construct, a city may purchase a sewer already constructed. *Schwabe v. Moore*, 187 Mo. App. 74, 79, 172 S. W. 1157.

Power to define the district

which shall be permitted to drain into a sewer is incident to power to construct system of sewers. Property cannot be included in a sewer district when no connection with the sewer is contemplated for such district, although it may be indirectly benefited. *Chicago v. Sullivan Mach. Co.*, 269 Ill. 58, 109 N. E. 696.

**Asceptic tanks.** Under authority to establish public, district and private sewers, city may provide for asceptic tanks as a part of its public sewer system. It is within the discretion of the city authorities to determine that such tanks are an indispensable part of the sewer system. *Schueler v. Kirkwood*, 191 Mo. App. 575, 177 S. W. 760.

**A sanitary district** as organized under Illinois law may not construct local improvements purely for the benefit of a municipality within the district, but if the improvement is for the benefit of the whole district it is within the power of the district. *Judge v. Bergman*, 258 Ill. 246, 101 N. E. 574, affirming 176 Ill. App. 42.

Construction and maintenance of sewers is an exercise of the police power. *Rogers v. Salem*, 61 Or. 321, 122 Pac. 308.

Power to construct is continuing. *Lyon v. Hyattsville*, 125 Md. 306, 93 Atl. 919.

Existence of an old sewer constructed by city out of general funds and with which property owner had no right to connect, is not ground for objection to construction of sewer for benefit of property owners, the cost thereof

property must bear its just proportion of the costs and expenses of securing them. Therefore, where sewers are necessary for the preservation of the public health, property must bear the cost of the construction and maintenance of sewers. This burden is not limited to the precise location of the property but a sewer may be constructed for a large area and all the property in such district may be required to bear the burden of construction and maintenance.<sup>5</sup>

**§ 1430. Same—interfering with private property.<sup>6</sup>**

**§ 1431. Same—right to contract for sewers.**

Power to purchase a sewer system already constructed is often given to municipal corporations;<sup>7</sup> and it has been held that power to construct sewers is authority to buy sewers in existence which are suitable for public purposes.<sup>8</sup>

**§ 1432. Same—authorities empowered to construct.<sup>9</sup>**

**§ 1434. Sewer outlet beyond corporate limits.<sup>10</sup>**

to be assessed against such owner. *Bell v. Burlington*, 154 Ia. 607, 134 N. W. 1082.

<sup>5</sup> *Whitsett v. Carthage*, 270 Mo. 269, 283, 284, 193 S. W. 21.

<sup>6</sup> *Chicago v. Sullivan Mach. Co.*, 269 Ill. 58, 109 N. E. 696.

<sup>7</sup> Under statutory authority, city may acquire sewer system of a sewer company upon payment of actual value at time of taking. *Hanover v. Hanover Sewer Co.*, 251 Pa. 95, 96 Atl. 132.

Under a statute which provides that towns must acquire any sewer system constructed by private or quasi public corporations in operation and serving the public before constructing a public sewer system a town is not required to

purchase a sewer system constructed by a firm for its own purposes and not with a view to serving the public generally. *Shute Sewerage Co. v. Monroe*, 162 N. C. 275, 78 S. E. 151.

<sup>8</sup> *Schwabe v. Moore*, 187 Mo. App. 74, 172 S. W. 1157.

<sup>9</sup> Authority of a given board of commissioners of a sewer district was held limited to the construction of the sewer and paying for same. When completed the sewer becomes subject to control of the city. *Jones v. Rogers Sewer Improvement Dist.*, 119 Ark. 166, 177 S. W. 888.

<sup>10</sup> May construct and maintain outlet sewers beyond corporate limits. *Chicago v. Green*, 238 Ill.

### § 1435. Nature of power to construct sewers—discretionary.

The power to construct and maintain sewers is discretionary with the appropriate local authorities, and not subject to judicial review in the absence of fraud, oppression or arbitrary action.<sup>11</sup>

### § 1436. Use of streets and alleys for sewers and drains.<sup>12</sup>

258, 87 N. E. 417; *Berwyn v. Berglund*, 255 Ill. 498, 99 N. E. 705, 708; *McLaughlin v. Hope*, 107 Ark. 442, 155 S. W. 910; *Jones v. Rogers Sewer Improvement Dist.*, 119 Ark. 166, 177 S. W. 888; *Kelly v. Miller*, 139 N. Y. S. 991, 78 Misc. Rep. 584; *Re Woolley*, 75 Wash. 206, 134 Pac. 825.

Construction of part of sewer outside of city does not change its character as a local improvement for which assessment may be made against property owners benefited. *Kraft v. Smothers*, 103 Ark. 269, 146 S. W. 505.

City may construct sewer in highway of another municipality where necessary for outlet and may agree to construct catchbasins in such highway in consideration of right to use same. *Park Ridge v. Wisner*, 253 Ill. 434, 97 N. E. 841.

See § 1434; vol. 4, ante.

<sup>11</sup> Ordinance to establish and construct is conclusive under ample power, in absence of fraud, etc. *Jennings Heights L. & I. Co. v. St. Louis*, 257 Mo. 291, 301, 165 S. W. 741.

Decision of municipal authorities as to nature of sewer to be constructed will not be set aside when there is no evidence that their action is oppressive and unreason-

able. *Bradley v. N. Y. C. R. R. Co.*, 277 Ill. 608, 115 N. E. 640.

Municipality is sole judge of necessity for sewers. *Bell v. Burlington*, 154 Ia. 607, 134 N. W. 1082.

The authority to determine the necessity and propriety of sewer improvements is legislative in character and if the proceedings are regular, in accordance with law, the findings of a city council in respect thereto are not subject to judicial review or control in the absence of fraud, etc. *Thomas v. Grinnell*, 171 Ia. 571, 153 N. W. 91.

Whether the location and character of a sewer improvement are "useful, advantageous or desirous for municipal purposes" is a question for determination by the city, subject only to review by a court where there is an abuse of power. *Chicago v. Chicago Sanitary Dist.*, 272 Ill. 37, 111 N. E. 491.

Decision of Sewerage Commission as to best method of disposing of sewerage of a district, made in good faith and after careful study of the problem, will not be reviewed by a court of equity. *Berdan v. Passaic Valley Sewerage Com'rs*, 82 N. J. Eq. 235, 88 Atl. 202.

<sup>12</sup> Right to lay sewers and drains



**§ 1437. Natural watercourses.<sup>13</sup>****§ 1445. Mode of exercise of power—discharge of sewers—polluting stream.<sup>14</sup>****§ 1446. Same—injunction.<sup>15</sup>****§ 1448. Municipal power to control and regulate—sewer connections.<sup>16</sup>**

in highway are privileges annexed as incidents by usage or custom to right of public in highway. *Public Service Ry. Co. v. Frazer*, 89 N. J. Eq. 569, 102 Atl. 890.

Where commission is given power to construct sewers, "under, over or across any street in such a manner as not unnecessarily to obstruct or impede travel," if reasonably necessary, they may interfere with street railway traffic but must bear expense of moving or providing temporary tracks. *Public Service Ry. Co. v. Frazer*, 89 N. J. Eq. 569, 102 Atl. 890.

<sup>13</sup> Where title to land under water and shore below highwater mark is vested in the state for public use, a city under authority from the state may grant to a water company the right to make use of the bed and waters of a stream for the purpose of supplying water to the public, and under such grant the company has power to protect its works from destruction or injury by removal of sand from the bed of the river. *Mann v. Des Moines Water Co.*, 202 Fed. 842, 121 C. C. A. 220.

<sup>14</sup> If turning of sewerage into a stream and the pollution of the water thereof to the damage of riparian owners is not a taking of property for private use, it is

nevertheless a damage thereof for public use, for which compensation must be made. *McLaughlin v. Hope*, 107 Ark. 442, 155 S. W. 910.

See § 2699, post; § 2699, vol. 6, ante.

<sup>15</sup> A court of equity will enjoin the dumping of large quantities of filth into a stream so as to create a nuisance. But a sewer system with a proper disposal plant upon the bank of a stream is not a nuisance per se and its construction will not be enjoined where there is no evidence showing with certainty that it will be a nuisance. *Thomas v. Grinnell*, 171 Ia. 571, 153 N. W. 91.

<sup>16</sup> Connection with sewers may be compelled. *Gault v. Ft. Collins*, 57 Colo. 324, 142 Pac. 171.

Ordinance requiring property owners to connect their premises with sewer system is a legitimate exercise of the police power. *Friscoe v. Crowley*, 142 La. 393, 76 So. 812; *Hutchinson v. Valdosta*, 227 U. S. 303, 33 Sup. Ct. 290, 57 L. ed. 520.

Ordinance requiring property owners to connect with public sewer may be enforced by criminal penalties. *Hutchinson v. Valdosta*, 227 U. S. 303, 33 Sup. Ct. 290, 57 L. ed. 520.

Where sewer is paid for by issue

**§ 1449. Same—permit to make connections.<sup>17</sup>****§ 1451. Duty to keep sewers in proper condition.<sup>18</sup>**

of bonds, city may fix rates for use of sewer. *Point Pleasant Beach v. Moore*, 88 N. J. L. 734, 95 Atl. 133.

City may require property owners who wish to connect their premises with city sewer to pay a fixed frontage charge. *Kilcullen v. Webster*, 260 Pa. 263, 103 Atl. 592, affirming 63 Pa. Super. Ct. 309.

Where lot owner failed to make required connection, connection may be made by city and cost thereof charged against lot owner. *Howe v. Turner Const Co.*, 66 Fla. 1, 63 So. 233.

Ordinance providing that within 30 days after the adoption of a resolution for improvement of a street, property owners thereon shall connect their premises with the sewer and upon failure of owner to make the connection, the work shall be included in the contract for the street improvement and the cost assessed against the owner, held reasonable and valid. *Indianapolis v. College Park Sand Co. (Ind.)*, 118 N. E. 356.

<sup>17</sup> Municipal consent to make sewer connection required. *Kilcullen v. Webster*, 260 Pa. 263, 103 Atl. 592.

Where a lot was purchased on representations that water and

sewer systems were complete and purchasers would not be assessed for same, it was held there was an implied contract that a purchaser would have the right to connect with a sewer and no condition can be imposed on the exercise of such right, e. g., exacting a permit. *Biggs v. Sea Gate Assn.*, 211 N. Y. 482, 165 N. E. 664, reversing 138 N. Y. S. 53, 152 App. Div. 918.

<sup>18</sup> All questions relating thereto are considered in Section 2690, et seq., post, Section 2690, et seq., vol. 6, ante.

A municipal obligation exists to keep sewers in a reasonably safe condition for use, and reasonable care is required on the part of the municipality, to keep them free from obstruction. *Hawkins v. Springfield*, 194 Mo. App. 151, 155, 186 S. W. 576.

City is not liable for consequences of some fault in the location, size, plan of construction, or general design of its sewers, but it is liable for failure to keep its sewers in repair. *Sherburne v. Sanford*, 113 Me. 66, 92 Atl. 997.

Municipality must keep sewers in proper repair. Section 2695, vol. 6, ante; Section 2695, post.

## CHAPTER 32.

### EMINENT DOMAIN.

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- III. USE FOR WHICH TAKEN AS A PUBLIC USE.
- IV. WHAT PROPERTY MAY BE TAKEN.
- V. DISCONTINUANCE OF PROCEEDINGS.
- VI. COMPENSATION, RIGHT TO AND AMOUNT OF.
- VII. TITLE AND RIGHTS ACQUIRED, ABANDONMENT, AND REVERSION.
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## I. GENERAL CONSIDERATIONS.

## § 1453. Definition.

Eminent domain is an inherent attribute of sovereignty,<sup>1</sup> to take or authorize the taking of any private property within its jurisdiction for public use without the consent of the owner,<sup>2</sup> upon payment of a just compensation therefor, according to the method prescribed by law.<sup>3</sup>

<sup>1</sup> Chicago B. & Q. R. Co. v. McCooey, 273 Mo. 29, 200 S. W. 59; Re Ely Ave., New York City, 217 N. Y. 45, 111 N. E. 266; Idaho-Iowa Lateral & Reservoir Co. v. Fisher, 27 Idaho 695, 151 Pac. 998; Turner v. Gardner, 216 Mass. 65, 103 N. E. 54; Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co., 186 Ala. 622, 65 So. 287; Arthur v. Chockton County, 43 Okl. 174, 141 Pac. 1.

Power does not emanate from the constitution or statute. New York Telephone Co. v. State, 154 N. Y. S. 1059, 169 App. Div. 310; State v. Superior Court, 77 Wash. 585, 137 Pac. 994; Philadelphia Clay Co. v. York Clay Co., 241 Pa. 305, 88 Atl. 487.

Application of doctrine at common law. George v. Consolidated Lighting Co. (Vt.), 89 Atl. 635.

<sup>2</sup> "The power of eminent domain to take or authorize the taking of any property within its jurisdiction for the public use

without the owner's consent is inherent in every government. \* \* \* The right to take or authorize the taking \* \* \* is legislative in its nature and property can only be taken by exercise of the power directly by the General Assembly or by delegation in express terms or by necessary implication." Chicago B. & Q. R. Co. v. Cavanaugh, 278 Ill. 609, 615, 116 N. E. 128.

<sup>3</sup> Cincinnati v. Louisville & Nashville R. Co., 88 Ohio 283, 102 N. E. 951; Kincaid v. Seattle, 74 Wash. 617, 134 Pac. 504.

"As recognized by all authorities, 'eminent domain' is a right inherent in all sovereignties, and is defined as the right of the nation or state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership or possession of such property for such use upon paying the owner due compensa-

A purchase of property involves a voluntary transfer, whereas taking against the will of the owner is an exercise by authority of the sovereign power of the state.<sup>4</sup>

It requires no constitutional recognition and is without restriction, except as the people have limited it by organic inhibition.<sup>5</sup>

It arises from the necessities of government.<sup>6</sup>

States may exercise the power of eminent domain for state purposes only: the nation for national purposes only.<sup>7</sup>

#### § 1454. Power distinguished from other powers.

The police power,<sup>8</sup> the power of taxation, both general

tion to be ascertained according to law." *Western Union Tel. Co. v. Louisville & Nashville R. Co.*, 270 Ill. 399, 110 N. E. 583, 589, per Craig, J.

<sup>4</sup> *Nevins v. Springfield*, 227 Mass. 538, 116 N. E. 881; *Janes v. Racine*, 155 Wis. 1, 143 N. W. 707.

<sup>5</sup> Organic provisions requiring just compensation for property so taken "is a mere limitation on the exercise of the right. \* \* \* When the sovereign power attaches conditions to its exercise the inquiry whether the conditions have been observed, is a proper matter for judicial cognizance." *Boom Co. v. Patterson*, 98 U. S. 403, 406; *Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 281, 148 S. W. 662, 4 L. R. A. (N. S.) 828, Ann. Cas. 1913B, 153.

State has paramount control of the entire subject. *State v. Superior Court*, 86 Wash. 155, 149 Pac. 652; *Re City of Rochester*, 224 N. Y. 386, 121 N. E. 102.

<sup>6</sup> *Kahlen v. State*, 223 N. Y. 383, 391, 119 N. E. 883.

Based on principles that private

rights must yield to the general public welfare. *Jones v. Lassiter*, 169 N. C. 750, 86 S. E. 710.

Is only justified to advance the common good. *Sacramento v. Swanston*, 29 Cal. App. 212, 155 Pac. 101.

<sup>7</sup> *Latinette v. St. Louis*, 201 Fed. 676, 120 C. C. A. 638.

<sup>8</sup> Section 1470, post. *Chicago v. O'Connell*, 278 Ill. 591, 116 N. E. 210.

**Distinguished from police power.** While the maintenance of a public bath building in a street can be justified as a public use for the conservation of the health of the inhabitants of the city the appropriation of the street for ornamentation of the front of the building cannot be said to be a necessary exercise of the police power. *Hellinger v. New York*, 168 N. Y. S. 271, 181 App. Div. 254, case involving easements of an abutting owner of light, air and access to his property, claimed to be impaired.

The right of recovery of compensation by the property owner

and special, or the levying of local assessments,<sup>9</sup> and damaging or destroying private property in event of

under the Alabama Constitution is confined, of course, to where the municipality is engaged in the construction or enlargement of the works, highways or improvements of the city. *Montgomery v. Maddox*, 89 Ala. 181, 7 So. 433; *Montgomery v. Townsend*, 80 Ala. 489, 2 So. 155, 60 Am. Rep. 112. Hence, the removal of shade trees of an abutting property owner which interfered with the sewage system of the city is not within the constitution but on the contrary is a mere exercise of the police power. *Birmingham v. Graves* (Ala. 1917), 76 So. 395.

<sup>9</sup> Distinguished from taxation. Eminent domain is the sovereign power vested in the state to take private property for public use, providing first a just compensation therefor. *Austin v. Nalle*, 102 Tex. 536, 120 S. W. 996. Taxes are burdens or charges imposed by the legislative power of the state upon persons or property to raise money for public purposes. "The former takes specific property (not money) upon paying compensation therefor, while under special assessment for local improvement no property is taken except the money belonging to the owner, and that is taken under the taxing power of the government upon the theory and fact that a corresponding benefit accrues to the party from whom such money is thus taken by reason of the enhanced value of his property as a result of the improvements." *Dallas v. Atkins* (Tex. Civ. App.), 197 S. W. 593, 599.

Exercise of taxing power. *Re University Ave.*, Rochester, 144 N. Y. S. 1086, 82 Misc. Rep. 598.

Taxation of membership of trade board is not taking. *Re Personal Property Tax* (State v. McPhail), 124 Minn. 398, 145 N. W. 108.

**Special taxation or assessments** is not taking. *Schultise v. Taloga*, 42 Okl. 65, 140 Pac. 1190; *Anderson v. Ocala*, 67 Fla. 204, 64 So. 775; *Wright v. House* (Ind. 1919), 121 N. E. 433, 437; *Windfall City v. Somerville*, 181 Ind. 463, 104 N. E. 859; *Gesser v. McLane*, 156 Ky. 743, 161 S. W. 1119; *Granite State Land Co. v. Hampton*, 77 N. H. 179, 89 Atl. 842.

Special taxation is sustainable under the taxing power; and the constitutional provisions relating to the taking or damaging of property for public use apply to the power of eminent domain. *Ranney v. Cape Girardeau*, 255 Mo. 514, 518, 164 S. W. 582; *McGrew v. Granite Bituminous Paving Co.*, 247 Mo. 549, 572, 155 S. W. 411; *Keith v. Bingham*, 100 Mo. 300; *Springfield v. Baker*, 56 Mo. App. 637, 640.

Assessments for oiling streets in which its tracks are laid against a railroad company, is not exercise of right of eminent domain. *Henderson Traction Co. v. Henderson*, 178 Ky. 124, 198 S. W. 730.

Nor are assessments of benefits for public improvements. *Re Main Street* (Mo. 1917), 198 S. W. 821; *Schneider Granite Co. v. Gast Realty & Inv. Co.*, 259 Mo. 153, 168 S. W. 687.

Street paving—reassessment. Gal-

necessity, are clearly distinguishable from the power of eminent domain.<sup>10</sup>

### § 1455. Constitutional provisions.

That private property shall not be taken (or "damaged" or "injured" in some constitutions) for public use without just compensation is the usual organic provision.<sup>12</sup>

### § 1458. Authority of legislature to delegate to municipalities power to condemn.

As the power of eminent domain is an exclusive inherent attribute of sovereignty, the state may exercise it directly or by such instrumentalities as it may create

lahar v. Whitley (Tex. Civ. App.), 190 S. W. 759.

If in excess of special benefits, it is taking. *State v. Ely*, 129 Minn. 40, 151 N. W. 545.

A special assessment which does not benefit property may be a taking. *Pomroy v. Pueblo Board of Public Water Works*, 55 Colo. 476, 136 Pac. 78.

Charter allowing assessments levied on abutting property in disregard of private or public benefits for whole cost of opening a public way, held unconstitutional, as taking private property without just compensation. *Lansing v. Jenison*, 201 Mich. 491, 167 N. W. 947.

<sup>10</sup>Sections 1454, 1470, vol. 4, ante; *Polsgrove v. Moss*, 154 Ky. 408, 157 S. W. 1133.

Statute allowing by court order the putting of property of aged person into possession of guardians, etc., is not taking. *Kutzner v. Meyers*, 182 Ind. 669, 108 N. E. 115.

Excluding the owner and occupying property by a city for public use, unless sustainable under the proper exercise of the police or other rightful exercise of governmental authority, is the power of eminent domain. *Sanborn v. Enosburg Falls*, 87 Vt. 479, 89 Atl. 746.

War power is not exercise of eminent domain. *George v. Consolidated Lighting Co.*, 87 Vt. 411, 89 Atl. 635.

<sup>12</sup>"No other limitations are placed upon the right to take." *Kahlen v. State*, 223 N. Y. 383, 389, 119 N. E. 883.

Obviously, the constitutional provisions stating the purposes the power of eminent domain may be exercised cannot be made more effective by statute. *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 155 Pac. 680.

Restriction on legislative power. *Bemis v. Guirl Drainage Co.* (Ind.), 105 N. E. 496.



by the legislature, save as restricted by the constitution.

The power is generally delegated by the state to be exercised by municipal corporations.<sup>13</sup>

### § 1459. No inherent power in municipality to condemn.<sup>14</sup>

### § 1460. Power conferred by implication.<sup>15</sup>

### § 1463. Construction of statutes.

Eminent domain is a sovereign power to be used only by the sovereign or by one on whom the sovereign has

<sup>13</sup> *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 Atl. 633; *Paris Mountain Water Co. v. Greenville*, 110 S. C. 36, 96 S. E. 545; *Redmond v. Perrigo*, 84 Wash. 407, 146 Pac. 838; *Chicago, B. & Q. R. Co. v. McCooney*, 273 Mo. 29, 200 S. W. 59.

By city charter, *Re Opening of Alley*, in St. Paul, Minn., 164 N. W. 983.

By statute. *Los Angeles v. Zeller* (Cal.), 167 Pac. 849.

Land for park purposes, partly within the partly without municipal area. *Hobart v. Minneapolis*, 139 Minn. 368, 166 N. W. 411.

Determination as to when power of eminent domain may be exercised may be delegated to municipalities. *Re Ely Ave.*, New York City, 217 N. Y. 45, 111 N. E. 266, reversing 153 N. Y. S. 1049, 168 App. Div. 867; *Re City of Rochester*, 224 N. Y. 386, 121 N. E. 102.

<sup>14</sup> *Portland R. R. Co. v. Portland*, 181 Fed. 632; *Chicago v. Hill*, 251 Ill. 502, 96 N. E. 223; *Columbia School District v. Jones*, 229 Mo. 510, 129 S. W. 705; *Eppley v. Bryson City*, 157 N. C. 487, 73 S. E. 197; *Edwards v. Cheyenne*, 19 Wyo. 110, 114 Pac. 677.

Power to condemn for streets must be conferred. *Lloyd v. Venable*, 168 N. C. 531, 84 S. E. 855.

<sup>15</sup> *Bemis v. Guril Drainage Co.* (Ind.), 105 N. E. 496; *Detroit v. Weil*, 180 Mich. 593, 147 N. W. 550; *Rosa v. Bandon*, 71 Or. 510, 142 Pac. 339.

Cannot arise by implication. *Re Crescent Pipe Line Co.*, 56 Pa. Super. Ct. 201.

Power implied to condemn lands beyond corporate limits for sewer outlets. *Rochford v. Moorer*, 259 Ill. 604, 102 N. E. 1132.

"Statutes authorizing the exercise of power to take private property without the consent of the owner are to be construed with reasonable strictness. The authority of the city to take the plaintiff's land by eminent domain exists only in case the legislature has delegated that power in express terms or by necessary implication. It is not to be inferred from vague and doubtful language." *Comiskey v. Lynn*, 226 Mass. 201, 115 N. E. 312, citing 1 *Lewis*, *Eminent Domain* (3rd ed.) § 371, 388, per De Courcy, J.

conferred it for a particular use, and when conferred it is to be treated as an invasion of the rights of the individual whose property is to be taken and therefore to be strictly construed.<sup>16</sup>

### § 1465. Public corporations on whom power conferred.<sup>17</sup>

<sup>16</sup> *Southwest Missouri Light Co. v. Scheurich*, 174 Mo. 235, 241, 242.

Statutes conferring the power are to be construed with reasonable strictness. *Comiskey v. Lynn*, 226 Mass. 201, 115 N. E. 312; *Orlean-Kimer Elec. Ry. Co. v. Metaire Ridge Nursery Co.*, 136 La. 968, 68 So. 93; *Cincinnati v. Louisville & Nashville R. Co.*, 88 Ohio 283, 102 N. E. 951; *Oswego, D. & R. Co. v. Cobb*, 66 Or. 587, 135 Pac. 181; *Texas Midland R. R. Co. v. Kaufman, County, Imp. Dist. (Tex. Civ. App.)*, 175 S. W. 482; *Chehalis v. Centralia*, 77 Wash. 673, 138 Pac. 293.

See § 1531, post.

Liberal construction. *Ridgeley v. Baltimore*, 119 Md. 567, 87 Atl. 909.

Statutes construed as limitation on exercise of power. *Arthur v. Choctaw County*, 43 Okl. 174, 141 Pac. 1.

Purposes specified constitute the measure of power; other purpose cannot be substituted by a municipality. *State v. District Court*, 133 Minn. 221, 158 N. W. 240.

Particular statute, holding "municipal buildings," did not include public library building. *Re Philadelphia*, 60 Pa. Super. Ct. 594.

Statute must be definite and certain, cannot discriminate. Statute held not discriminating. *Alabama*

*Interstate Power Co. v. Mt. Vernon-Woodbury Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

<sup>17</sup> *Bowden v. York Shore Water Co.*, 114 Me. 150, 95 Atl. 779.

State may delegate the power to take private property for public use to municipal corporations, governmental subdivisions or to public service corporations, and also to public officers, boards of trustees, managers of state institutions, county commissioners and other like board and officers. It is lawfully delegated to administrative boards or officers, such as school officers, commissioners of highways, county boards, park commissioners or others exercising similar powers. *Chicago, B. & Q. R. Co. v. Cavanaugh*, 278 Ill. 609, 616, 116 N. E. 128.

De facto corporation may exercise power. *Crystal Park Co. v. Morton*, 27 Colo. App. 74, 146 Pac. 566; *Roaring Springs Townsite Co. v. Paducah Tel. Co. (Tex. Civ. App. 1914)*, 164 S. W. 50.

Corporations cannot condemn without authority. *Chicago, M. & St. P. R. R. Co. v. Des Moines Union Ry. Co.*, 165 Iowa 35, 144 N. W. 54.

May be conferred on corporation. *Buncobul Metallic Telephone Co. v. McGinnis*, 268 Ill. 504, 109 N. E. 257; *Rogers v. Cosgrave*, 98 Neb. 608, 153 N. W. 569.

**§ 1466. Amount of property which may be condemned.<sup>18</sup>**

**§ 1467. Necessity as a condition to condemnation.**

The necessity<sup>19</sup> and extent of taking is legislative,<sup>20</sup>

Telegraph companies. *Western Union Tel. Co. v. Louisville & N. R. Co.*, 107 Miss. 626, 65 So. 650.

Electric railway corporations. *St. Louis El. Term. Ry. Co. v. Mac Adaras*, 257 Mo. 448, 166 S. W. 307.

Conferred on railroads for branch, etc., roads. *Kenly v. Washington R. Co.*, 129 Md. 1, 98 Atl. 232.

Public service corporations. *Deseret Water, Oil & I. Co. v. State*, 167 Cal. 147, 138 Pac. 981.

Power to private corporation, denied. *Norfolk County Water Co. v. Wood*, 116 Va. 142, 81 S. E. 19.

Cannot be conferred on private coal mining companies. *Re Polard Coal Co.*, 58 Pa. Super. Ct. 312.

Private corporation for water power. *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

Power of eminent domain cannot be conferred constitutionally to obtain way for transportation on corporations or individuals engaged in moving forest products, oil and minerals, etc. *Boyd v. Ritter Lumber Co.*, 119 Va. 348, 89 S. E. 273.

18 City may take only property required. *Kansas City v. Woerishoeffer*, 249 Mo. 1, 155 S. W. 779.

"Whenever it may lawfully be done, the board of aldermen, in the ordinance providing for the appropriation of private property or any easement or use therein for

any highway, street, boulevard, parkway, park, wharf, bridge, viaduct, subway, tunnel, or sewer, or providing for any public work or improvement which will damage or benefit private property, may provide for the appropriation in fee by the city of private property or any easement or use therein in excess of that actually required for such specific purpose, and in the same or a different ordinance may authorize the sale of such excess for value with or without restrictions. Such excess shall be condemned and compensation therefor ascertained and rendered in the same proceeding, and in the same manner as near as may be, as the property, easement, or use actually needed as aforesaid; provided, that the value of such excess shall be paid for by the city." *St. Louis Charter*, Art. XXI, § 16.

19 *State v. District Court*, 133 Minn. 221, 158 N. W. 240.

Necessity of property, is administrative. *Re Rochester*, 165 N. Y. S. 1026, 100 Misc. Rep. 421.

Necessity for the improvement is a question exclusively for the municipal authorities. *Depue v. Bansbach*, 273 Ill. 574, 113 N. E. 156.

Power arises from necessity only. *Spokane v. Spokane & I. E. R. Co.*, 75 Wash. 651, 135 Pac. 636; *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 Atl. 633.

20 Law giving power to city to determine necessity for taking,

but, the legislature may submit the question to the judiciary for decision.<sup>21</sup>

Therefore, necessity for the extension of streets, alleys and sidewalks can not be brought before the court when the "legislature has settled that question by an unqualified grant of power to the city to make the extension."<sup>22</sup>

Laws sometimes require in certain municipal improvements the enactment of an ordinance or resolution declaring the necessity of the taking as a condition to proceed.<sup>23</sup>

### § 1468. What questions are reviewable by courts.<sup>24</sup>

The judicial department is vested with the power to take, the power to determine the character of the taking,

with hearing to owner, held constitutional. *Sears v. Akron*, 246 U. S. 242, 38 Sup. Ct. 245, 62 L. ed. 688; *Sloan v. Lawrence* (Ark.), 203 S. W. 260; *Joslin Mfg. Co. v. Clarke* (R. I.), 103 Atl. 935.

<sup>21</sup> *Sears v. Akron*, 246 U. S. 242, 38 Sup. Ct. 245, 62 L. ed. 688.

The necessity for condemnation may be determined by the state or it may be committed for determination to a proper corporation. *Bowden v. York Shore Water Co.*, 114 Me. 150, 95 Atl. 779.

<sup>22</sup> *Mobile & O. R. Co. v. Union City*, 137 Tenn. 491, 194 S. W. 572, 574.

<sup>23</sup> *Tremonton v. Johnston* (Utah), 164 Pac. 190.

See § 1871, vol. 4, ante.

<sup>24</sup> **Public use** is a judicial question. *Fitzpatrick v. Warden*, 157 Ky. 95, 162 S. W. 550; *Illinois Central R. Co. v. East Sioux Falls Quarry Co.*, 33 S. D. 63, 144 N. W. 724; *Gauley S. R. Co. v. Vencill*, 73 W. Va. 650, 80 S. E. 1103.

Public use and necessity for park, held question for municipal

authorities. *Spokane v. Meriam*, 80 Wash. 222, 141 Pac. 358.

Whether reservoir to supply water for the public use, for public welfare. *Hartford Water Comrs. v. Manchester*, 89 Conn. 671, 96 Atl. 182.

As to public use, see § 1478, post.

If good faith appears in the exercise of the right courts will not interfere. *Bowden v. York Shore Water Co.*, 114 Me. 150, 95 Atl. 779.

**Extent** is legislative, not judicial. *Cuyahoga River Power Co. v. Akron*, 210 Fed. 524. But if grossly in excess, courts will deny. *Chicago v. Lehmann*, 262 Ill. 468, 104 N. E. 829.

Whether fee or easement only should be taken for a subway, held legislative question. *Re New York City*, 147 N. Y. S. 1057, 163 App. Div. 10.

**When necessity** is a judicial question. *Chicago v. Lehmann*, 262 Ill. 468, 104 N. E. 829; *Eckart v. Ft. Wayne & N. I. Traction Co.* (Ind.), 104 N. E. 762; *Alabama In-*

and the justness of the compensation to be made, "but all other incidents of the taking are political questions for the determination of the sovereign, and not judicial questions for the determination of the courts. Selecting the property to be taken, as contradistinguished from similar property in the same locality, determining its suitability for the use to which it is proposed to put it, as well as deciding the quantity required are all political questions which inhere in and constitute the chief value of the power to take."<sup>25</sup>

terstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co., 186 Ala. 622, 65 So. 287; Arthur v. Choctaw County, 43 Okl. 174, 141 Pac. 1.

The question of necessity or expedience is legislative, not judicial. District of Columbia v. Washington Steel & Ordinance Co., 413 App. D. C. 344.

Necessity is an administrative question to be exercised within legislative restrictions. Mountrail County v. Wilson, 27 N. D. 277, 146 N. W. 531.

The determination of the questions of necessity or expediency in the acquirement of private property for public use are political, not judicial in their nature. Re Ely Ave., New York City, 217 N. Y. 45, 111 N. E. 266, 270, reversing 153 N. Y. S. 1049, 168 App. Div. 867.

Necessity and propriety of taking is legislative question solely, but whether power to take for particular purpose and whether such purpose is public is judicial. State v. District Court, 133 Minn. 221, 158 N. W. 240.

Necessity for improvement is not reviewable by courts. Depus v.

Banschbach, 273 Ill. 574, 113 N. E. 156.

Under the New York Rapid Transit Act the determination by the Public Service Commission of the necessity for a rapid transit railroad in a particular locality and taking land therefor will not be reviewed by the Courts, nor will the good faith of the Commission be judicially inquired into. Re Public Service Com., 217 N. Y. 61, 111 N. E. 658, with a dissenting opinion says: "Though proper in form, the action of a body exercising the delegated power of eminent domain or even taxation may be so arbitrary as to authorize the interference of the judiciary," citing Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. ed. 392.

<sup>25</sup> Southern Ry. Co. v. Memphis, 126 Tenn. 267, 282, 283, 148 S. W. 662, 4 L. R. A. (N. S.), 828, approved in Mobile & O. R. Co. v. Union City, 137 Tenn. 491, 194 S. W. 572, 574; Webb v. Lucas, 125 Minn. 403, 147 N. W. 273; Minnesota Canal and Power Co. v. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

Where a municipality is vested

Usually the motives of the municipal authorities will not be reviewed by courts.<sup>26</sup>

## II. WHAT IS "TAKING" OF PROPERTY.

### § 1469. Meaning of "taking."

Constitutions usually do not define property, nor do they declare what shall be a "taking." Those questions are left to be determined by the courts upon the facts of each particular case.<sup>27</sup>

Material interference with access,<sup>28</sup> and light, air and view, is generally held to be taking within the meaning of the constitution.<sup>29</sup>

### § 1470. Taking as affected by the police power.

The following have been held a proper exercise of the police power, as distinguished from the power of

with authority to condemn lands for park purposes, courts will not inquire into the propriety of its exercise of such right. The city has broad discretion in determining the amount taken, etc. *Depue v. Banschbach*, 273 Ill. 574, 113 N. E. 156.

<sup>26</sup> *De Priest v. Camp*, 101 Kan. 810, 168 Pac. 872.

Court will not inquire into the intention of the municipal authorities, as that instead of condemning the land for street purposes, they desire it for an elevated railroad. *Re Ely Ave.*, New York City, 217 N. Y. 45, 111 N. E. 266, 270, 271, reversing 153 N. Y. S. 1049, 168 App. Div. 867.

<sup>27</sup> *Baltimore v. Bregenzer*, 125 Md. 78, 93 Atl. 425.

See § 1456, vol. 4, ante.

<sup>28</sup> *Colorado Springs v. Stark*, 57 Colo. 384, 140 Pac. 794; *Barnard v. Chicago*, 270 Ill. 27, 110 N. E.

412; *Chicago I. & L. Ry. Co. v. Ader*, 184 Ind. 235, 110 N. E. 67; *Oler v. Pittsburgh, C. C. & St. L. Ry. Co.*, 184 Ind. 431, 111 N. E. 619; *Rourke v. Holmes Street Railway Company* (Mo. App. 1915), 177 S. W. 1102; *Texarkana v. Lawson* (Tex. Civ. App. 1914), 168 S. W. 867.

<sup>29</sup> *Chicago Sanitary Dist. v. Baumbach*, 270 Ill. 128, 110 N. E. 331; *Barnard v. Chicago*, 270 Ill. 27, 110 N. E. 412; *Rourke v. Holmes St. Ry. Co.* (Mo. App. 1915), 177 S. W. 1102; *Rothschild v. Interborough Rapid T. Co.*, 147 N. Y. S. 1040, 162 App. Div. 532.

Light, air and access of abutting owners are held to be property rights, and can only be taken on payment of just compensation. *Linsheimer v. Underpinning and Foundation Co.*, 165 N. Y. S. 645, 178 App. Div. 495; *Yates & Donelson Co. v. Memphis*, 137 Tenn. 642,

eminent domain: Seizure of intoxicating liquors;<sup>30</sup> license requirements;<sup>31</sup> removing garbage;<sup>32</sup> destruction of diseased orange trees, as those affected by citrus canker,<sup>33</sup> and the destruction of infected fruit;<sup>34</sup> necessary and reasonable health regulations,<sup>35</sup> as the enactment and enforcement of vital statistics laws,<sup>36</sup> and laws requiring the inspection of cows to learn whether they are suffering from tuberculosis or other contagious disease;<sup>37</sup> safety requirements and reasonable regulations of the several kinds.<sup>38</sup>

Unreasonable restrictions on the use of property not endangering public safety, health or morals or not in-

194 S. W. 903; *Liebman v. New York City*, 164 N. Y. S. 769.

<sup>30</sup> *State v. Nejin*, 140 La. 793, 74 So. 103.

<sup>31</sup> *Dunn v. Hoboken*, 85 N. J. L. 79, 88 Atl. 1053.

License and license fee for display on real estate of advertisements. *State v. Murphy*, 90 Conn. 662, 98 Atl. 343.

<sup>32</sup> *Urbach v. Omaha*, 101 Neb. 314, 163 N. W. 307.

<sup>33</sup> *Louisiana State Board, etc. v. Tanzmann*, 140 La. 756, 73 So. 854.

<sup>34</sup> *Colvill v. Fox*, 51 Mont. 72, 149 Pac. 496, L. R. A. 1915F, 894.

Statute authorizing destruction of citrus plants when infected with disease, held not a taking of private property for public use without compensation. *Stockwell v. State* (Tex. Civ. App.), 203 S. W. 109.

<sup>35</sup> *Pest house* which damages property, entitles owner to compensation. *Oklahoma City v. Vetter* (Okla.), 179 Pac. 473.

<sup>36</sup> *State v. Norvell*, 137 Tenn. 82, 191 S. W. 536.

<sup>37</sup> *Hawkins v. Hoyer*, 108 Miss. 282, 66 So. 741.

<sup>38</sup> *Regulating horse racing. Douglas Park Jockey Club v. Talbott*, 173 Ky. 685, 191 S. W. 474.

Police regulations against construction of wooden building and provisions for removal or destruction of buildings, etc., is not an exercise of the power of eminent domain. *Crossman v. Galveston* (Tex. Civ. App.), 204 S. W. 128.

Erection of viaduct by city. *Baltimore v. Bregenzer*, 125 Md. 78, 93 Atl. 425.

Requiring railroad to maintain street lights is not a taking. *State ex rel. Lake Charles v. St. Louis I. M. & S. Ry. Co.*, 138 La. 714, 70 So. 621.

Reasonable billboard regulations. *Horton v. Old Colony Bill Posting Co.*, 36 R. L. 507, 90 Atl. 823; § 929, ante; § 929, vol. 3, ante.

Excluding jitney busses from specified districts. *Gill v. Dallas* (Tex. Civ. App.) 209 S. W. 209.

Eliminating street crossings at grade with railroad tracks. *Armour & Co. v. New York, N. H. & H. R. Co.* (R. I.), 103 Atl. 1031.

fringing lawful rights of others, under the guise of the police power, is a taking.<sup>39</sup>

Restrictions on the use of private property cannot be imposed by the city to effect symmetry of the city streets or sections under the police power, but only under the power of eminent domain, allowing compensation, if at all.<sup>40</sup>

Damages resulting from a public nuisance maintained by the municipality is a taking.<sup>41</sup>

<sup>39</sup> *State v. Haughton*, 134 Minn. 226, 158 N. W. 1017; *State v. Lamb* (N. J. L.), 98 Atl. 459; *Chicago v. Lederer*, 274 Ill. 584, 113 N. E. 883.

"Anything done by a state or its delegated agent, as a municipality, which substantially interferes with the beneficial use and ownership of land, depriving the owner of his lawful dominion over it or any part of it not within the general police power of the state as commonly understood, is a taking or damaging of the property without compensation." *Fruth v. Charleston Board of Affairs*, 75 W. Va. 456, 84 S. E. 105, L. R. A. 1915 C 981.

<sup>40</sup> *State ex rel. v. Stahlman*, 81 W. Va. 335, 94 S. E. 497, approving *Fruth v. Board of Affairs*, 75 W. Va. 457, 84 S. E. 105, L. R. A. 1915 C 981.

The construction of levees by the United States Government along navigable rivers is not the exercise of the power of eminent domain. *Jackson v. United States*, 230 U. S. 1, 33 Sup. Ct. 1011; 58 L. ed. 1363; *Hughes v. United States*, 230 U. S. 24, 33 Sup. Ct. 1019, 46 L. R. A. (N. S.) 624.

The same rule applies to a levee district constructed by the state.

*St. Louis Southwestern Ry. Co. v. Miller Levee District*, 207 Fed. 338, 125 C. C. A. 88, affirming 197 Fed. 815.

Change of harbor line by congress interfering with private wharves, does not entitle owner to compensation. *Greenleaf v. Garrison*, 237 U. S. 251, 35 Sup. Ct. 551, 59 L. ed. 929, affirming 215 Fed. 576, 131 C. C. A. 644, which reversed 208 Fed. 1022.

<sup>41</sup> Public nuisance created by city, as throwing sewage into a stream, is taking. *Smith v. Silverton*, 71 Or. 379, 142 Pac. 609.

Damage to property resulting from the maintenance of a municipal garbage disposal plant, is a taking. *Jacobs v. Seattle*, 93 Wash. 171, 160 Pac. 299, 302; *Louisville v. Hehemann*, 161 Ky. 523, 171 S. W. 165, L. R. A. 1915 C 747; *Hines v. Rocky Mount*, 162 N. C. 409, 78 S. E. 510, L. R. A. 1915 C 751, Ann. Cas. 1915 A 132.

Damages arising from municipal septic sewer tank, not a nuisance, not included in constitution. *Brewster v. Forney* (Tex. Civ. App.), 196 S. W. 636.

City maintaining a nuisance, as garbage dump, is taking. *Louisville v. Hehemann*, 161 Ky. 523,



**§ 1470a. Same—regulating service, rates, etc., of public service companies.**

Reasonable regulations of the service,<sup>42</sup> rates, fares, charges, etc.,<sup>43</sup> of public utility companies, is not an exercise of the power of eminent domain. Of course, such regulations must be reasonable, within the duty of the public service company, and required by public necessity or convenience.<sup>44</sup>

171 S. W. 165, L. R. A. 1915 C 747.

Construction of drainage system affecting the use of property, if injured, of course, compensation is required. *Diamond v. North Attleborough*, 219 Mass. 587, 107 N. E. 445.

Action for a private nuisance resulting in taking in violation of property rights. United States Constitution forbids immunity in such case. *Richards v. Washington Terminal Co.*, 233 U. S. 546, 34 Sup. Ct. 654, 58 L. ed. 1088, reversing 37 App. D. C. 289.

<sup>42</sup> *Pittsburgh, C. C. & St. L. Ry. Co. v. Indiana R. R. Com.*, 171 Ind. 189, 86 N. E. 328.

Regulating private corporations engaged in public service, which do not impose unreasonable burdens. *District of Columbia v. Capital Traction Co.*, 41 App. D. C. 115.

Unreasonable burden is taking. *Cacke River Drainage District v. Chicago & E. I. R. Co.*, 264 Ill. 97, 105 N. E. 699.

Motor busses or jitneys regulation is not a taking. *Auto Transit Co. v. Ft. Worth (Tex. Civ. App.)*, 182 S. W. 685.

<sup>43</sup> *Union Dry Goods Co. v. Georgia Public Service Corp.*, 142 Ga. 841, 83 S. E. 946; *Willis v. Roch-*

*ester*, 219 N. Y. 427, 114 N. E. 851, affirming 160 N. Y. S. 1150; *Hocking Valley Ry. Co. v. Public Utilities Com.*, 92 Ohio 362, 110 N. E. 952; *State v. Public Service Com.*, 76 Wash. 625, 137 Pac. 132.

<sup>44</sup> There is no common law duty, imposed on a railroad to construct a bridge, for example, over a channel of a sanitary district crossing its right of way subsequent to construction of its road. *Chicago Sanitary Dist. v. Chicago & Alton R. Co.*, 267 Ill. 252, 108 N. E. 312.

The validity of the order is to be "tested by considering whether in view of all the facts the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet." *State ex rel. Oregon R. R. and Navigation Co. v. Fairchild*, 224 U. S. 510, 524, 32 Sup. Ct. 535, 56 L. ed. 863, reversing 52 Wash. 17.

"In one sense there may be, and often is, a taking of property through the legitimate exercise of the power of regulation and as necessarily incident thereto. In such case the company whose business is subjected to the regulation is not deprived of the title to or possession of its property, but it may be required to forego

These regulations have been sustained: requiring a railroad to expend its money for a railroad connection, and to submit to certain losses in revenue;<sup>45</sup> requiring a railroad to accept and transport loaded cars received from other railroads, although it was willing and wished to use its own cars for the purpose;<sup>46</sup> requiring the establishment of a union depot at heavy expense;<sup>47</sup> requiring railroads doing an interstate business to use their tracks within a city for the interchange of interstate traffic;<sup>48</sup> requiring the interchange of car loads of freight between connecting carriers ordered within switching limits;<sup>49</sup> compelling the continuance by a railroad of interurban service;<sup>50</sup> compelling physical connection of telephone lines;<sup>52</sup> apportionment of expenses in making a crossing at grade.<sup>53</sup>

profits which it might otherwise receive; to apply its property, within the dedicated use, to some purpose contrary to its wishes; to expend its money as it would not otherwise expend it; to perform service it would not perform except for the regulation; and to submit to losses which it would prefer to avoid." *Michigan State Telephone Co. v. Michigan Railroad Com.*, 193 Mich. 515, 161 N. W. 240, 243.

<sup>45</sup> *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. ed. 194.

<sup>46</sup> *Chicago, M. & St. P. R. Co. v. Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. ed. 988.

<sup>47</sup> *Worcester v. Norwich & W. R. Co.*, 109 Mass. 103.

<sup>48</sup> *Grand Trunk Ry. Co. v. Michigan R. R. Com.*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. ed. 310.

<sup>49</sup> *Pennsylvania Co. v. United States*, 236 U. S. 351, 35 Sup. Ct. 370, 59 L. ed. 616, affirming 214 Fed. 445.

<sup>50</sup> *Hocking Valley Ry. Co. v. Public Utilities Com.*, 92 Ohio St. 9, 110 N. E. 521.

<sup>52</sup> *Michigan State Telephone Co. v. Michigan Railroad Com.*, 193 Mich. 515, 161 N. W. 240, 243, approving *Wisconsin Telephone Co. v. Railroad Com.* 162 Wis. 383, 156 N. W. 614, *L. R. A.* 1916 E 748; *Pacific Tel. & Tel. Co. v. Wright-Dickinson Hotel Co.* (D. C.), 214 Fed. 666; and *Pioneer Telephone & Telegraph Co. v. State*, 38 Okl. 554, 134 Pac. 398, and disapproving *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 641, 137 Pac. 1119, 50 L. R. A. (N. S.), 652, *Ann. Cas.* 1915 C 822.

Requiring telephone companies to make physical connections, etc., not taking. *Pacific Tel. & Tel. Co. v. Wright-Dickinson Hotel Co.*, 214 Fed. 666.

<sup>53</sup> *State v. Northern Pac. Ry. Co.*, 94 Wash. 10, 161 Pac. 850.

**§ 1471. Preliminary steps as taking.<sup>54</sup>****§ 1472. Change of grade of street.<sup>55</sup>****§ 1473. Vacation of street or alley.<sup>56</sup>**

<sup>54</sup> Marking street on city plat is not taking. *Re Philadelphia Parkway*, 250 Pa. 257, 95 Atl. 429.

<sup>55</sup> See § 1975, et seq., post; § 1975, et seq., vol. 4, ante.

Compensation denied. *Butter v. Kokomo* (Ind. App.), 113 N. E. 391; *Rigney v. New York Central & H. R. R. Co.*, 217 N. Y. 31, 111 N. E. 226, affirming 146 N. Y. S. 395, 161 App. Div. 187; *Hobbs v. Shamokin Borough*, 66 Pa. Super. Ct. 22.

Compensation allowed. *Louisville v. Lausberg*, 161 Ky. 361, 170 S. W. 962; *Louisville v. Koshewa*, 161 Ky. 359, 170 S. W. 964; *Baltimore & O. R. Co. v. Kahl*, 124 Md. 299, 92 Atl. 770; *Morgan v. Albert Lea*, 129 Minn. 59, 151 N. W. 532; *Leynaud v. Cherry*, 203 Ill. App. 541; *Funderburk v. Columbus*, 117 Miss. 173, 78 So. 1; *Nestlehut v. De Soto* (Mo. App. 1918), 202 S. W. 425; *Ketchum v. Monett*, 193 Mo. App. 529, 181 S. W. 1064; *Hollenbeck v. Seattle*, 88 Wash. 322, 153 Pac. 18 (holding change of grade is "damaging" property under the constitution), *Rogers v. New London*, 89 Conn. 343, 94 Atl. 364, *Lannan v. Waltenpiel*, 45 Utah 564, 147 Pac. 908; *Spokane v. Onstine*, 86 Wash. 4, 149 Pac. 1; *Kincaid v. Seattle*, 74 Wash. 617, 134 Pac. 504.

<sup>56</sup> Section 1405, ante; § 1981, post, § 1981, vol. 4, ante.

Closing street is not taking. *Stevens v. Dublin* (Tex. Civ. App.), 169 S. W. 188.

Damages to abutting owner by vacation of street, held not included by the constitution. *Seager v. Com.*, 258 Pa. 339, 101 Atl. 990.

Vacation of portion of street requiring abutting owner to go further to reach his property, held not entitled to compensation. *Re Edgemont Street*, 66 Pa. Super. Ct. 142.

Vacation of street gives abutting owner no right to compensation in absence of statute. *Wright v. Luzerne County*, 67 Pa. Super. Ct. 618.

Vacating alley is taking. *Hubbel v. Des Moines*, 173 Iowa 55, 154 N. W. 337.

Vacation of streets, compensation required to injured abutting property owners. *Jones v. Aurora*, 97 Neb. 825, 151 N. W. 958.

Closing of public way which destroys easements, entitled abutting owners to compensation, when. *Re Wallace, Barnes and Matthews Avenues*, New York City, 222 N. Y. 139, 118 N. E. 506; *Re White Plains Road*, New York City, 168 N. Y. S. 435, 179 App. Div. 216.

Property suffered special injury due to vacation of street is taking. Construing statute providing damages. *Hill v. Kimball*, 269 Ill. 398, 110 N. E. 18.

Right of access viewed as of material value and hence compensation often required. *Hubbell v. Des Moines*, 173 Ia. 55, 167 N. W. 619.

No application to closing private

### § 1473a. Public improvements.<sup>57</sup>

Incidental damages due to repairing a public way is not a "taking" or "damaging," etc.<sup>58</sup>

So a drainage ditch on the side of a street owned by a city is not a taking of property of the abutting owner.<sup>59</sup>

But damage to property, although consequential, in the construction of a municipal sewer has been held to be a taking.<sup>60</sup>

On the other hand, it has been held that the construction is not applicable to the construction of sewers by the city.<sup>61</sup>

Opening<sup>62</sup> and laying out streets usually gives the abutting property owner no right to damages.<sup>63</sup>

### § 1474. Interfering with franchise.<sup>64</sup>

Property, of course, cannot be taken under the guise of the police power, e. g., compelling a lighting company

way. *Re Wallace, Barnes and Matthews Avenues*, New York City, 222 N. Y. 139, 118 N. E. 506, reversing 166 N. Y. S. 429, 179 App. Div. 172.

<sup>57</sup> Section 1967, et seq., vol. 4, ante; § 1968, et seq., post.

Grading streets, not taking. *Schuss v. Chehalis*, 82 Wash. 595, 144 Pac. 916.

Limited to taking for public improvements, under Alabama Constitution. *Birmingham v. Graves* (Ala.), 76 So. 395.

Taking or injuring for water supply or to construct dams across natural water courses just compensation is constitutional prerequisite. *Prather v. Springfield*, 202 Ill. App. 406.

<sup>58</sup> *Granger Telephone & Tel. Co. v. Sloane Bros.*, 96 Wash. 333, 165 Pac. 102.

<sup>59</sup> *Port Arthur Comrs. v. Fant* (Tex. Civ. App.), 193 S. W. 334.

<sup>60</sup> *Muskogee v. Hancock*, 58 Okl. 1, 158 Pac. 622.

<sup>61</sup> *St. Joseph & G. I. Ry. Co. v. Hiawatha*, 95 Kan. 471, 148 Pac. 744.

<sup>62</sup> *Re Sixty-Fourth St.*, New York City, 170 N. Y. S. 641, 183 App. Div. 708.

<sup>63</sup> Laying out street, gives abutter no right to damages, as such act renders his lot available. *Turner v. North Carolina Pub. Service Co.*, 174 N. C. 522, 93 N. E. 998.

<sup>64</sup> Interference with franchise right may be taking. *New York Telephone Co. v. State*, 154 N. Y. S. 1059, 169 App. Div. 310.

Can condemn franchise by statute. *State v. Circuit Court*, 162 Wis. 234, 155 N. W. 139.

Constructing city street railway built along street occupied by tracks of private street railroad, held not a taking, requiring com-

to re-locate its poles and instrumentalities that the municipality may install its own system acting in its proprietary capacity.<sup>65</sup>

**§ 1475. Tax or assessment as a taking.<sup>66</sup>**

**§ 1476. Injury to lateral support.**

In Illinois it has been held that a property owner is entitled to damages for the removal of lateral support due to excavations by the city for a street railway tunnel.<sup>67</sup>

**§ 1477. "Damage" or "injury" to property.<sup>68</sup>**

III. USE FOR WHICH TAKEN AS A PUBLIC USE.

**§ 1478. Use must be a public use.<sup>69</sup>**

In the exercise of the power of eminent domain "private property cannot be taken for private purposes at

pensation. *United Railroads v. San Francisco*, 239 Fed. 987.

<sup>65</sup> *Los Angeles Gas and El. Co. v. Los Angeles*, 241 Fed. 912, 918.

<sup>66</sup> See § 1454, ante.

<sup>67</sup> *Barnard v. Chicago*, 270 Ill. 27, 110 N. E. 412.

<sup>68</sup> "Injury" and "taking" distinguished. *Baltimore v. Bregner*, 125 Md. 78, 93 Atl. 425.

If value of fee of land is impaired, the property is damaged. *Great Northern Ry. Co. v. Quigg*, 213 Fed. 873.

Compensation required for damaging property. *Jones v. Sewer Improvement District*, 119 Ark. 166, 177 S. W. 888; *Austin v. Hennepin County*, 130 Minn. 359, 153 N. W. 138.

Notwithstanding the constitution requires compensation for taking or damaging property, the doctrine of *damnum absque injuria*

applies. *Taylor v. Chicago, M. & St. P. Ry. Co.*, 85 Wash. 592, 148 Pac. 887, L. R. A. 1915 E 634.

In making municipal improvements, § 1967, et seq., vol. 4, ante; § 1968, et seq., post.

Not taken, but damaged, consequential damages denied. *Chicago v. Lord*, 282 Ill. 120, 118 N. E. 432.

<sup>69</sup> *Bushart v. Fulton County (Ky.)*, 209 S. W. 499; *Knapp v. State*, 125 Minn. 194, 145 N. W. 967; *Chicago v. Lord*, 277 Ill. 397, 115 N. E. 543.

Drainage, held public use. *Orr v. Allen*, 245 Fed. 486.

City may condemn property to erect a sea wall, to give protection against floods. *Sick v. Bay of St. Louis*, 113 Miss. 175, 74 So. 272, 274.

Spur track in city, to serve public is. *Harrold Bros. v. Americus*,

all. This is a power which the sovereign does not possess in a free government like ours, in which sovereignty is not vested in a ruler, but resides in the people." <sup>70</sup>

In the absence of a constitutional provision there is no authority for the taking of private property for private use. <sup>71</sup>

Therefore, apart from express constitutional prohibition it is elementary that private property can only be taken for a public as distinguished from a private use, <sup>72</sup>

142 Ga. 686, 83 S. E. 534. See *Landau Cabinet Co. v. Bush*, 3 Mo. P. S. C., p. 476, for discussion by the author relating to spur track to serve a private industry as a public use.

Spur track as private use. *Bradley v. Lithonia & A. M. R. Co.*, 141 Ga. 741, 82 S. E. 138.

Temporary logging road as an aid to develop mineral resources of the state, held a public use. *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 155 Pac. 680.

Land taken upon which to construct telephone poles and lines, held public use. *Mitchell v. Southern New England Tel. Co.*, 90 Conn. 179, 96 Atl. 966.

Every municipal purpose. *N. Ward Co. v. Boston*, 217 Mass 381, 104 N. E. 965.

Public use defined. *Re Hartford Water Commissioners*, 87 Conn. 193, 87 Atl. 870; *Pennsylvania Mut. Life Ins. Co. v. Philadelphia*, 242 Pa. 47, 88 Atl. 904.

Way of necessity to public way. *Pitznogle v. Western Maryland Ry. Co.*, 119 Md. 673, 87 Atl. 915, 46 L. R. A. (N. S.) 319.

Private right of way is not a public use. *Fitzpatrick v. Warden*, 157 Ky. 95, 162 S. W. 550.

<sup>70</sup> *Southern Ry. Co. v. Memphis*, 126 Tenn. 267, 281, 148 S. W. 662, 4 L. R. A. (N. S.) 828, Ann. Cas. 1913 B, 153; *Bowden v. York Shore Water Co.*, 114 Me. 150, 95 Atl. 779.

<sup>71</sup> *Wells v. Weston*, 22 Mo. 384; *St. Charles v. Nolle*, 51 Mo. 122; *Cole v. LaGrange*, 113 U. S. 8.

<sup>72</sup> *Dickey v. Tennison*, 27 Mo. 373.

Private use denied. *Anderson v. Smith-Powers Logging Co.*, 71 Or. 276, 139 Pac. 736; *Gauley & S. R. Co. v. Vencill*, 73 W. Va. 650, 80 S. E. 1103; *Vetter v. Broadhurst*, 100 Neb. 356, 160 N. W. 109; *Nakdimen v. Ft. Smith and Van Buren Bridge Dist.*, 115 Ark. 194, 172 S. W. 272; *Bradley v. Lithonia & A. M. R. Co.*, 141 Ga. 741, 82 S. E. 138; *Webb v. Lucas*, 125 Minn. 403, 147 N. W. 273; *Minnesota Canal & Power Co. v. Fall Lake Boom Co.*, 127 Minn. 23, 148 N. W. 561; *Acme Cement Plaster Co. v. American Cement Plaster Co. (Tex. Civ. App.)*, 167 S. W. 183.

Footwalk as means to reach railroad, held public use. *Wanamaker v. Schuylkill River East Side R. Co.*, 244 Pa. 214, 90 Atl. 561.

Cannot take for benefit of pri-

unless, of course, the owner consents thereto. This conclusion is undoubtedly a correct one and is too well settled by authority to necessitate inquiry into the true ground upon which it rests.<sup>73</sup>

vate individual. *Mosely v. Bradford* (Tex. Civ. App.), 190 S. W. 824.

Improvements to protect a beach, held a public purpose. *Donnelly v. Longport Borough*, 88 N. J. L. 68, 95 Atl. 740.

Private roads, held public use, as whole public may use. *Bashor v. Bowman*, 133 Tenn. 269, 180 S. W. 326.

Railroad overhead crossing, held public use. *Eikenberry v. St. Paul & K. C., S. L. R. Co.*, 174 Ia. 6, 156 N. W. 163.

Bridge is a public use. *State v. Eirick*, 35 Ohio Cir. Ct. R. 18, affirmed 84 Ohio St. 503, 95 N. E. 1156.

Tramroad. *Hutchinson v. Caldwell Lumber Co.*, 144 Ga. 565, 87 S. E. 777.

Improvement of navigation is public use. *State v. Milwaukee*, 156 Wis. 549, 146 N. W. 775.

The fact that the contemplated improvement will benefit one person or class of persons more than others, or will serve a private interest, does not make the use private if the use designed is available to the entire public. *Oneonta Light & Power Co. v. Schwarzbach*, 150 N. Y. S. 76, 164 App. Div. 548.

Under some constitutions lands for private way of necessity, held could be condemned. *Crystal Park Co. v. Morton*, 27 Colo. App. 74, 146 Pac. 566; *State v. Superior Court*, 82 Wash. 503, 144 Pac. 722;

*Inspiration Consol. Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 144 Pac. 277.

Legislature may authorize the exercise of the right for private as well as public use, unless restricted by the constitution. *Inspiration Consolidated Copper Co. v. New Keystone Copper Co.*, 16 Ariz. 257, 144 Pac. 277.

Need not be for public purpose unless so restricted by organic provision, since the power exist apart from the constitution. *State v. Superior Court*, 77 Wash. 585, 137 Pac. 994.

<sup>73</sup> "It is conceded on all hands that the legislature has no power in any case to take the property of one individual and pass it over to another without reference to some use to which it is to be applied for the public's benefit." *Coolley Const. Lim.* (6th ed.), p. 651; *Caster v. Tide Water Co.*, 18 N. J. Eq. 54, 63; *Forney v. Fremont, etc.*, R. Co., 23 Neb. 465, 468, 36 N. W. 806.

"When we come to seek for the principles upon which the question of public use is to be determined, or to define the word 'public use' in the light of judicial decisions we find ourselves utterly at sea. I Lewis, *Eminent Domain* (3rd ed.), § 252. "No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the word 'public

In providing for the condemnation of private property the legislative department must, of course, determine in the first instance whether the use for which it is proposed to authorize the condemnation is a public one, but the prevailing rule is that whether a particular use is or is not public within the meaning of the constitution is a question for the judiciary.<sup>74</sup>

Some constitutions so provide in express terms.<sup>75</sup>

However, a legislative declaration on the subject will be respected by the courts unless it is palpably without reasonable foundation.<sup>76</sup>

But certain constitutions direct that the courts shall determine the question "without regard to any legislative assertion that the use is public."<sup>77</sup>

#### § 1481. Cemeteries.<sup>78</sup>

#### § 1483. Light, heat and power supply.<sup>79</sup>

use' as found in the different state constitutions regulating the right of eminent domain." *Dayton Mining Co. v. Seawell*, 11 Nev. 394, 400.

<sup>74</sup> *Sears v. Akron*, 246 U. S. 242, 33 Sup. Ct. 245, 62 L. ed. 688.

Public use is judicial question, but necessity of property for such use, is administrative. *Re Rochester*, 165 N. Y. S. 1026, 100 Misc. Rep. 421; *State v. District Court*, 133 Minn. 221, 158 N. W. 240.

The property owner has "the right to contest the question whether the proposed use is public or private and whether the power is to be exercised for the purpose for which it was conferred. *Chicago, B. & Q. R. Co. v. Cavanaugh*, 278 Ill. 609, 617, 116 N. E. 128.

<sup>75</sup> Constitution of Missouri, 1875, Article 11, § 20.

<sup>76</sup> *United States v. Gettysburg Electric Railroad Co.*, 160 U. S. 688,

<sup>77</sup> Constitution of Missouri, 1875, Article 11, § 20.

Public use is a judicial question. *Webb v. Lucas*, 125 Minn. 403, 147 N. W. 273.

Judiciary may determine public use by statute. *Cox v. Revelle*, 125 Md. 579, 94 Atl. 203, L. R. A. 1915 E 443.

Public use is question for municipal authorities. *Spokane v. Merriam*, 80 Wash. 222, 141 Pac. 358.

<sup>78</sup> *Brown v. Park Cemetery*, 78 N. H. 387, 101 Atl. 34.

<sup>79</sup> *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U. S. 30, 36 Sup. Ct. 234, 60 L. ed. 507, affirming 186 Ala. 622, 65 So. 287; *Miller v. Southern Indiana Power Co.*, 185 Ind. 35, 111 N. E. 308.

Power to condemn lands for an electric transmission line to a pumping station for water supply, denied under particular statute in



§ 1486. Parks.<sup>80</sup>§ 1489. School purposes.<sup>81</sup>§ 1490. Sewers and drains.<sup>82</sup>§ 1491. Streets and alleys.<sup>83</sup>

## § 1491a. Same—bridge.

To maintain a bridge over a navigable river, the city must condemn the right to the use of the bed of the stream; the maintenance of the bridge confers no prescriptive right therein.<sup>84</sup>

the light of contemporaneous legislation. *Comiskey v. Lynn*, 226 Mass. 210, 115 N. E. 312.

In Washington, a municipality cannot by eminent domain secure a system of lighting in another city. *Bremerton v. North Pacific Public Service Com.*, 243 Fed. 980.

<sup>80</sup> *Lynnfield v. Peabody*, 219 Mass. 322, 106 N. E. 977; *Bunyan v. Commissioners*, 153 N. Y. S. 622, 167 App. Div. 457; *Re Ashland Street, Queens Borough*, 165 N. Y. S. 977; *Pennsylvania Mut. Life Ins. Co. v. Philadelphia*, 244 Pa. 47, 88 Atl. 904; *Vickroy v. Ferndale Borough*, 259 Pa. 321, 102 Atl. 958; *Depue v. Banschbach*, 273 Ill. 574, 113 N. E. 156; *Hobart v. Minneapolis*, 139 Minn. 368, 166 N. W. 411; *Chaplin v. Kansas City*, 259 Mo. 479, 168 S. W. 763; *Spokane v. Merriam*, 80 Wash. 222, 141 Pac. 358.

Denied under particular statute. *Potter v. Board of Public Utility Comrs.*, 89 N. J. L. 157, 98 Atl. 30.

<sup>81</sup> *Connecticut College for Women v. Calvert*, 87 Conn. 421, 88 Atl. 633; *Nelson v. School District*, 100 Kans. 612, 164 Pac. 1075; *Dennis*

*v. Walker Indep. School Dist.*, 166 Ia. 744, 148 N. W. 1007; *Ogden School Dist. v. Smith*, 113 Ark. 530, 168 S. W. 1089; *Knapp v. State*, 125 Minn. 194, 145 N. W. 967; *Graded School Trustees v. Hinton*, 165 N. C. 12, 80 S. E. 890.

<sup>82</sup> *El Dorado v. Schruggs*, 113 Ark. 239, 168 S. W. 846; *Bemis v. Guirl Drainage Co.*, 182 Ind. 36, 105 N. E. 496.

<sup>83</sup> *State v. Montevideo (Minn.)*, 171 N. W. 314; *Los Angeles v. Zeller (Cal.)*, 167 Pac. 849; *Re Ely Ave., New York City*, 217 N. Y. 45, 111 N. E. 266; *Re Saratoga Ave., New York City*, 168 N. Y. S. 180, 180 App. Div. 638; *Re Rosebank Ave., New York City*, 147 N. Y. S. 638, 162 App. Div. 332; *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344; *Ashley v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 37 N. D. 147, 163 N. W. 727; *Re Parkway in Philadelphia*, 249 Pa. 367, 94 Atl. 1174.

Street which is a mere *cul de sac* is a public use. *University Ave., Rochester*, 144 N. Y. S. 1086, 82 Misc. Rep. 598.

<sup>84</sup> *Metropolitan Inv. Co. v. Mil-*

**§ 1492. Water supply.<sup>85</sup>****§ 1493. Wharves.<sup>86</sup>****§ 1493a. Garbage disposition.<sup>87</sup>**

## IV. WHAT PROPERTY MAY BE TAKEN.

**§ 1494. All property may be taken.<sup>88</sup>**

All private property, real or personal, or any ease-

waukee, 165 Wis. 216, 161 N. W. 785.

<sup>85</sup> *Evel v. Utica*, 103 Kan. 567, 175 Pac. 635; *Wood v. Millville*, 89 N. J. L. 646, 98 Atl. 267; *Domrese v. Roslyn*, 101 Wash. 372, 172 Pac. 243; *Prather v. Springfield*, 202 Ill. App. 406; *Hartford Water Comrs. v. Manchester*, 89 Conn. 671, 96 Atl. 182; *Bowden v. York Shore Water Co.*, 114 Me. 150, 95 Atl. 779; *Redmond v. Perrigo*, 84 Wash. 407, 146 Pac. 838; *Chehalis v. Centralia*, 77 Wash. 673, 138 Pac. 293; *Cheyenne v. Edwards*, 22 Wyo. 401, 143 Pac. 356; *Cuyahoga River Power Co. v. Akron*, 210 Fed. 524; *Flagg v. Concord*, 222 Mass. 569, 111 N. E. 369; *New York v. Sage*, 239 U. S. 57, 36 Sup. Ct. 25, 60 L. ed. 143; *Lynnfield v. Peabody*, 219 Mass. 322, 106 N. E. 977; *St. Louis v. Glasgow*, 254 Mo. 262, 162 S. W. 596; *Jenks v. Taunton*, 227 Mass. 293, 116 N. E. 550; *Comiskey v. Lynn*, 226 Mass. 201, 115 N. E. 312; *Paterson v. Mont Clair Water Co.*, 87 N. J. L. 533, 94 Atl. 889; *Paterson v. West Orange Water Co.*, 87 N. J. L. 538, 94 Atl. 891, affirming 84 N. J. L. 460, 87 Atl. 104; *Paterson v. Keaney*, 84 N. J. L. 456, 87 Atl. 103; *Paterson v. West Orange Water Co.*, 84 N. J. L. 460, 87 Atl. 104.

Water supply contract, held

property subject to condemnation. *Wood v. Millville*, 89 N. J. L. 646, 98 Atl. 267.

Denying grant of power to city to condemn property for. *Paris Water Mountain Co. v. Greenville*, 105 S. C. 180, 89 S. E. 669.

Under legislative authority to condemn water and water rights for the purpose of supplying a city with water, the city may condemn (for water supply) rights of another city to flow of stream for purposes of amusement and recreation where it appeared that rights of latter city would hardly be disturbed. *Paterson v. Jersey City*, 84 N. J. L. 454, 87 Atl. 102.

<sup>86</sup> *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 101 Mo. 192, 13 S. W. 822, 8 L. R. A. 801; *Delaware Transportation Co. v. Trenton*, 82 N. J. L. 367, 91 Atl. 1068, affirming 85 N. J. L. 479, 90 Atl. 5; *White v. Cleveland*, 87 Ohio St. 482, 102 N. E. 1135, affirming 33 Ohio Cir. Ct. R. 317; *State v. Milwaukee*, 156 Wis. 549, 146 N. W. 775.

<sup>87</sup> For garbage reduction. *Houquiam v. Lenhart*, 86 Wash. 625, 150 Pac. 1196.

Collection and disposal of garbage is a municipal purpose. *N. Ward Co. v. Boston*, 217 Mass. 381, 104 N. E. 965.

<sup>88</sup> Apart from constitutional re-

ment or use therein for public use, is subject to condemnation.<sup>89</sup>

**§ 1495. Property outside corporate limits.<sup>90</sup>**

**§ 1496. Property already devoted to public use.<sup>91</sup>**

The authorities quite generally declare that where land has once been appropriated for public purposes in the exercise of eminent domain it cannot again be condemned to public use by the city or town for street or other purposes inconsistent therewith without statutory authority for doing so.<sup>92</sup>

striktion any estate in land may be taken for public purposes. *Hays v. Walnut Creek Oil Co.*, 75 W. Va. 263, 83 N. E. 900.

Extends to tangibles and intangibles, including choses in action, contracts and charters. *Cincinnati v. Louisville & N. R. R. Co.*, 223 U. S. 390, 32 Sup. Ct. 267, 59 L. ed. 481.

Restrictions in deed will not preclude. *Wallace v. Clifton Land Co.*, 92 Ohio St. 349, 110 N. E. 940.

Alley may be taken for parkway. *Chaplin v. Kansas City*, 259 Mo. 479.

Water rights are subject to. *Gibson v. Carroll* (Tex. Civ. App.), 180 S. W. 630.

Power of city to condemn a public stream for sewer, denied. *Healy v. Delta*, 59 Colo. 166, 147 Pac. 662.

Power to take property for any municipal purpose is authority to condemn flats. *N. Ward Co. v. Boston*, 217 Mass. 381, 104 N. E. 965.

Meaning of "lands." *Ex parte Montgomery Light & Traction Co.*, 187 Ala. 376, 65 So. 403.

<sup>89</sup> Charter. St. Louis, Art. XXI, § 1, adopted June 30, 1914.

<sup>90</sup> *Water Supply-Paterson v. Jersey City*, 84 N. J. L. 454, 87 Atl. 102.

Cannot condemn a lighting system in another city. *Bremerton v. North Pacific Public Service Com.*, 243 Fed. 980.

For park, partly within and partly without the corporate limits. *Hobart v. Minneapolis*, 139 Minn. 368, 166 N. W. 411.

<sup>91</sup> *Re Newport Ave.*, New York City, 155 N. Y. S. 1127; *Cuyahoga River Power Co. v. Akron*, 210 Fed. 524.

By legislative grant only. *Newell v. Loeb*, 77 Wash. 182, 137 Pac. 811.

<sup>92</sup> *Alvord v. Great Northern Ry. Co.*, 179 Ia. 465, 161 N. W. 467, 469.

Cannot be condemned for another public use, except by express authority. *Re Seneca Ave.*, New York City, 163 N. Y. S. 503, 98 Misc. Rep. 712.

Special grant to do so, held essential, as it cannot be exercised under general grant. *Re Newport*

§ 1497. Same—what are inconsistent uses.<sup>93</sup>

§ 1499. Same—property not actually devoted to public use.<sup>94</sup>

§ 1500. Same—application of rule to railroad property.

To extend street, property of a railroad already devoted to public use for railroad tracks, switchyards and buildings, may be condemned by the city by virtue of legislative grant of power.<sup>95</sup>

Ave., New York City, 218 N. Y. 274, 112 N. E. 911, affirming 155 N. Y. S. 1127, 171 App. Div. 928.

Property devoted to a public use may be by the legislature appropriated to another public use even though the latter use is inconsistent with the first. But the legislature must clearly manifest such intention in express terms or by necessary implication. Such implication never arises except as a necessary condition to the beneficial enjoyment and efficient exercise of the power expressly granted. *Mobile & O. R. Co. v. Union City*, 137 Tenn. 491, 194 S. W. 572.

Land used as school purposes cannot be condemned for street purposes. *St. Louis v. Moore*, 269 Mo. 430, 190 S. W. 867.

Lands devoted to streets may be condemned by city, for street purposes. Power is not restricted to entirely new public ways. *Re Ely Ave.*, New York City, 217 N. Y. 45, 111 N. E. 266, reversing 153 N. Y. S. 1049, 168 App. Div. 867.

Public alley may be taken for parkway. *Chaplin v. Kansas City*, 259 Mo. 479, 168 S. W. 763.

Land through sanitary district may be condemned for sewer outlets. *Chicago v. Chicago Sanitary*

*Dist.*, 272 Ill. 37, 111 N. E. 491.

Rights in a stream acquired by another municipality cannot be disturbed. *Paterson v. Jersey City*, 87 N. J. L. 163, 93 Atl. 592, affirming 84 N. J. L. 454, 87 Atl. 102.

City may condemn a wharf controlled by it. *Delaware River Transportation Co. v. Trenton*, 82 N. J. L. 367, 91 Atl. 1068, affirming 85 N. J. L. 497, 90 Atl. 5.

<sup>93</sup> Park cannot be taken for street railroad purposes. *Buffalo L. & R. Ry. Co. v. Hoyer*, 214 N. Y. 236, 108 N. E. 455, reversing 132 N. Y. S. 31, 147 App. Div. 205.

<sup>94</sup> *Chicago v. Chicago Sanitary Dist.*, 272 Ill. 37, 111 N. E. 491.

Cemetery property not put to prior public use, and not at present required therefor may be taken. *St. Paul Water Com'rs v. Roselawn Cemetery*, 138 Minn. 458, 165 N. W. 279.

<sup>95</sup> *Mobile & O. R. Co. v. Union City*, 137 Tenn. 491, 194 S. W. 572.

Street across railroad tracks may be extended by condemnation. *Andover v. Cooper*, 37 S. D. 258, 157 N. W. 1053.

Street and alleys crossed by a railroad need not be condemned. *Pittsburgh, C., C. & St. L. Ry. Co. v. Gage*, 280 Ill. 639, 117 N. E. 726.

"The power to extend streets and highways across railroad tracks at suitable places is generally held to be implied necessarily from the general authority conferred on cities and towns to open and extend streets without explicit provision on the subject. Railways cross streets and highways and vice versa, and the adjustment of the two public uses is essential to public convenience and necessity when practicable."<sup>96</sup>

"That the use of ground as an alley would be inconsistent with that for depot purposes is manifest." The municipality is given control over streets and alleys and required to keep them open for public use. "This necessarily would prevent any occupation by the railway and would obstruct travel in the alley, and would necessarily exclude all freight and storage buildings required by it for the transaction of its business and the laying of side tracks thereon or any use by it other than the public may enjoy as an alley."<sup>97</sup>

<sup>96</sup> *Alvord v. Great Northern Ry. Co.*, 179 Ia. 465, 161 N. W. 467, 469, following *Chicago, M. & St. P. Ry. Co. v. Starkweather*, 97 Ia. 159, 66 N. W. 87, 31 L. R. A. 183, 59 Am. St. Rep. 404, and approving *Chicago, G. W. R. C. v. Mason City*, 155 Iowa 99, 135 N. W. 9, set out in note in § 1500, p. 3142, vol. 4, ante.

<sup>97</sup> *Alvord v. Great Northern Ry. Co.*, 179 Ia. 465, 161 N. W. 467, 469.

Statute may authorize condemnation of railway property for street extension. *Emery v. Ch., M. & St. P. Ry. Co.*, 35 S. D. 583, 153 N. W. 655; *Eudice v. Louisiana Western Ry. Co.*, 135 La. 882, 66 So. 257.

Power to extend street through station yards by condemnation, denied under particular statute. *St. Louis & S. F. R. Co. v. Tulsa*, 213 Fed. 87,

City may take railroad property for streets. *Southern Ry. Co. v. Rome*, 141 Ga. 143, 80 S. E. 57; *Pittsburgh & W. R. R. Co. v. Butler Borough*, 242 Pa. 461, 89 Atl. 579.

Statute may give city power to condemn railway and its franchise. *State v. Superior Court*, 77 Wash. 593, 138 Pac. 277.

A municipal street railroad may cross the tracks of another street railroad, as the first franchise "must be understood to be subject to this incident," and "a taking by eminent domain was not necessary." *United Railroads of San Francisco v. San Francisco*, 249 U. S. 517, 39 Sup. Ct. 361, affirming 239 Fed. 987.

**§ 1501. Property of municipal corporation already devoted to public use.<sup>98</sup>**

**§ 1502. Public lands.<sup>99</sup>**

**§ 1503. Exemptions.<sup>1</sup>**

V. DISCONTINUANCE OF PROCEEDINGS.

**§ 1504. Right to discontinue proceedings.**

Usually the proceedings to condemn may be aban-

<sup>98</sup> Statute may authorize county to condemn highways through municipal territory. *State v. Superior Court*, 86 Wash. 401, 150 Pac. 618.

Power to condemn property for streets does not include by implication authority to condemn municipal property used for poor farm. *Edwardsville v. Madison County*, 251 Ill. 265, 96 N. E. 238, 37 L. R. A. (N. S.) 101.

<sup>99</sup> U. S. public land is not subject to condemnation by virtue of state power, but by act of Congress only. *Utah Power & Light Co. v. United States*, 230 Fed. 328, 144 C. C. A. 470.

Statute conferring power to condemn state or municipal property is to be limited to property held as a private person, unless provision is otherwise made therein. *State v. Superior Court*, 91 Wash. 454, 157 Pac. 1097.

Under some laws the power of a city to condemn property for street purpose is limited to the condemnation of private property and does not extend to property of the state held for the state by a school district or other subordinate agency of the state. *St. Louis v. Moore*, 269 Mo. 430, 190 S. W. 867,

Property of state cannot be condemned. *Western Union Tel. Co. v. Western & A. R. Co.*, 142 Ga. 532, 83 S. E. 135.

Statute may authorize state land to be condemned. *Deseret Water, Oil & I. Co. v. State*, 167 Cal. 147, 138 Pac. 981.

State lands cannot be condemned unless the right is given by statute. *Re Condemnation of Lands, etc.*, 124 Minn. 271, 144 N. W. 960.

Condemnation through a state's convict farm, held unauthorized under particular statute. *Linwood and Auburn Levee Dist. v. State*, 121 Ark. 489, 181 S. W. 892.

State may exercise power of eminent domain over all state lands as an inalienable right of sovereignty. *Idaho-Iowa Lateral & Reservoir Co. v. Fisher*, 27 Idaho 695, 151 Pac. 998.

<sup>1</sup> Tenant houses of private corporation held not dwelling house, as exempted by statute. *Raleigh C. & S. R. Co. v. Mecklenburg Mfg. Co.*, 166 N. C. 168, 82 S. E. 5.

Opening street through cemetery, held not forbidden under particular law. *United Brethren Congregation v. Emaus Borough*, 56 Pa. Sup. Ct. 136.

doned, at any time,<sup>2</sup> in the absence of a statute forbidding.<sup>3</sup>

**§ 1505. Recovery of damages after discontinuance.<sup>4</sup>**

**§ 1507. Discontinuance as bar to new proceedings.<sup>5</sup>**

VI. COMPENSATION, RIGHT TO AND AMOUNT OF.

**§ 1508. Right to compensation.<sup>6</sup>**

Authority conferred by statute on a municipality to lay out a street along a river shore, does not give the

<sup>2</sup> Abandonment allowed. *Re Rochester*, 165 N. Y. S. 1026, 100 Misc. Rep. 421.

Proceedings may be abandoned at any time. *Kanakanui v. United States* (U. S. C. C. A. Hawaii), 244 Fed. 923, 157 C. C. A. 273.

<sup>3</sup> *Whitford v. Engel*, 42 App. D. C. 452.

Under particular provisions. *Eyssell v. St. Louis*, 168 Mo. 607, 617, 68 S. W. 893; *St. Louis v. Lawton*, 189 Mo. 474, 483, 88 S. W. 80; *St. Louis v. Weber*, 140 Mo. 515, 522-523, 41 S. W. 965.

Voluntary dismissal is not evidence of wrongful institution. *Simpson v. Kansas City*, 111 Mo. 237, 20 S. W. 38.

<sup>4</sup> Under particular law. *Lester Real Estate Co. v. St. Louis*, 170 Mo. 31, 70 S. W. 151; *St. Louis Brewing Ass'n v. St. Louis*, 168 Mo. 37, 67 S. W. 563.

<sup>5</sup> New proceedings authorized. *Kansas City v. Mulkey*, 176 Mo. 229, 75 S. W. 973.

If dismissal is for any reason other than defect in the proceedings a like action shall not be begun within ten years after such dismissal, unless upon petition of the owners of three-fifths of the

property to be taken or upon condition that the city shall pay all damages assessed therein. *St. Louis Charter*, Art. XXI, § 10, adopted June 30, 1914, in effect Aug. 29, 1914.

<sup>6</sup> *Blackwell Lumber Co. v. Empire Mill*, 28 Idaho 556, 155 Pac. 680; *Thomas v. Boise City*, 25 Idaho 522, 138 Pac. 1110; *Moreanville v. Boyer*, 138 La. 1070, 71 So. 187; *Ensign Yellow Pine Co. v. Hohenberg* (Ala.), 75 So. 897; *Dallas v. Atkins* (Tex. Civ. App.), 197 S. W. 593; *De Castello v. Cedar Rapids*, 171 Ia. 18, 153 N. W. 353; *Hubbell v. Des Moines*, 173 Ia. 55, 154 N. W. 337; *Knapp v. State*, 125 Minn. 194, 145 N. W. 967.

Imposition of costs by statute on defeated party after commissioner's report is not a denial of just compensation. *Moffat v. Denver*, 57 Colo. 473, 143 Pac. 577.

Construction of wharf municipal. *Re Main Street*, New York City, 216 N. Y. 67, 110 N. E. 176.

Statute authorizing procedure must be construed to provide just compensation. *Jefferson City v. Wells*, 263 Mo. 231, 172 S. W. 329.

Right of private turnpike company to charge toll on use of road,

right to take riparian proprietor's easements without just compensation.<sup>7</sup>

A statute relating to condemnation of land for a public street is valid which provides that the value of the land taken and the damages to the residue must be paid by special benefits to that not taken, due to the public improvements, and if the damages exceed the benefits such excess must either be paid by the city or the proceedings dismissed. It cannot be taxed back against the land not taken as a further benefit. To do that would render the statute unconstitutional.<sup>8</sup>

### § 1509. Necessity of statutory provisions as to payment.<sup>9</sup>

condemned by town as a highway, held not an element of damages. *Peru Turnpike Co. v. Peru* (Vt. 1917), 100 Atl. 679.

Taking property of street railroad for street uses. *Los Angeles v. Allen*, 32 Cal. App. 553, 163 Pac. 697.

Consequential damages to part of land not taken. *St. Louis v. St. Louis, I. M. & S. Ry. Co.*, 272 Mo. 80, 197 S. W. 107.

Damage to part of land not taken. *Erie County v. Fridenberg*, 221 N. Y. 389, 117 N. E. 611.

Generally and particularly in an organic law property "comprehends not only the thing possessed but the right also to use and enjoy it, and every part of it, and in case of real estate to the full limits of the boundaries thereof." *Fruth v. Charleston Board of Affairs*, 75 W. Va. 456, 84 S. E. 105, L. R. A. 1915 C 981.

"In this state the right of the owner, as against the public, is protected only to the extent that his property can not be taken or damaged for public use without

just compensation, which when not made by the state, must be ascertained by a jury." *Chicago, B. & Q. R. Co. v. Cavanagh*, 278 Ill. 609, 605, 116 N. E. 128.

<sup>7</sup> *Burns Bros. v. New York City*, 165 N. Y. S. 615, 178 App. Div. 615.

Taking waters from streams to supply city with water authorized in exercise of right of eminent domain on payment of just compensation to owner of riparian rights to the full extent of property taken. *Domrese v. Roslyn*, 101 Wash. 372, 172 Pac. 243.

<sup>8</sup> *Jefferson City v. Wells*, 263 Mo. 231, 247, 172 S. W. 329; *Norfolk v. Chamberlain*, 89 Va. 196, 16 S. W. 730; *Leopold v. Chicago*, 150 Ill. 568, 37 N. E. 892; *Davis v. Newark*, 54 N. J. L. 595, 25 Atl. 336; *Goodrich v. Omaha*, 10 Neb. 98, 4 N. W. 424; *Lewis, Eminent Domain* (3rd ed.), § 704.

Assessment of benefits where part of property taken, see § 2047, vol. 5, post.

<sup>9</sup> *Shaw v. Daviess County Drainage Com'rs*, 160 Ky. 422, 169 S. W. 859; *State v. District Court*, 128



**§ 1510. Waiver of right to compensation.<sup>10</sup>****§ 1511. Additional servitudes.<sup>11</sup>****§ 1512. Amount of compensation.**

The loss suffered by the taking is the true measure of compensation to the owner.<sup>12</sup>

The market value,<sup>13</sup> true market value, present market value, or actual market value (as variously expressed)<sup>14</sup> for all uses to which the property taken is reasonably adaptable has often been declared as a just and fair standard.<sup>15</sup>

Minn. 432, 151 N. W. 144; Watauga and Y. R. Co. v. Ferguson, 169 N. C. 70, 85 S. E. 156; Skelton v. Newburg, 76 Or. 126, 148 Pac. 53; Re Pawtucket, etc., Grade Crossing Com., 36 R. I. 200, 89 Atl. 695.

<sup>10</sup> Quinn v. St. Louis & S. F. R. Co., 253 Mo. 48, 161 S. W. 820; Gray v. Salt Lake City, 44 Utah 204, 138 Pac. 1177.

<sup>11</sup> See § 1700, et seq., post.

<sup>12</sup> Value of property taken. Kanananui v. United States (U. S. C. C. A. Hawaii), 244 Fed. 923, 157 C. C. A. 273; Bonaparte v. Baltimore, 131 Md. 80, 101 Atl. 594.

To be measured by actual loss resulting from the taking. Erie County v. Fridenberg, 221 N. Y. 389, 117 N. E. 611.

Condemnation of public alley by railroad; damage to abutting owner. Leach v. Philadelphia, H. & P. Ry. Co., 258 Pa. 522, 102 Atl. 175.

Depreciation. El Dorado v. Scruggs, 113 Ark. 239, 168 S. W. 846; Otis Elevator Co. v. Chicago, 263 Ill. 419, 105 N. E. 338, 52 L. R. A. (N. S.) 192; Knickerbocker Ice Co. v. Philadelphia, 246 Pa. 84, 92 Atl. 62.

Depreciation due to construction of viaduct. Newman v. Davis, 145 Ga. 380, 89 S. E. 336.

Depreciation due to changing street grade. Egbers v. Seattle, 90 Wash. 172, 155 Pac. 751.

Whether odors, noxious and offensive, from sewerage tank or sewerage disposal plant, are elements of damages is answered both ways. Wynne Sewer Imp. Dist. v. Fiscus (Ark.), 193 S. W. 521, L. R. A. 1917 D, 682; Taylor v. Baltimore, 130 Md. 133, 99 Atl. 900, L. R. A. 1917 C, 1046.

<sup>13</sup> Consolidated Gas, E. L. & P. Co. v. Baltimore, 130 Md. 20, 99 Atl. 968; Re Public Service Commission, 155 N. Y. S. 985, 92 Misc. Rep. 420; Ft. Worth v. Morgan (Tex. Civ. App.), 168 S. W. 976.

Not necessarily limited to market value of property taken. Elvert County v. Brown, 16 Ga. App. 834, 86 S. E. 651.

<sup>14</sup> Drainage Dist. v. Stacey, 127 Ark. 549, 192 S. W. 904.

Actual value of property taken, in the absence of consequential damages. Re Ashland Street, Queens Borough, 165 N. Y. S. 977.

<sup>15</sup> Market value, as to uses.

The value is ordinarily to be ascertained at the date of condemnation.<sup>16</sup>

Compensation must cover all damages resulting from the taking.<sup>17</sup>

*Yazoo & M. V. R. Co. v. Longview Sugar Co.*, 135 La. 542, 65 So. 638.

Adaptability of land to various uses. *Stone v. Delaware, L. & W. R. Co.*, 257 Pa. 456, 101 Atl. 813; *Bonaparte v. Baltimore*, 131 Md. 80, 101 Atl. 594.

Present market value, taking into account its capable uses. *Montana Eastern Ry. Co. v. Lebeck*, 32 N. D. 162, 155 N. W. 648.

Availability for specific purpose may be considered. *Baltimore v. Carroll*, 128 Md. 68, 96 Atl. 1076; *Brack v. Baltimore*, 128 Md. 430, 97 Atl. 548.

Market value for use to which land is adapted. *Chicago Sanitary District v. Baumbach*, 270 Ill. 128, 110 N. E. 331.

Market value, for all uses adaptable. *Suburban Land Co. v. Arlington*, 219 Mass. 539, 107 N. E. 432.

Most profitable present use, test of value. *Chicago v. Lord*, 277 Ill. 236, 115 N. E. 403, 276 Ill. 571, 115 N. E. 397.

Where land has been improved for a special kind of business, the value should be tested from such view point. *Re Second and Third Streets, Queens Borough*, 163 N. Y. S. 521, 98 Misc. Rep. 716.

<sup>16</sup> Value fixed at date of proceedings. *United States v. Chamblar-Dunbar Water Power Co.*, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. ed. 1063.

Actual value of property at date right to compensation accrues, e. g. date summons is issued. *Oak-*

*land v. Wheeler* (Cal. App.), 168 Pac. 23.

Value at the time of taking, not prospective. *Louisiana Ry. & Nav. Co. v. Baton Rouge Brickyard*, 136 La. 833, 67 So. 922.

Value based on future use rejected. *Lockport v. Tonawanda Iron & Steel Co.*, 151 N. Y. S. 923, 166 App. Div. 962.

Easement for water main laid by city. *Perley v. Cambridge*, 220 Mass. 507, 108 N. E. 494.

Market value at date of condemnation. *Brack v. Baltimore*, 128 Md. 430, 97 Atl. 548.

Condemning fee of street, nominal damages, when. *Nassau Electric R. Co. v. Cabot*, 159 N. Y. S. 473, 173 App. Div. 253.

Street condemned through right of way of railroad, damages limited to value of land taken. *Kansas City Southern Ry. Co. v. Mena*, 123 Ark. 323, 185 S. W. 290.

<sup>17</sup> *Flagg v. Concord*, 222 Mass. 569, 111 N. E. 369.

Boarding house conducted in connection with farm taken due to construction of reservoir for municipal water supply; elements. *Re New York City Board of Water Supply*, 167 N. Y. S. 529, 180 App. Div. 701.

Part of cemetery for municipal reservoir. *St. Paul Board of Water Com'rs v. Roselawn Cemetery*, 138 Minn. 458, 165 N. W. 279.

Taking part of land containing a factory, compensation should include damage to entire factory.

§ 1513. Extending street across railroad track.<sup>18</sup>

§ 1515. Time of making payment where not regulated by constitution.

In the absence of organic law on the subject, the time of making payment is regulated by local statutes.<sup>19</sup> Under a statute providing that before the property can be disturbed the money must be paid to the owner,

St. Louis v. St. Louis I. M. & S. Ry. Co., 272 Mo. 80, 197 S. W. 107.

Change of street grade; elements. Greenewalt v. West Newton Borough, 64 Pa. Super. Ct. 576; Louisville & N. R. Co. v. Or. (Ala.), 76 So. 961; Ft. Worth v. Ashley (Tex. Civ. App.), 197 S. W. 336.

In street improvements by the city, not only the building taken but those injured are to be included. Re Tibbett Ave., New York City, 221 N. Y. 127, 116 N. E. 779, reversing 161 N. Y. S. 1147, 175 App. Div. 975.

In widening street, lands damaged, although not taken, are to be included. Chicago v. Lord, 277 Ill. 397, 115 N. E. 543.

Land to widen street. Lanier v. Greenville, 174 N. C. 311, 93 N. C. 850.

<sup>18</sup> Condemning land of electric railroad for purpose of street; adequate compensation to be allowed. Los Angeles v. Zeller, 176 Cal. 194, 167 Pac. 849.

<sup>19</sup> Damage to property of abutting land owner, held need not be made under particular statute prior to entry. Childs & Co. v. Chicago, 279 Ill. 623, 117 N. E. 115, affirming 203 Ill. App. 235.

Compensation to precede taking. Erie County v. Fridenberg, 221 N. Y. 389, 117 N. E. 611.

Need not be made prior to vacating public way. Saline Com'rs v. Klans, 199 Ill. App. 108.

Damages to be paid or deposited in establishing a public way prior to order therefor. Weaver v. Ferguson (Ind. App.), 117 N. E. 659.

Need not pay, at the time of entry. Carpenter v. Lancaster City, 67 Pa. Super. Ct. 22.

Payment should precede taking land. Depue v. Banschback, 273 Ill. 574, 113 N. E. 156.

Statute may authorize taking prior to payment. Re Newton Ave., New York, 159 N. Y. S. 484, 173 App. Div. 15.

Accrues under California statute at date of issuance of summons. Oakland v. Wheeler (Cal. App.), 168 Pac. 23.

Before taking, as laying tracks in streets. Harrold Bros. v. Americus, 142 Ga. 686, 83 S. E. 534.

Statute may authorize vacation of streets without first paying compensation. Loudon v. Starr, 171 Iowa 528, 154 N. W. 331.

In absence of statute city in laying out its street car tracks over the tracks of a private railroad need not pay prior to action. United Railroads of San Francisco v. San Francisco, 239 Fed. 987.

enacting an ordinance authorizing the register to draw a warrant on the treasurer "in favor of the party or parties interested in said property for the amount in this ordinance specified when so ordered by the mayor," it was held did not constitute payment, or preclude an injunction by the owner restraining the city from taking possession.<sup>20</sup>

**§ 1516. Waiver of right to prepayment of compensation.**<sup>21</sup>

**§ 1517. Interest as part of compensation.**<sup>22</sup>

VII. TITLE AND RIGHTS ACQUIRED, ABANDONMENT AND REVERSION.

**§ 1518. Title acquired by municipality.**<sup>23</sup>

**§ 1519. Power of legislature to authorize a fee to be condemned.**<sup>24</sup>

<sup>20</sup> *Carpenter v. St. Joseph*, 263 Mo. 705, 706-718, 174 S. W. 53.

<sup>21</sup> Not waived by contract by city and railway. *Chicago v. Lord*, 277 Ill. 590, 115 N. E. 548.

Parties entitled to damages may waive the right thereto in whole or in part, where property is taken for street purposes. *Nevins v. Springfield*, 227 Mass. 538, 116 N. E. 881.

Land owner held not estopped from claiming damage due to construction of a bridge by payment of taxes on basis of old valuation. *Brackett v. Commonwealth*, 223 Mass. 119, 111 N. E. 1036.

<sup>22</sup> *Murphy v. Prendergast*, 164 N. Y. S. 213, 99 Misc. Rep. 326, affirmed 165 N. Y. S. 1100; *Rider v. New Haven W. & P. Co.* 255 Pa. 196, 99 Atl. 798.

Interest allowed for delayed payment. *Wyoming Ry. Co. v. Leiter*, 25 Wyo. 286, 169 Pac. 1;

*Hawkins v. West Side Electric St. Ry. Co.*, 64 Pa. Super. Ct. 68.

<sup>23</sup> Only estate necessary for public purpose can be taken. *Miller v. Lincoln Park Com'rs*, 278 Ill. 400, 116 N. E. 178. Where easement is sufficient, no greater estate can be taken. *Ib.*

Under statute, land taken for sewers by city, fee rests in city. *Moberly v. Lotter*, 266 Mo. 457, 181 S. W. 991.

Land for reservoir site. *Ft. Worth v. Morgan* (Tex. Civ. App. 1914), 168 S. W. 976.

Taking water supply from land under particular statute. *Lynnfield v. Peabody*, 219 Mass. 322, 106 N. E. 977.

Where owner continues in possession paying taxes after condemnation of land for street, the city acquires no title. *Carpenter v. St. Joseph*, 263 Mo. 705, 174 S. W. 53.

<sup>24</sup> Power of legislature to take

**§ 1522. Title acquired to streets and alleys.<sup>25</sup>****§ 1526. Rights acquired by municipality.<sup>26</sup>****§ 1527. Effect of condemnation on rights of owner.<sup>27</sup>****VIII. PROCEDURE.****§ 1529. What law governs.**

In the exercise of the right of eminent domain, of course, the particular law applicable must be invoked,<sup>28</sup> whether it is embodied in a legislative act with special reference to the purpose of the given proceedings,<sup>29</sup> in the general eminent domain act,<sup>30</sup> on the local charter.<sup>31</sup>

all title for streets denied. *Lincoln Safe Deposit Co. v. New York*, 210 N. Y. 34, 103 N. E. 768, affirming 132 N. Y. S. 1135, 148 App. Div. 895.

<sup>25</sup> Fee of land taken for widening street cannot be appropriated by city. *Excelsior Needle Co. v. Springfield*, 221 Mass. 34, 108 N. E. 497.

City takes easement only. *Re Rosebank Ave., New York City*, 147 N. Y. S. 638, 162 App. Div. 332.

Title vests in condemnor. *Re Flatbush Avenue Extension*, 151 N. Y. S. 766.

<sup>26</sup> *Flagg v. Concord*, 222 Mass. 569, 111 N. E. 369.

Taking water supply from pond. *Lynnfield v. Peabody*, 219 Mass. 322, 106 N. E. 977.

<sup>27</sup> Taking to construct conduit by city. *Perley v. Cambridge*, 220 Mass. 509, 108 N. E. 494.

<sup>28</sup> *Thomas v. Boise City*, 25 Idaho 522, 138 Pac. 1110; *N. Ward Co. v. Boston*, 217 Mass. 381, 104 N. E. 965; *Excelsior Needle Co. v. Springfield*, 221 Mass. 34, 108 N. E. 497;

*Cheyenne v. Edwards*, 22 Wyo. 401, 143 Pac. 356.

Exercise of power must be as applicable statute provides. *Minnesota Canal & Power Co. v. Fall Lake Boom Co.*, 127 Minn. 23, 148 N. W. 561.

<sup>29</sup> Special act held applicable. *Peasant Hill v. Stark*, 277 Ill. 302, 115 N. E. 188.

General law, held not applicable to improvement of streets dedicated to and accepted by the city. *Bealer v. Tacoma Park*, 130 Md. 297, 100 Atl. 379.

<sup>30</sup> *Depue v. Banschback*, 273 Ill. 574, 113 N. E. 156.

<sup>31</sup> Charter provision as to eminent domain often supersede general statutes on the subject as a matter of municipal regulation. Section 174, vol. 1, ante; § 174, ante.

A constitutional charter may establish a municipal court to condemn property for streets, especially where the city has "exclusive control over its public highways, streets," etc., and particularly where such power has been exer-

It is often a matter of close construction to ascertain what law governs.<sup>32</sup>

### § 1530. Special proceeding and not a civil action.

The proceeding to condemn is a special statutory proceeding at law,<sup>33</sup> and the principles of equity have no application.<sup>34</sup>

### § 1531. Construction of procedure statutes.<sup>35</sup>

Statutes generally prescribe the procedure and constitutions define the purposes for which the right of eminent domain may be exercised.<sup>36</sup>

The mandatory steps specified must be observed with a reasonable degree of strictness.<sup>37</sup>

cised for a period of twenty years affecting large property rights. *State ex rel. v. Seehorn*, 246 Mo. 541, 549, 551, 151 S. W. 716.

A municipal court created by the city charter and empowered to condemn property for a public use and to assess damages and benefits is a constitutional court. *Kansas City v. St. Louis & Kansas City Land Co.*, 260 Mo. 395, 412, 413, 169 S. W. 62.

<sup>32</sup> *Clinton v. Johnson*, 174 N. C. 286, 93 S. E. 776.

<sup>33</sup> *Chicago G. W. R. Co. v. Askeford*, 268 Ill. 87, 108 N. E. 761; *Parrish v. Yorkville*, 96 S. C. 24, 79 S. E. 635.

<sup>34</sup> Equity has no jurisdiction. *Western Union Tel. Co. v. Nashville, C. & St. Ry.*, 243 Fed. 694.

Is a proceeding at law, not equitable. *Ridgeley v. Baltimore*, 119 Md. 567, 87 Atl. 909.

Law rules, not equity, obtain. *Chicago Sanitary Dist. v. Munger*, 264 Ill. 256, 106 N. E. 185.

<sup>35</sup> Proceedings provided for by charter, held to conform to con-

stitution. *Re Main Street, Kansas City, Mo.* (Mo. 1917), 198 S. W. 821.

Charter provision as to compensation, held to conform to constitution. *Dallas v. Atkins* (Tex. Civ. App. 1917), 197 S. W. 593.

In the construction of a bridge over a navigable river, the municipality is not required first to condemn rights of riparian owners in the bed of the river. *Childs v. Chicago*, 279 Ill. 623, 117 N. E. 115, affirming 203 Ill. App. 235.

<sup>36</sup> *Blackwell Lumber Co. v. Empire Mill Co.*, 28 Idaho 556, 155 Pac. 680.

<sup>37</sup> *Illinois. Prather v. Springfield*, 202 Ill. App. 406; *Mound City v. Mason*, 262 Ill. 392, 104 N. E. 685.

*Maryland. Baltimore v. Kane*, 125 Md. 135, 93 Atl. 393.

*Minnesota. St. Paul Water Com'rs v. Roselawn Cemetery*, 138 Minn. 458, 165 N. W. 279.

*Missouri. St. Louis v. Glasgow*, 254 Mo. 262, 162 S. W. 596.

*New York. Re Brown Parkway*

The record must disclose due observance of all jurisdiction requirements. Omissions can not be supplied by intendment or implication.<sup>38</sup> It must affirmatively appear on the face of the proceedings that every essential prerequisite of the law conferring jurisdiction has been observed in substance, otherwise the proceedings will be void.<sup>39</sup>

The two stages in the hearing are: (1) sufficiency of the petition and right to condemn, and (2) compensation to be paid.<sup>40</sup>

Com., 164 N. Y. S. 9, 99 Misc. Rep. 397; *People v. Fisher*, 164 N. Y. S. 125, 98 Misc. Rep. 131.

North Carolina. *Clinton v. Johnson*, 174 N. C. 286, 93 S. E. 776.

Ohio. *Parkside Cemetery Ass'n v. Cleveland, Bedford and G. L. T. Co.*, 93 Ohio St. 162, 112 N. E. 596.

Oregon. *Thurman v. Multnomah County*, 70 Or. 401, 140 Pac. 626.

Pennsylvania. *Johnson v. Delaware L. & W. R. Co.*, 245 Pa. 338, 91 Atl. 618.

South Carolina. *Paris Water Mountain Co. v. Greenville*, 105 S. C. 180, 89 S. E. 669.

South Dakota. *Illinois Central R. Co. v. East Sioux Falls Quarry Co.*, 33 S. D. 63, 144 N. W. 724.

Utah. *Tremonton v. Johnston*, 49 Utah 307, 164 Pac. 190.

Park purposes—may be exercised only as by statute permitted—Terms and conditions therein specified must be observed. *Vickroy v. Ferndale Borough*, 259 Pa. 321, 102 Atl. 958.

City cannot purchase property for a street extension and then impose damages on property benefited. *Rosa v. Bandon*, 71 Or. 510, 142 Pac. 339.

Proceeding to be in strict com-

pliance with the controlling law. When a municipal corporation attempts to acquire property by condemnation "it must proceed in strict compliance with all of the provisions of the law authorizing such proceedings. This is a correct enunciation of the law as laid down by this court forty odd years ago (*Lind v. Clemens*, 44 Mo. 540), and has been reaffirmed numerous times since as late as the case of *In Re Bledsoe Hill*, 200 Mo. 630. The same rule is stated in \* \* \* 4 *McQuillin on Mun. Corp.*, §§ 1531, 1532." *St. Louis v. Glasgow*, 254 Mo. 262, 272, 273, 162 S. W. 596.

The procedure authorized and observed must constitute due process of law. *Re Main Street* (Mo. 1917), 198 S. W. 821; *Dallas v. Atkins* (Tex. Civ. App. 1917), 197 S. W. 593.

<sup>38</sup> *Meyers v. Williams*, 199 Mo. App. 21, 199 S. W. 565.

Mandatory provisions of applicable law must be observed, and record should so show. *Elbert v. Scott*, 5 *Boyce* (Del.) 1, 90 Atl. 587.

<sup>39</sup> *Spurlock v. Dornan*, 182 Mo. 242, 250, 81 S. W. 412.

<sup>40</sup> *St. Louis, etc., Ry. Co. v. Mac-*

**§ 1532. Matters to be considered before instituting condemnation proceedings.**

Particular laws require certain steps to be taken which constitute conditions precedent,<sup>41</sup> as an attempt to agree with the land owner as to the price of the property needed,<sup>42</sup> and in event of failure the enactment of an ordinance or resolution declaring the intention or necessity of the proceeding, is often required.<sup>43</sup>

Adaras, 257 Mo. 448, 166 S. W. 307.

Record of apportionment. Kirkwood v. Cronin, 259 Mo. 207, 168 S. W. 674.

Common law jury-waiver. Kansas City v. Woerishoeffer, 249 Mo. 1, 22-24, 155 S. W. 779.

Estoppel of city to question title. St. Louis v. Barthel, 256 Mo. 255, 276, 166 S. W. 267.

<sup>41</sup> Los Angeles v. Zeller, 176 Cal. 194, 167 Pac. 849.

For parks, ordinance establishing park district as a condition precedent. Pash v. St. Joseph, 257 Mo. 332, 165 S. W. 710.

Municipal department recommendation. Delaware River Transp. Co. v. Trenton, 85 N. J. L. 479, 90 Atl. 5.

<sup>42</sup> Pittsburgh, C. C. & St. Louis Ry. Co. v. Gage, 280 Ill. 639, 117 N. E. 726; State v. District Court, 48 Mont. 614, 139 Pa. 791; St. Louis v. Glasgow, 254 Mo. 262, 162 S. W. 596; Re University Ave. Rochester, 114 N. Y. S. 1086, 82 Misc. Rep. 598.

Effort to agree by condemnor and owner necessary preliminary. Atlanta v. Austell, 146 Ga. 456, 91 S. E. 478.

Effort to purchase. Re Bronx Parkway Com., 163 N. Y. S. 882, 176 App. Div. 717; People ex rel.

v. Hayes, 165 N. Y. S. 436, 178 App. Div. 301.

Waiver of attempt to agree by omission to raise question. Spokane v. Merriam, 80 Wash. 222, 141 Pac. 358.

<sup>43</sup> Ordinance declaring intention. Chehalis v. Centralia, 77 Wash. 673, 138 Pac. 293.

Ordinance declaring necessity required. Tremonton v. Johnston, 49 Utah 307, 164 Pac. 190.

Enabling ordinance authorizing the improvement is an essential step. Depue v. Banschbach, 273 Ill. 574, 113 N. E. 156.

Proceedings initiated by resolution of ordinance. Phoenix Const. Co. v. Gentry County, 257 Mo. 392, 166 S. W. 1034.

By resolution of harbor board. Delaware River Transp. Co. v. Trenton, 86 N. J. L. 48, 91 Atl. 1068, affirming 85 N. J. L. 479, 90 Atl. 5.

Ordinance, sufficiency. Cuyahoga River Power Co. v. Akron, 210 Fed. 524; Chicago v. Arnold, 261 Ill. 142, 103 N. E. 587.

Ordinance to acquire system of lighting, held insufficient, under particular statute upon which to predicate condemnation. Bremer-ton v. North Pacific Public Service Co., 243 Fed. 980.

Ordinance is not a condition pre-



**§ 1533. Petition.**

The petition must contain all essential jurisdictional averments,<sup>44</sup> and sufficiently described the property sought to be condemned.<sup>45</sup>

**§ 1534. Notice of proceeding.<sup>46</sup>**

Where preliminary notice of proceedings to take property for public use is required the giving of such notice is jurisdictional.<sup>47</sup>

cedent. *East Chicago v. Interstate Iron & Steel Co.*, 183 Ind. 33, 107 N. E. 274.

Particular agreement with owner need not be incorporated in an ordinance. *Chicago v. Lord*, 277 Ill. 236, 115 N. E. 403, 276 Ill. 571, 115 N. E. 397.

In condemning land for reservoir, need not declare necessity for taking by formal vote, prior to proceeding. *Hartford Board of Water Comrs. v. Manchester*, 89 Conn. 671, 96 Atl. 182.

<sup>44</sup> *Chicago, B. & Q. R. Co. v. Cavanaugh*, 278 Ill. 609, 116 N. E. 128; *Mound City v. Mason*, 262 Ill. 392, 104 N. E. 685.

Sufficiency of petition to condemn for garbage plant. *Hoquian v. Lenhart*, 86 Wash. 625, 150 Pac. 1196.

<sup>45</sup> *Oakland v. Wheeler* (Cal. App.), 168 Pac. 23; *Re Rochester*, 165 N. Y. S. 1026, 100 Misc. Rep. 421; *Re Fifth Ave. New York City*, 163 N. Y. S. 449, 99 Misc. Rep. 38; *Sieferer v. St. Louis*, 141 Mo. 586, 43 S. W. 163.

Inaccurate description of land

may be corrected in decree. *Chehalis v. Centralia*, 77 Wash. 673, 138 Pac. 293.

<sup>46</sup> *Springfield v. Owen*, 262 Mo. 92, 170 S. W. 1118; *Loudenslager v. Atlantic County*, 86 N. J. L. 555, 91 Atl. 1021; *Thurman v. Multnomah County*, 70 Or. 401, 140 Pac. 626.

Binding on lessee. *Salma Northern R. Co. v. Allison*, 100 Kan. 472, 164 Pac. 1068.

Publication, nonresidents. *Chicago, M. & St. P. Ry. Co. v. McClellan*, 39 S. D. 191, 163 N. W. 675.

By publication. *Newman v. Lynchburg Inv. Corp.*, 236 U. S. 692, 35 Sup. Ct. 477, 59 L. ed. 792; *Kansas City v. Mastin*, 169 Mo. 80, 90 S. W. 1037; *Re Condemnation of Lands, etc.*, 188 Mo. App. 567, 176 S. W. 529.

Publication must be as law provides. *Wiegand v. Siddons*, 41 App. Cases D. C. 130.

<sup>47</sup> *St. Louis v. Bell Place Realty Co.*, 259 Mo. 126, 140, 168 S. W. 721; *Webb v. Strovah*, 143 Mo. App. 459, 127 S. W. 680.

## CHAPTER 33.

### DEDICATION.

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## I. NATURE AND KINDS AND OTHER GENERAL RULES.

**§ 1537. General consideration and scope of chapter.<sup>1</sup>**

The principle of dedication was known to the common law at an early date.<sup>2</sup>

Municipal corporations usually have express power to accept or reject grants or dedications, absolute or conditional, of highways, streets, boulevards, parkways, alleys or other property for public use.

**§ 1538. Definition and nature.**

The owner's offer, either express or implied, of appropriation of land or some interest or easement therein to public use, and acceptance thereof, either express or implied (when acceptance is required) constitute dedication.<sup>3</sup>

<sup>1</sup> *Baltimore v. Gordon*, 133 Md. 150, 104 Atl. 536.

*Appleton v. New York City*, 219 N. Y. 150, 114 N. E. 73, 76, 77.

<sup>2</sup> *St. Louis Charter*, Art. XIII § 5, par. d, adopted June 30, 1914.

<sup>3</sup> The setting apart of land or an easement therein to a public purpose evidenced by a declaration. *Shearer v. Reno (Neb.)*, 136 Pac. 705.

Permanent devotion, of land to public use. *Black v. Central R. Co.*, 185 N. J. L. 197, 89 Atl. 24; *Poindexter v. Schaffner (Tex. Civ. App. 1914)*, 162 S. W. 22.

Lands or easements therein given for the benefit of the public generally constitute dedication. *West-*

*ern Union Telegraph Co. v. Georgia R. & B. Co.*, 227 Fed. 276.

On proof of the dedication lapse of time is not important, since one day is as effectual as a series of years. *Kleinhans v. North Hampton Traction Co.*, 60 Pa. Super. Ct. 641.

Can be made only to the public; not for private right of way. *Hill v. Wing*, 193 Ala. 312, 69 So. 445.

Private use may be changed to public use. *Francioni v. Soledad Land & Water Co.*, 170 Cal. 221, 149 Pac. 161.

Dedicator may limit extent as he desires. *Ft. Smith & V. B. Bridge Dist. v. Scott*, 111 Ark. 449, 163 S. W. 1137.

The intention of the owner to dedicate and acceptance thereof by the public are the essential elements of a complete dedication.<sup>4</sup>

The offer or intention to dedicate need not be in writing. It may arise from oral declaration or be manifested by acts.<sup>5</sup> Moreover, no particular language is necessary to constitute a dedication.<sup>6</sup>

### § 1539. Kinds of dedication and distinguishing characteristics.

Dedication may be either common law or statutory,<sup>7</sup>

Who must prove. *H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481; *Edwards v. Gill*, 96 Neb. 761, 148 N. W. 465.

See §§ 1570 and 1586, post.

"A dedication or public easement in land is generally defined as its devotion to a public use by an unequivocal act of owner of the fee manifesting an intention that it shall be accepted and used presently or in future." *Birmingham v. Graham* (Ala. 1918), 79 So. 574, 576.

<sup>4</sup> *Baltimore v. Gordon*, 133 Md. 150, 104 Atl. 536; *Phillips v. Leininger*, 280 Ill. 132, 117 N. E. 497; *De Castello v. Cedar Rapids*, 171 Iowa 18, 153 N. W. 353; *Bradford v. Fultz*, 167 Iowa 686, 149 N. W. 925; *Kaufman v. Butte*, 48 Mont. 400, 138 Pac. 770; *Wensel v. Chicago, M. & St. P. Ry. Co.* (Iowa 1919), 170 N. W. 409; *Harris v. St. Helens*, 72 Or. 377, 143 Pac. 941; *Bennington County v. Manchester*, 87 Vt. 555, 90 Atl. 502; *People v. Laugenour*, 25 Cal. App. 44, 142 Pac. 888; *Philadelphia Museum Trustees v. Pennsylvania University Trustees*, 251 Pa. 125, 96 Atl. 126.

Must be offer, express or implied, and an acceptance, express or implied. *Brown v. East Port*, 148 Ga. 85, 95 S. E. 962.

"It is of the essence of a dedication that it should appropriate the land for public use and that such should be the intent of the owner and that it should be accepted by the public." *Hardin v. Ferguson*, 271 Mo. 410, 414, 196 S. W. 746.

<sup>5</sup> *Attorney General v. Onset Bay Grove Ass'n*, 221 Mass. 342, 109 N. E. 165; *Hardin v. Ferguson*, 271 Mo. 410, 414, 196 S. W. 746; *Jones v. Teller*, 65 Or. 328, 133 Pac. 354.

<sup>6</sup> *Bidwell v. McCuen*, 183 Iowa 633, 166 N. W. 369, 372.

<sup>7</sup> *Borchers v. Brewer*, 271 Mo. 137, 196 S. W. 10; *Kee v. Satterfield* (Okl. 1915), 149 Pac. 243; *McCoy v. Thompson*, 84 Or. 141, 164 Pac. 589, 591; *Nodine v. Union*, 42 Or. 613, 72 Pac. 582.

Statutory and common law, distinguished. *Poindexter v. Schaffer* (Tex. Civ. App. 1915), 162 S. W. 22.

and the former may be either express or implied,<sup>8</sup> but the latter is essentially express.<sup>9</sup>

A common law dedication is distinguished from a statutory dedication,<sup>10</sup> and prescription,<sup>11</sup> operates as an

<sup>8</sup> Georgia. *Brown v. East Point*, 148 Ga. 85, 95 S. E. 962.

Iowa. *Wensel v. Chicago, M. & St. P. Ry. Co.* (Iowa 1919), 170 N. W. 409, 413, 414; *De Castello v. Cedar Rapids*, 171 Iowa 18, 153 N. W. 353.

Missouri. *Borchers v. Brewer*, 271 Mo. 137, 196 S. W. 10.

Oklahoma. *Kee v. Satterfield* (Okl. 1915), 149 Pac. 243.

Oregon. *McCoy v. Thompson*, 84 Or. 141, 164 Pac. 589, 591; *Harris v. St. Helens*, 72 Or. 377, 143 Pac. 941.

Texas. *Kaufman v. French* (Tex. Civ. App.), 171 S. W. 831; *Poin-dexter v. Schaffner* (Tex. Civ. App. 1914), 162 S. W. 22.

Utah. *William J. Lemp Brewing Co. v. P. J. Moran* (Utah 1917), 169 Pac. 459.

Vermont. *Bennington County v. Manchester*, 87 Vt. 555, 90 Atl. 502.

**Implied dedication** is one arising from operation of law from the acts of the owner. *Poseyville v. Gatewood* (Ind. App.), 114 N. E. 483.

Implied for public way must exist by operation of law resulting from acts of the owner. It may exist in the absence of express grant or declaration by words in writing or oral. *Triplett Township v. Mc-Phearson*, 172 Mo. App. 369, 157 S. W. 857.

Implied arises by acts constitute an estoppel in pais. *Jones v. Teller*, 65 Or. 328, 133 Pac. 354.

<sup>9</sup> Section 1539, vol. 4, ante.

<sup>10</sup> Section 1540, vol. 4, ante; § 1540, post; *Granite Bituminous Pav. Co. v. McManus*, 244 Mo. 184, 148 S. W. 621; *McCoy v. Thompson*, 84 Or. 141, 164 Pac. 589, 591.

Essentials of common law dedication. *Portland R. L. & P. Co. v. Oregon City*, 85 Or. 574, 166 Pac. 932.

<sup>11</sup> Common law dedication consists of acts in pais which evince an intention on the part of the owner to dedicate. "No particular formality is necessary, it may be made by any act of the owner showing an intention to dedicate which is the vital principle in dedication. Time is not an indispensable element because if the dedication is accepted and used by the public in the manner intended the dedication is complete, precluding the owner from revoking the dedication. Whether a common law dedication has been made is therefore a conclusion of fact to be drawn by the jury from the circumstances of each particular case. The throwing open of land to public use as a street without other formality is sufficient to establish the fact of dedication to the public and if individuals in consequences of this act, become interested to have it continue so, as by purchasing property abutting thereon, the owner cannot resume it. All that is required is the assent of the owner and use of the premises for the purposes in-

estoppel,<sup>12</sup> and usually rests upon an estoppel in pais.<sup>13</sup>

tended by the appropriation; the law creates out of the owner's act in such case an estoppel in pais and precludes him from revoking the dedication. The difference between prescription and common law dedication lies in the ingredient of time. To establish dedication by prescription in this state, user for ten years must be shown and nothing short of that will suffice; but a valid common law dedication may be shown by an act of dedication and of the animus dedicandi without reference to the period of use. For example, opening on the ground a street or highway and selling lots fronting upon such street and which are accessible only thereover will constitute a common law dedication of the land covered by the highway to public use, irrevocable so far as the general public is concerned because the rights acquired by third persons such a common law dedication will operate in favor of the public as well as of such lot owner." *Drimmell v. Kansas City*, 180 Mo. App. 339, 344, 345, 168 S. W. 280.

"When the only title a city can show to land in a street is by prescription or adverse user it is necessary to show such uses for a period as long as that which the statute of limitations prescribe to create a title in land by adverse possession. But when it is shown that the owner of the land has done an act which clearly indicates his intention to dedicate the land to the city for a street, and the city in response has done an act which clearly indicates its purpose

to accept the dedication and take possession and make use of the land for a street, the concurring acts of the owner and the city constitute a complete common law dedication, and in such case it is not necessary to show user extending over any given period of time, but it is sufficient to show it for such length of time as to show clearly the intention of the parties. In such case the statute of limitations has nothing to do with the title; it is a title by common law dedication." *McGrath v. Nevada*, 188 Mo. 102, 107.

<sup>12</sup> *Center v. Collier*, 26 Colo. App. 354, 144 Pac. 1123.

<sup>13</sup> *Lehigh & H. R. R. Co. v. Warwick*, 149 N. Y. S. 378.

Application of doctrine of estoppel in pais. *Bennington County v. Manchester*, 87 Vt. 555, 90 Atl. 502.

"Generally by reason of the terms of the statute a statutory dedication operates as a grant. Some authorities declare that common law dedications always operate upon the principle of an estoppel while others go no further than to say that such a dedication is of itself a distinctive common law doctrine based upon principles analogous to those underlying estoppels. The theory usually accepted is: That to reclaim land would be a violation of good faith to the public and to those who have acquired private property with the expectation of enjoying the use contemplated by the dedication, and in the case of the sale of a lot with reference to a plat there is the added feature that an

A common law or a non-statutory dedication is just as efficacious as a statutory dedication, provided it is accepted by the municipality in any of the ways recognized by law, or provided the owners by any acts having that effect have estopped themselves to question the dedication.<sup>14</sup>

The authorization of statutory dedication does not in any way restrict the common law power of the owner to devote his land or some easement therein to the use of the public.<sup>15</sup>

Hence, the rule is that a statutory dedication imperfectly made will be held as valid as a common law dedication if good as such.<sup>16</sup>

### § 1540. Statutory dedication.<sup>17</sup>

The filing or recording of plats of, and additions to, municipal corporations, pursuant to statute are termed

easement indicated by the plat constitutes a part of the consideration passing to the purchaser." McCoy v. Thompson, 84 Or. 141, 164 Pac. 589, 591.

<sup>14</sup> Hatton v. St. Louis, 264 Mo. 634, 644, 175 S. W. 888.

<sup>15</sup> Crosby v. Greenville, 183 Mich. 452, 150 N. W. 246.

<sup>16</sup> Hardin v. Ferguson, 271 Mo. 410, 415, 196 S. W. 746.

Lands subdivided and platted, so that the several parcels should be bounded by certain streets and alleys which had been dedicated to the city, and the plat thereof, though not acknowledged was duly recorded, constitutes a common law or non-statutory dedication, if accepted by the city in any of the ways recognized by law, or if the owners by any acts having that effect have estopped themselves to question the dedication. Hatton v. St. Louis, 264 Mo. 634, 644, 175 S. W. 888.

<sup>17</sup> Corbin v. Baltimore & O. C. T. R. Co., 285 Ill. 439, 120 N. E. 800; Tri-City Artificial Ice Co. v. Day (Ill. 1920), 127 N. E. 106; Ladonia v. Day, 265 Mo. 383, 390-394, 178 S. W. 741; Albers v. Acme Paving & Crusher Co., 196 Mo. App. 265, 194 S. W. 61; McCoy v. Thompson, 84 Or. 141, 164 Pac. 589; Superior v. Northwestern Fuel Co., 164 Wis. 631, 161 N. W. 9.

Is in nature of a grant. Ramstad v. Carr, 31 N. D. 504, 154 N. W. 195; McCoy v. Thompson, 84 Or. 141, 164 Pac. 589, 591.

Acceptance of an incomplete or defective statutory dedication, held valid. Minium v. Solel (Mo. 1916), 183 S. W. 1037.

Dedication and acceptance of land for highway. Herrington v. Booth & Flinn, 252 Pa. 70, 97 Atl. 178.



statutory dedications. Such dedications and their legal effect is controlled wholly by the terms of the statute authorizing them.<sup>18</sup> Under some statutes the acknowledgment and recording of a plat of the land in due form is held to be a complete statutory dedication, without any act on the part of the municipality, and it becomes thereafter irrevocable by the dedicator or his heirs.<sup>19</sup>

Substantial compliance with all mandatory statutory provisions are required.<sup>20</sup>

Certain defects may be corrected subsequent to the filing and recording of the plat.<sup>21</sup>

Although the act or acts taken may not be good as a statutory dedication, it may be good at common law.<sup>22</sup>

<sup>18</sup> *Hardin v. Ferguson*, 271 Mo. 410, 415, 196 S. W. 746.

<sup>19</sup> *Hatton v. St. Louis*, 264 Mo. 634, 643, 175 S. W. 888; *Union Elevator Co. v. Kansas City Suburban Belt Rd. Co.*, 135 Mo. 353, 366, 36 S. W. 1071; *Thomas v. Hunt*, 134 Mo. 392, 403, 35 S. W. 581, 32 L. R. A. 857; *Shoddy v. Bolen*, 122 Mo. 479, 491, 25 S. W. 935; *R. S. Mo.*, 1909 § 10294.

Evidence that the plat of the land was duly executed, acknowledged and filled in the office of the recorder of deeds of the proper county, is sufficient to constitute a statutory dedication of streets and the fee thereto vested at once in the public by force of the statute and no further acceptance is necessary. *Otterville v. Bente*, 240 Mo. 291, 296, 144 S. W. 822.

Dedication of land by a properly executed, acknowledged and recorded plat by the owner in strict statutory form vests title to the streets and alleys therein designated without any act on the part of the city. "The estate thus conveyed was a public easement in

the land shown by the plat to be set apart for streets and alleys." *Hatton v. St. Louis*, 264 Mo. 634, 643, 175 S. W. 888.

<sup>20</sup> *Doran v. Graham*, 195 Ill. App. 65; *Lais v. Silverton*, 82 Or. 503, 162 Pac. 251; *Poindexter v. Schaffner* (Tex. Civ. App. 1914), 162 S. W. 22.

Unacknowledged plat, held insufficient. *Center v. Collier*, 26 Colo. App. 354, 144 Pac. 1123.

Particular plat, held not a statutory dedication. *Rau v. Freund*, 165 Wis. 27, 160 N. W. 1063.

Plat dedicating need not be sealed under Missouri statute. *Bobb v. St. Louis*, 276 Mo. 59, 205 S. W. 713, 715.

<sup>21</sup> Defects, as failure to give power of attorney to agent to acknowledge and record plat, may be corrected by owner by executing and recording power of attorney subsequently which will constitute a complete ratification. *Bright v. Superior*, 163 Wis. 1, 156 N. W. 600.

<sup>22</sup> *McMahon v. Borland*, 262 Ill.

**§ 1541. Parties to dedication.<sup>23</sup>****§ 1542. Necessity for specific grantee.<sup>24</sup>**

The dedication of land to the public is legally effective although at the time there is no corporate entity or artificial grantee in whom the title is vested. In this respect a dedication differs from a grant which presupposes the existence of a competent taker of the estate conveyed.<sup>25</sup>

**§ 1543. Purposes for which dedication is proper.<sup>26</sup>**

A conveyance of land along an established park to be used as a "carriage avenue" of the park "for all such carriages and teams as by regulations and rules

358, 104 N. E. 701; *Kaufman v. Butte*, 48 Mont. 400, 138 Pac. 774.

"If the plat filed was defective and insufficient under the statute, it and the subsequent sale of lots thereunder, and building the town chiefly in this addition on the lots along the streets laid out therein and the acceptance by the town and the public of most of the streets in their entirety and the major portion of Grover and Boonville streets themselves, coupled with the sale, according to the plat, as indicated by the evidence, of all the lots, abutting on the parts of Grover and Boonville streets now in dispute, constituted a common law dedication and an acceptance of the plat in its entirety and the whole of all the streets as marked on the plat." *Otterville v. Bente*, 240 Mo. 291, 296, 144 S. W. 822.

<sup>23</sup> When city on receiving dedication of a cemetery acts as trustee in administering the trust. *Hoboken Cemetery v. Griffin*, 88 N. J. L. 111, 95 Atl. 758.

<sup>24</sup> No distinct grantee or corporate body in existence. *De Castello v. Cedar Rapids*, 171 Iowa 18, 153 N. W. 353; *Buffalo L. & R. Ry. Co. v. Hoyer*, 214 N. Y. 226, 108 N. E. 455, reversing 132 N. Y. S. 31, 147 App. Div. 205.

Land for streets may be dedicated to an unincorporated town, municipal corporation, which afterwards incorporates and accepts. *Lanstinger v. Adel*, 142 Ga. 321, 82 S. E. 884; *Kniss v. Duquesne Borough*, 255 Pa. 417, 100 Atl. 132.

A municipality coming into being subsequent to offer to dedicate land may accept. *White v. Moore*, 146 N. Y. S. 593, 161 App. Div. 400, affirming 132 N. Y. S. 441, 73 Misc. Rep. 96

<sup>25</sup> *Hardin v. Ferguson*, 271 Mo. 410, 414, 196 S. W. 746.

<sup>26</sup> Highways. *Rylee v. State*, 106 Miss. 123, 63 So. 342; *Barden v. State*, 98 Neb. 180, 152 N. W. 330; *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344.

governing the park may be allowed to run in same," was held to be a dedication of such land for highway purposes. A further clause in the grant subjecting it to the "immediate government of the park commissioners" was held to refer to such regulations as might be exercised in the control of the public highway.<sup>27</sup>

**§ 1544. Property which may be dedicated.<sup>28</sup>**

**§ 1545. Conditions and reservations by dedicator.<sup>29</sup>**

Lands may be dedicated for a specific purpose, e. g., school.<sup>30</sup>

So the dedication may specify reasonable conditions,<sup>31</sup> e. g., restricting the use of lands for a street to pedestrians.<sup>32</sup>

But reservations of lands dedicated for streets which hamper public control are void as against public policy.<sup>33</sup>

<sup>27</sup> Kennard v. Eyermann, 267 Mo. 1, 11 et seq., 182 S. W. 737.

<sup>28</sup> Approach to bridge owned by a public service company which was required in discharging its public obligations, held under particular law could not be dedicated to a municipality. Richmond v. Mayo Land & Bridge Co., 120 Va. 545, 91 S. E. 615, 617.

<sup>29</sup> Birmingham v. Graham (Ala. 1918), 79 So. 574; Loomis v. Collins, 272 Ill. 221, 111 N. E. 999; Grand Crossing Land & Imp. Co. v. Moberge, 39 S. D. 574, 165 N. W. 988; Horton v. Okanogan County, 98 Wash. 626, 168 Pac. 479.

Acceptance in violation of conditions is void. Consent of owner to acceptance without conditions is waiver of conditions. Home Laundry Co. v. Louisville, 168 Ky. 499, 182 S. W. 645.

<sup>30</sup> Montevallo v. Montevallo School District, 268 Mo. 217, 186 S. W. 1078; West Paterson Bor-

ough v. Murphy, 90 N. J. Eq. 57, 106 Atl. 32.

<sup>31</sup> Dedication to public use for streets and alleys, "save and except the right of way for the street railroads," held grant of right of way for street railroads would not authorize the construction of a steam railroad. Ettenson v. Wabash, R. R. Co., 248 Mo. 395, 410, 154 S. W. 785.

<sup>32</sup> Home Laundry Co. v. Louisville, 168 Ky. 499, 182 S. W. 645.

Restrictions as to nature of structures that may be built on the property dedicated. Doran v. Graham, 195 Ill. App. 65.

A reservation to locate or control the location of railroads in the dedicated streets is not inconsistent with the uses and purposes for which the streets were dedicated. Arn v. Chesapeake & O. Ry., 171 Ky. 157, 188 S. W. 340, 342.

<sup>33</sup> Bradley v. Spokane & I. E. R. Co., 79 Wash. 455, 140 Pac. 688.

## II. WHO MAY DEDICATE.

## § 1546. General rules.

The dedication, of course, must be made by the owner of the title,<sup>34</sup> or by some person by him duly authorized.<sup>35</sup>

The acquisition of title subsequent to the dedication and due ratification thereof will validate the dedication.<sup>36</sup>

§ 1547. Agent.<sup>37</sup>§ 1548. Corporations.<sup>38</sup>§ 1549. Persons acting in certain representative capacities.<sup>39</sup>§ 1555. Holder of equitable title.<sup>40</sup>

## III. PLATS AND MAPS.

§ 1556. General consideration.<sup>41</sup>

The most common method of making dedication is by

<sup>34</sup> One who has no title, of course, cannot dedicate. *Wheeler v. Oakland* (Cal. App. 1917), 170 Pac. 864.

<sup>35</sup> *Elliott v. Trisler* (Okl. 1917), 167 Pac. 755.

<sup>36</sup> *Chase v. Oregon City*, 72 Or. 527, 143 Pac. 1111.

<sup>37</sup> *Elliott v. Trisler* (Okl. 1917), 167 Pac. 755.

Under statute an agent may be authorized to acknowledge and record a plat dedicating property to the public. *Bright v. Superior*, 163 Wis. 1, 156 N. W. 600.

<sup>38</sup> Town may dedicate land for court house. *Bennington County v. Manchester*, 87 Vt. 555, 90 Atl. 502.

**Directors of a railroad** must authorize. President alone cannot. Where president declares dedica-

tion and directors have no knowledge thereof, but claim title, held no ratification. *Lehigh & H. R. R. Co. v. Warwick*, 149 N. Y. S. 378.

<sup>39</sup> Church trustees, held could dedicate property for boulevard. *Alpers v. Acme Paving & Crushing Co.*, 196 Mo. App. 265, 194 S. W. 61, 70.

<sup>40</sup> Holder of bond for title. *Jacobx Pharmacy Co. v. Luckie*, 143 Ga. 457, 85 S. E. 332.

Claimant of land prior to securing certificate under act of Congress cannot dedicate it by parol to charitable use. *Stansbery v. First Methodist Episcopal Church*, 79 Or. 155, 154 Pac. 887, 891.

<sup>41</sup> *Curtiss and Yale Co. v. Minneapolis*, 123 Minn. 344, 144 N. W. 150; *People v. Massieon*, 200 Ill.

filing and recording plats and maps, showing public way, etc.<sup>42</sup>

In many states provision is made for plats of, and additions to, villages and cities and the recording of such plats.<sup>43</sup>

A street dedicated to a city according to a properly executed and recorded plat by the owner ordinarily vests the title thereof in the city without any action on its part.<sup>44</sup>

App. 86; *Balmat v. Argenta* (Ark.), 184 S. W. 445; *Hobart v. Towle*, 220 Mass. 293, 107 N. E. 954; *Ralph v. Clifford*, 224 Mass. 58, 112 N. E. 482; *Guilford County v. Porter*, 171 N. C. 356, 88 N. E. 855; *Hanford v. Seattle*, 92 Wash. 257, 158 Pac. 987; *Lang v. Portland* (Or.), 147 Pac. 378.

Recording of plat showing streets and alleys as proposition to dedicate. *Crosby v. Greenville*, 183 Mich. 452, 150 N. W. 246.

Map recorded showing street and selling lots with reference to its complete offer of dedication. *Berton v. All Persons* (Cal. 1918), 170 Pac. 151, 153.

The filing of a plat purporting to convey a street constitutes a color of title. *Meyer v. Bobb*, 185 Mo. App. 685, 171 S. W. 600.

Restriction as to use. *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999.

Vacation of plats, additions, subdivisions, etc. *Mome v. Lasell*, 26 N. D. 638, 145 N. W. 577.

<sup>42</sup> *H. A. & L. D. Holland Co. v. Northern Pacific Ry. Co.*, 208 Fed. 598, affirmed (C. C. A.) 214 Fed. 920; *Creekmore v. Central Const. Co.*, 157 Ky. 336, 163 S. W. 194; *St. Louis v. Barthel*, 256 Mo. 255, 166 S. W. 267; *Camden v. Me-*

*Andrews & Forbes Co.*, 85 N. J. L. 260, 88 Atl. 1034.

Map or plat as constituting dedication. *Swanson v. Molaine R. I. & E. Traction Co.*, 204 Ill. App. 144; *Portland R. L. and P. Co. v. Oregon City*, 85 Or. 574, 166 Pac. 932.

<sup>43</sup> *Hardin v. Ferguson*, 271 Mo. 410, 415, 196 S. W. 746.

Laws as to plats and maps, held applicable to cities and towns, but not to town sites or unincorporated villages. *Kenwood Park v. Leonard*, 177 Iowa 337, 158 N. W. 655, 658.

Plat to conform to streets existing. *Poindexter v. Schaffner* (Tex. Civ. App. 1914), 162 S. W. 22.

When plat is insufficient to constitute a grant of land as and for a street for failure to conform to statutory requirements. *Rau v. Freund*, 165 Wis. 27, 160 N. W. 1063.

<sup>44</sup> *Hatton v. St. Louis*, 264 Mo. 634, 643, 175 S. W. 888.

Where the owner of a tract of land makes a town plat of it with spaces for streets laid out thereon, and conveys lots with reference to and bounded by such streets, he thereby dedicates the streets to public use as such and the grantees in the conveyance acquire the right

Selling lots with reference to a plat, duly filed and recorded as prescribed by law, with streets and alleys marked thereon, is usually regarded as a dedication of such public way to the public,<sup>45</sup> or at least evidence of

to have such streets kept open for the benefit of light and air, as well as passageways. *Kirkland v. Tampa* (Fla. 1918), 78 So. 17, 19, following *Porter v. Carpenter*, 39 Fla. 14, 21 So. 788, and *Winter v. Payne*, 33 Fla. 470, 15 So. 211.

The proprietor by virtue of the Indiana statute who plats a street and acknowledges the plat and has it approved and recorded grants to the municipality, in trust for the public, title to an easement for a street, and no further assent or acceptance by the public is required so far as the grant is concerned. *Interstate Iron and Steel Co. v. East Chicago (Ind.)*, 118 N. E. 958; *Murray v. Huntingburg* (Ind. 1918), 119 N. E. 209.

Unacknowledged plat recorded, accepted by a city, and deeds given by the dedicator in accordance therewith, held to constitute a complete common law dedication. *Hutton v. St. Louis*, 264 Mo. 634, 175 S. W. 888.

<sup>45</sup> *Alabama. Mobile v. Chapman* (Ala. 1918), 79 So. 566, 573, (citing § 1561, vol. 4, ante); *Rudolph v. Birmingham*, 188 Ala. 620, 65 So. 1006; *South & N. A. R. Co. v. Davis*, 185 Ala. 193, 64 So. 606.

*Illinois. H. A. Hillmer Co. v. Behr*, 264 Ill. 567, 106 N. E. 481.

*Nebraska. Shearer v. Reno*, 36 Nev. 443, 136 Pac. 705.

*New Jersey. Ridgefield Park Trustees v. New York, S. & W. R. Co.*, 85 N. J. L. 278, 89 Atl. 773.

*New York. Buffalo v. Erie R.*

*Co.*, 144 N. Y. S. 578, 83 Misc. Rep. 144.

*North Carolina. Elizabeth City v. Commander*, 176 N. C. 26, 96 S. E. 736.

*Oregon. Johnson v. Crawford*, 88 Or. 125, 171 Pac. 568; *Chase v. Oregon City*, 72 Or. 527, 143 Pac. 1111.

*Ohio. Cincinnati v. Leeds*, 3 Ohio App. 123.

*Pennsylvania. Bell v. Pittsburgh Steel Co.*, 243 Pa. 91, 89 Atl. 816; *Sorrino v. Pittsburgh Steel Co.*, 243 Pa. 91, 89 Atl. 816; *Leach v. Philadelphia H. & P. R. Co.*, 258 Pa. 518, 102 Atl. 174.

*Texas. Kaufman v. French* (Tex. Civ. App.), 171 S. W. 831; *Poindexter v. Schaffner* (Tex. Civ. App.), 162 S. W. 22.

*West Virginia. Elkins v. Donohoe*, 74 W. Va. 335, 81 S. E. 1130.

Owner must consent. *Lemle v. Louisiana Farm Land Co.*, 135 La. 757, 66 So. 185.

Plat showing dedication of streets. *Keyes v. Excelsior*, 126 Minn. 456, 148 N. W. 501.

Mere filing of plat with reservation marked thereon of park, held not dedication. *Eugene v. Lowell*, 72 Or. 234, 143 Pac. 903.

So filing of map with reference thereon for wharves is not a dedication. *Harris v. St. Helens*, 72 Or. 377, 143 Pac. 941.

Selling lots with reference to land marked as public common. *Buffalo L. & R. Ry. Co. v. Hoyer*, 214 N. Y. 236, 108 N. E. 455, re-

dedication,<sup>46</sup> depending, of course, on the precise conditions of the particular case.

### § 1557. Sufficiency of description.<sup>47</sup>

versing 132 N. Y. S. 31, 147 App. Div. 205.

Lots sold with reference to plat marked "park," held dedication irrevocable. *Bozarth v. Egg Harbor City*, 89 N. J. Eq. 26, 103 Atl. 405, holding city could not sell land dedicated for park for commercial purposes, nor could legislature authorize the city so to do, because here private rights existed in the land "in the nature of an easement touching the use of the land by the owner of the fee."

Acceptance of a conveyance made with reference to a plat which seeks to dedicate streets and alleys to the public, constitutes an adoption of the dedication, and the purchaser cannot acquire title to abutting alley shown on such plat although the dedication was defective in that there was no showing of a submission of the plat to the city council. *Caruthersville v. Huffman*, 262 Mo. 367, 376, 377, 171 S. W. 323.

Plat showing blocks, lots and streets, acknowledged and recorded and selling lots with reference thereto, held dedication. *Krueger v. Gulf C. & S. F. Ry. Co.* (Tex. Civ. App.), 191 S. W. 151.

A plat duly filed with streets marked thereon and showing sales of lots with reference thereto, held to amount to an offer to dedicate. *Rose v. Elizabethtown*, 275 Ill. 167, 114 N. E. 14, 18.

<sup>46</sup> *Wheeler v. Charlotte Consoli-*

*dated Con'st Co.*, 170 N. C. 427, 87 S. E. 221; *Sexton v. Elizabeth City*, 169 N. C. 385, 86 S. E. 344; *Gibson v. Carroll* (Tex. Civ. App.), 180 S. W. 630; *Woodcock v. New Orleans*, 222 Fed. 260, 138 C. C. A. 50; *Attorney General v. Onsett Bay Grove Assn.*, 221 Mass. 342, 109 N. E. 165; *Ramstad v. Carr*, 31 N. D. 504, 154 N. W. 195; *Kee v. Satterfield* (Okla. 1915), 149 Pac. 243; *Steinogle v. Pittsburgh, McK. & Y. R. Co.*, 58 Pa. Super. Ct. 324; *Sipe v. Alley* (Va.), 86 S. E. 122.

Street shown on plat, and deed conveying land as bounded by it, etc., as evidence to prove dedication. *Philadelphia B. & W. R. Co. v. Baltimore*, 124 Md. 635, 93 Atl. 146.

"The making of a common law plat and the sale of lots with reference thereto, are merely evidence of an intent to dedicate, which, like every other dedication, to be made complete and carried into effect so as to create public rights, must be accepted and acted upon by the public." *Rose v. Elizabethtown*, 275 Ill. 167, 114 N. E. 14, 18.

<sup>47</sup> Indefinite, but cured by plat. *Laddonia v. Day*, 265 Mo. 383, 178 S. W. 741.

The land could be located by a competent surveyor, held sufficient description. *Curtiss & Yale Co. v. Minneapolis*, 123 Minn. 344, 144 N. W. 150, 152 citing § 1557, vol. 4, ante.

### § 1558. Construction of plats and maps.<sup>48</sup>

In construing plats and maps as to dedications, courts will give effect to their plain meaning and intent, exhibited by their outlines as well as by their words.<sup>49</sup>

### § 1560. Vacation of plat.<sup>50</sup>

#### IV. INTENTION TO DEDICATE.

### § 1561. Necessity for intent to dedicate.

It is of the essence of a dedication that it should appropriate the land for public use and that such should be the intention of the owner.<sup>51</sup>

<sup>48</sup> *Mobile v. Chapman* (Ala. 1918), 79 So. 566; *McDonald v. Kummer*, 56 Colo. 153, 137 Pac. 51; *Schick v. West Davenport Imp. Co.*, 167 Iowa 294, 145 N. W. 689; *Camden v. McAndrews & Forbes Co.*, 85 N. J. L. 260, 88 Atl. 1034; *Ridgefield Park Trustees v. New York, S. & W. R. Co.*, 85 N. J. L. 278, 89 Atl. 773; *Eugene v. Lowell*, 72 Or. 234, 143 Pac. 903; *Thurman v. Multnomah County*, 70 Or. 401, 140 Pac. 626.

"Reserved" marked thereon, held to reserve to owner strip so marked. *Ft. Smith & V. B. Bridge Co. v. Scott*, 111 Ark. 449, 163 S. W. 1137.

Land sold with reference to, extent of dedication. *Camden v. McAndrews & Forbes Co.*, 85 N. J. L. 260, 88 Atl. 1034.

<sup>49</sup> *Caruthersville v. Huffman*, 262 Mo. 367, 375, 171 S. W. 323.

A map, the legend thereon, and the certificate of the surveyor are to be considered together, in ascertaining whether the statute has been observed, and the existence of an intention to dedicate. *Superior v. Northwestern Fuel Co.*,

164 Wis. 631, 161 N. W. 9, 13.

<sup>50</sup> *Johnson v. Buhman*, 98 Neb. 236, 152 N. W. 403, following *Hart v. Ainsworth*, 89 Neb. 418, 131 N. W. 816, set out in § 1560, p. 3238, in note, vol. 4, ante.

Right of owner to vacate blocks in town. *Burlington v. Lambert* (Okl. 1917), 166 Pac. 137.

<sup>51</sup> *Alabama. Mobile v. Chapman* (Ala. 1918), 79 So. 566, 573, citing § 1561, vol. 4, ante.

*California. San Diego v. Hall* (Cal. 1919), 179 Pac. 889; *F. A. Hihn Co. v. Santa Cruz*, 170 Cal. 436, 150 Pac. 62.

*Georgia. Hillside Cotton Mills v. Ellis* (Ga. App. 1918), 97 S. E. 459.

*Illinois. Hansen v. Green*, 275 Ill. 221, 113 N. E. 982.

*Indiana. Poseyville v. Gatewood* (Ind. App. 1916), 114 N. E. 483.

*Iowa. Wensel v. Chicago, M. & St. P. Ry. Co.* (Iowa 1919), 170 N. W. 409, 414; *Jones v. Peterson*, 178 Iowa 1389, 161 N. W. 181,



§ 1562. How intent shown.<sup>52</sup>

As mentioned, dedication may be effected without any writing, not being within the statute of frauds, and all of its elements may be shown by positive or circumstantial evidence of acts in pais.<sup>53</sup>

The intent may be shown in a variety of ways.<sup>54</sup>

It may be shown from the declarations and acts of the owner,<sup>55</sup> and from all the attendant circumstances.<sup>57</sup>

Kentucky. *Harmon v. Lay*, 169 Ky. 132, 183 S. W. 459.

Maine. *Wooster v. Fiske*, 115 Me. 161, 98 Atl. 378.

Maryland. *Baltimore v. Yost*, 121 Md. 366, 88 Atl. 342.

Michigan. *Weihe v. Macatawa Resort Company*, 198 Mich. 334, 164 N. W. 510.

Nebraska. *Burk v. Diers* (Neb. 1918), 169 N. W. 263.

N. Dakota. *Ramstad v. Carr*, 31 N. D. 504, 154 N. W. 195, L. R. A. 1916 B, 1175.

Utah. *William J. Lemp Brewing Co. v. P. J. Moran* (Utah 1917), 169 Pac. 459.

Owner cannot be deprived of his property without his consent. *Portland R. L. & P. Co. v. Oregon Ctiy*, 85 Or. 574, 166 Pac. 932.

"A dedication rests primarily in the intention of the owner. There must be a concession intentionally made by him." *Morris v. Blunt*, 49 Utah 243, 161 Pac. 1127, 1130.

To constitute a dedication of land for a street on the doctrine of an estoppel in pais it is essential that the donor should intend to set the land apart for the benefit of the public. *Rau v. Freund*, 165 Wis. 27, 160 N. W. 1063, 1064, citing *Elliott on Roads and Streets* § 138.

<sup>52</sup> *People v. Laugenour*, 25 Cal.

App. 44, 142 Pac. 888; *Borchers v. Brewer* (Mo. 1917), 196 S. W. 10; *Ramstad v. Carr*, 31 N. D. 504, 520, 521, 54 N. W. 195, quoting with approval from § 1562, pp. 3247, 3248, vol. 4, ante.

<sup>53</sup> *Hardin v. Ferguson*, 271 Mo. 410, 414, 196 S. W. 746; *Heitz v. St. Louis*, 110 Mo. 618, 19 S. W. 735; *Benton v. St. Louis*, 217 Mo. 687, 705, 118 S. W. 418; *Curran v. St. Joseph*, 264 Mo. 656, 659, 175 S. W. 584.

<sup>54</sup> *Ramstad v. Carr*, 31 N. D. 504, 520, 54 N. W. 195, citing § 1562, vol. 4, ante.

<sup>55</sup> *Weihe v. Pein*, 281 Ill. 130, 117 N. E. 849; *Pittsburgh C. C. & St. L. Ry. v. Ervington*, 59 Ind. App. 371, 108 N. E. 133; *Re West 172nd Street*, New York City, 157 N. Y. S. 399, 171 App. Div. 242; *Kaufman v. French* (Tex. Civ. App.), 171 S. W. 831.

Acts or declarations must be unequivocal to amount to dedication. *Norfolk v. Southern Ry. Co.*, 117 Va. 101, 83 S. E. 1085.

Plat prepared and filed by the owner showing a public way thereon, held sufficient to show intent. *Porter v. Stuttgart*, 135 Ark. 48, 204 S. W. 607.

Manifestations must be evidenced by acts, not by a hidden intent. *Ft. Smith & V. B. Bridge*

Any act or declaration on the part of the owner showing a present fixed, unequivocal purpose to dedicate, coupled with the use by the public in conformity with the purpose of the owner, is sufficient.<sup>58</sup>

### § 1563. User as showing intent to dedicate.<sup>59</sup>

*Dist. v. Scott*, 111 Ark. 449, 163 S. W. 1137.

Owner treated land as public way. *Merchant v. Grant*, 26 Cal. App. 485, 147 Pac. 484.

Fencing of way by owner. *Robison v. Gebauer*, 98 Neb. 196, 152 S. W. 329.

Conveyance of a strip of land as a public way shows an intent, to dedication. *Kennard v. Eyermann*, 267 Mo. 1, 182 S. W. 737.

Deed conveying property recognizing adjacent land as street. *Hall v. Olean*, 143 N. Y. S. 664, 82 Misc. Rep. 300.

Descriptions and recitals in deeds as intention to dedicate. *Hobart v. Weston*, 223 Mass. 161, 111 N. E. 776; *Burnham v. Mahoney*, 222 Mass. 524, 111 N. E. 396; *Perrow v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.), 181 S. W. 496.

A contract by the owner with an adjoining owner to dedicate land for an alley which contract is acted upon in leaving the land open and such owner contributes to paving such land as an alley, these acts held to constitute a dedication. *Jochimsen v. Johnson*, 173 Iowa 553, 156 N. W. 21.

Either verbally or by writing by a single act or a series of acts, if clear and unequivocal, as indicating the owner's intention. A single clear and unequivocal declaration by the owner may be

sufficient for this purpose. *Trammell v. Bradford* (Ala. 1917), 73 So. 894.

As dedication is essentially a question of intention, sometimes a single act of the owner will be ample to show such intention so that he cannot deny it. Usually the intention is gathered from a series of consistent acts clearly evidencing the intention. A single act alone is not always sufficient to show the intention. *Kleinhans v. Northampton Traction Co.*, 60 Pa. Super. Ct. 641.

<sup>57</sup> *Childs & Co. v. Chicago*, 279 Ill. 623, 117 N. E. 115, affirming 203 Ill. App. 235.

Intention "may be proved by declarations or by acts, or may be inferred from circumstances." *Morris v. Blunt*, 49 Utah 243, 161 Pac. 1127, 1130.

<sup>58</sup> *Santa Fe Town-Site Co. v. Parker* (Tex. Civ. App.), 194 S. W. 487, 489.

<sup>59</sup> *Keppler v. Richmond* (Va. 1919), 98 S. E. 747, 753, citing § 1563, vol. 4, ante; *Smith v. Southern Iron & Steel Co.*, 183 Ala. 482, 62 So. 766; *Triplett Township v. McPheerson*, 172 Mo. App. 369, 374, 157 S. W. 857.

Owner's consent and user as designated constitute implied dedication. *Kee v. Satterfield* (Okla. 1915), 149 Pac. 243.

Mere temporary use by public of

§ 1564. Same—permissive user.<sup>60</sup>

Undoubtedly mere permission on the part of the owner to the public to use the land as a way, without more, will not constitute an intention to dedicate,<sup>61</sup> since a

part of right of way of railroad is not. *H. A. & L. D. Holland Co. v. Northern Pacific Ry. Co.*, 208 Fed. 598, affirmed (C. C. A.) 214 Fed. 920.

"To constitute a dedication by user there must be adverse and exclusive possession under a claim of right with the knowledge and acquiescence of the owner, or such open and notorious possession that he may be charged with notice; the use must also be continuous and uninterrupted for a period equal to that of the statute barring a recovery of real estate. In addition, there must be an acceptance by the public manifested by the use of the property as a public highway. \* \* \* Under the facts above set forth, it is evident that there was no dedication by user of this property.

"There are no facts in this case which will authorize a finding that there has been a common law dedication regardless of the statute of limitations applicable to actions for the recovery of real estate. First, there was no act of the owners indicating an intention to dedicate, and second, the city's action was not indicative of a purpose to accept the dedication and to improve and use the property as a street; but when it ultimately sought to establish the highway it was under the claim that the property had been properly condemned. Under this state of facts, the statute of limitations before referred

to must prevail and the rule as to the intention of the parties as a controlling feature is inapplicable (*McGrath v. Nevada*, 188 Mo. 102).

"An appropriate conclusion to this branch of the case is the admirable summary of the essentials of a dedication by user by *Nixon, J.*, in *State v. Hood*, 143 Mo. App. 313, 316, in which the court said, 'to establish a dedication of this character,' the proof must usually be strict, cogent and convincing, and the acts proved must not be consistent with any construction other than that of a dedication.' " *Carpenter v. St. Joseph*, 263 Mo. 705, 715, 716, 175 S. W. 53.

"To imply dedication from use by the public it must be shown that such use was with the knowledge and acquiescence of the owner, and for the period fixed by the statute of limitations as a bar to real actions." *Jones v. Peterson*, 178 Iowa 1352, 161 N. W. 181, 183.

User must be adverse under claim of right. *Hertzog v. South Reading Market House Co.*, 69 Pa. Super. Ct. 292.

<sup>60</sup> *Kepler v. Richmond* (Va. 1919), 98 S. E. 747, 753, citing § 1564, vol. 4, ante; *Savannah v. Standard Fuel Supply Co.*, 140 Ga. 353, 78 S. E. 906.

<sup>61</sup> *Burk v. Diers* (Neb. 1918), 169 N. W. 263; *Nelson v. Reick*, 96 Neb. 486, 148 N. W. 331.

Owner's permission of occasional use by public, held not sufficient showing of intent. *Portland R. L.*

temporary right to use a private way is in the nature of a mere license, revocable at pleasure, and does not in any sense, establish the requisite intent.<sup>62</sup>

**§ 1567. Showing absence of intent to dedicate.<sup>63</sup>**

**§ 1568. Intent must be clearly indicated.<sup>64</sup>**

The intent of the dedicator is the foundation and life

& P. Co. v. Oregon City, 85 Or. 574, 166 Pac. 932.

Mere acquiescence by owner, held insufficient to show intent. Heater v. Chicago & Alton R. Co., 200 Ill. App. 331.

Permitting use of land along a beach in accordance with custom, held not a dedication. People v. Rindge (Cal. 1917), 164 Pac. 633, 638, 639.

<sup>62</sup> Norton v. State, 11 Ala. App. 216, 65 So. 689.

<sup>63</sup> Jones v. Peterson, 178 Iowa 1389, 161 N. W. 181; Morris v. Blunt, 49 Utah 243, 161 Pac. 1127, 1130; Oberhelman v. Allen, 7 Ohio App. 251.

Thomas v. Vanderslice (Ala. 1917), 77 So. 367; Franseioni v. Soledad Land & Water Co., 170 Cal. 221, 149 Pac. 161; Leader Realty v. Lakeview Land Co., 133 La. 646, 63 So. 253; Weihe v. Macatawa Resort Co. (Mich. 1917), 164 N. W. 510; Hodges v. West Bloomfield Tp., 186 Mich. 259, 152 N. W. 1056.

**Indefinite reference** to proposed street, held insufficient. Felin v. Philadelphia, 242 Pa. 164, 88 Atl. 421; Jones v. Teller, 65 Or. 328, 133 Pac. 354.

**A promise to dedicate** not made by the owner is ineffectual. New York, S. & W. R. Co. v. Board of

Public Utility Comrs., 91 N. J. L. 701, 103 Atl. 1053.

<sup>64</sup> Florida. Kirkland v. Tampa (Fla. 1918), 78 So. 17.

Georgia. Savannah v. Standard Fuel Supply Co., 140 Ga. 353, 78 S. E. 906.

Illinois. Doss v. Bunyan, 262 Ill. 101, 104 N. E. 153; Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14.

Louisiana. Kenner v. Zito, 141 La. 76, 74 So. 636.

Maryland. Baltimore v. Yost, 121 Md. 366, 88 Atl. 342.

Missouri. Phillips v. Pryor (Mo. App. 1916), 190 S. W. 1027.

Nebraska. Burk v. Diers (Neb. 1918), 169 N. W. 263.

New York. Lehigh & H. R. R. Co. v. Warwick, 149 N. Y. S. 378.

N. Dakota. Ramstad v. Carr, 31 N. D. 504, 154 N. W. 195.

Oregon. Christie v. Bandon, 82 Or. 481, 162 Pac. 248; Clatskanie v. McDonald, 85 Or. 670, 167 Pac. 560; Portland Railway, Light and Power Co. v. Oregon City, 85 Or. 574, 166 Pac. 932; Harris v. St. Helens, 72 Or. 377, 143 Pac. 941; Jones v. Teller, 65 Or. 328, 133 Pac. 354.

Virginia. Keppler v. Richmond (Va. 1919), 98 S. E. 747, 754, citing § 1568, vol. 4, ante.

of all dedications, and the intent must be clearly and unequivocally manifested.<sup>65</sup>

**§ 1569. Presumption as to intention.<sup>66</sup>**

**§ 1570. Sufficiency of evidence to prove intent.<sup>67</sup>**

<sup>65</sup> McCoy v. Thompson, 84 Or. 141, 164 Pac. 589, 591.

Platting, showing street, without owner's consent does not show intent. Baltimore v. Gordon, 133 Md. 150, 104 Atl. 536.

<sup>66</sup> Florida. Marianna v. Daniel (Fla. 1917), 76 So. 692.

Illinois. Weihe v. Pein, 281 Ill. 130, 117 N. E. 849; Fors v. Anderson, 270 Ill. 45, 110 N. E. 361.

Iowa. De Castello v. Cedar Rapids, 171 Iowa 18, 153 N. W. 353.

Ohio. Cleveland & P. Ry. Co. v. Cleveland, 33 Ohio Cir. Ct. R. 482.

Oregon. Clatskanie v. McDonald, 85 Or. 670, 167 Pac. 560.

Pennsylvania. Newell v. W. R. Chase & Sons Cutlery Co., 60 Pa. Super. Ct. 166; Hertzog v. South Reading Market House Co., 69 Pa. Super. Ct. 292.

S. Carolina. McCormac v. Evans, 107 S. C. 39, 92 S. E. 19.

Texas. Kaufman v. French (Tex. Civ. App.), 171 S. W. 831.

Virginia. Keppler v. Richmond (Va. 1919), 98 S. E. 747, 754, citing § 1569, vol. 4, ante.

There must be evidence upon which to rest inference or presumption. Allen v. Railroad Com. Mission (Cal. 1918), 175 Pac. 466.

Narrower way than authorized by law will not raise a presumption of intention to dedicate. McCutcheon v. Buffalo Terminal Sta-

tion Com., 154 N. Y. S. 711, affirming 151 N. Y. S. 451, 88 Misc. Rep. 601.

Use of property by city for a particular public purpose does not create presumption of dedication for such purpose. Norfolk v. Southern Ry. Co., 117 Va. 101, 83 S. E. 1085.

Moving a fence and allowing the public to use the strip on the other side for some forty years, creates a presumption of dedication. Boonville Special Road District v. Fuser, 184 Mo. App. 634, 641, 171 S. W. 962.

"Nor is there any presumption or inference of a dedication from mere use alone, but there must be such act or word or course of conduct on the part of the alleged dedicator fairly indicating his actual intent to give or grant the easement to public use." Jones v. Peterson, 178 Iowa 1352, 161 N. W. 181, 183.

<sup>67</sup> Facts in particular cases.

Alabama. Rudolph v. Birmingham, 188 Ala. 620, 65 So. 1006.

Illinois. S. D. Childs & Co. v. Chicago, 279 Ill. 623, 117 N. E. 115, affirming 203 Ill. App. 235; Phillips v. Leininger, 280 Ill. 132, 117 N. E. 497.

Iowa. Valley Junction v. McCurnin, 180 Iowa 510, 163 N. W. 345; De Castello v. Cedar Rapids, 171 Iowa 18, 153 N. W. 353.

This must be determined from the particular conditions in each case as it arises.

Kentucky. *Nieten v. Kimsey*, 177 Ky. 817, 198 S. W. 203.

Massachusetts. *Trefry v. Younger*, 226 Mass. 5, 114 N. E. 1033.

Missouri. *Hardin v. Ferguson*, 271 Mo. 410, 196 S. W. 746; *Phillips v. Pryor* (Mo. App.), 190 S. W. 1027.

Maryland. *Beale v. Tacoma Park*, 130 Md. 297, 100 Atl. 379.

New York. *Huber v. Gorg*, 168 N. Y. S. 834, 181 App. Div. 369; *Lehigh & H. R. R. Co. v. Warwick*, 149 N. Y. S. 378.

Nebraska. *Burk v. Diers* (Neb. 1918), 169 N. W. 263; *Edwards v. Gill*, 96 Neb. 761, 148 N. W. 965.

Oregon. *Eugene v. Lowell*, 72 Or. 281, 143 Pac. 903; *Christie v. Bandon*, 82 Or. 481, 162 Pac. 248.

Pennsylvania. *McKee v. Pennsylvania R. Co.*, 255 Pa. 560, 100 Atl. 454.

Texas. *Buckanan v. Houston & T. C. R. Co.* (Tex. Civ. App.), 180 S. W. 625; *Santa Fe Town-Site Co. v. Parker* (Tex. Civ. App.), 194 S. W. 487; *Wheeler v. McVey* (Tex. Civ. App.), 164 S. W. 1100.

Vermont. *Bennington County v. Manchester*, 87 Vt. 555, 90 Atl. 502.

Washington. *Horton v. Okanoga County*, 98 Wash. 626, 168 Pac. 479; *Humphrey v. Krutz*, 77 Wash. 152, 137 Pac. 806.

Insufficient. *Camden v. Armstrong Cork Co.*, 210 Fed. 818; *Stillman v. Olean*, 210 N. Y. 168, 104 N. E. 128, reversing 133 N. Y. S. 1145, 148 App. Div. 936; *Buffalo v. Erie R. Co.*, 144 N. Y. S. 578, 83 Misc. Rep. 144; *Re Sixty Fourth St.*, New York City, 170 N. Y. S.

641, 183 App. Div. 708; *Maggs v. Seattle*, 74 Wash. 323, 133 Pac. 388.

Insufficient to establish dedication of canal. *United States v. Jamaica & R. T. Co.*, 204 Fed. 759, 123 C. C. A. 128, reversing 183 Fed. 598.

Insufficient to show dedication of land for street. *Savannah v. Standard Fuel Supply Co.*, 140 Ga. 353, 78 S. E. 906.

From recital in deed of adjoining lot. *Simon v. Pemberton*, 112 Ark. 202, 165 S. W. 297.

Parol dedication. *Nicholas v. Title and Trust Co.*, 79 Or. 226, 154 Pac. 391.

As to extent of dedication of street. *Brickell v. Ft. Lauderdale* (Fla. 1918), 78 So. 681.

Evidence of filing of plat and user by public, held sufficient. *Curtiss & Yale Co. v. Minneapolis*, 123 Minn. 344, 144 N. W. 150.

Acquiescence by city of public use of beach land, held no presumption to dedicate. *F. A. Hihn Co. v. Santa Cruz*, 170 Cal. 436, 150 Pac. 62.

Opening pathway from a public way to a summer resort and keeping same open during summer months only, held not to show sufficiently an intent, etc. *Bradford v. Fultz*, 167 Iowa 686, 149 N. W. 925.

Partition decree as dedication. *St. Louis v. Barthel*, 256 Mo. 255, 277, 166 S. W. 267.

"Dedication exists only when so intended by the party and permissive use does not prove it."

**§ 1571. Evidence admissible to show intent.<sup>68</sup>**

As the intention to dedicate may be shown in a variety of ways,<sup>69</sup> written,<sup>70</sup> or parol evidence, consisting of words,<sup>71</sup> or acts in pais,<sup>72</sup> or conduct,<sup>73</sup> and applicable physical facts,<sup>74</sup> are clearly admissible.

**§ 1573. Intent as question of fact.<sup>75</sup>**

## V. ACCEPTANCE.

**§ 1574. Power to accept.<sup>76</sup>****§ 1575. Necessity for acceptance.<sup>77</sup>**

The general rule is that to complete a common law

Wooster v. Fiske, 115 Me. 161, 98 Atl. 378.

<sup>68</sup> Hudson v. Carrithers, 201 Ill. App. 153; Casey v. Chicago, 263 Ill. 147, 104 N. E. 1025; Kaufman v. Butte, 48 Mont. 400, 138 Pac. 770; Lehigh & H. R. R. Co. v. Warwick, 149 N. Y. S. 378.

<sup>69</sup> Section 1562, ante; § 1562, vol. 4, ante.

<sup>70</sup> Where description in deed is not clear, map may aid. Wheeler v. Oakland (Cal. App. 1917), 170 Pac. 864, 866.

<sup>71</sup> Humphreys v. Krutz, 77 Wash. 152, 137 Pac. 806.

<sup>72</sup> Eugene v. Lowell, 72 Or. 281, 143 Pac. 903.

<sup>73</sup> McCoy v. Thompson, 84 Or. 141, 164 Pac. 589, 591.

<sup>74</sup> Existence of stakes showing the public way. Nicholas v. Title & Trust Co., 79 Or. 266, 154 Pac. 391.

<sup>75</sup> Ft. Smith & V. B. Bridge Dist. v. Scott, 111 Ark. 449, 163 S. W. 1137; Humphrey v. Krutz, 77 Wash. 152, 137 Pac. 806; Pittsburgh, C. C. & St. L. Ry. Co. v. Ervington, 59 Ind. App. 371, 108

N. E. 133; Kleinhans v. Northampton Traction Co., 60 Pa. Super. Ct. 641; Drimmell v. Kansas City, 180 Mo. App. 339, 168 S. W. 280.

If unequivocally shown, law question, but if inference to be gathered from facts, it is jury question. Camden v. Armstrong Cork Co. (C. C. A.), 210 Fed. 818.

Whether ground for street was dedicated for public use, held question of fact. Bingham v. Kollman, 256 Mo. 573, 165 S. W. 1097.

<sup>76</sup> Keyes v. Excelsior, 126 Minn. 456, 148 N. W. 501.

Under particular law. Farmers & Mechanics Savings Bk. v. Lockport, 151 N. Y. S. 865, 89 Misc. Rep. 157; McCutcheon v. Buffalo Terminal Station Com., 154 N. Y. S. 711, affirming 151 N. Y. S. 451, 88 Misc. Rep. 601.

Dedication land for streets may be accepted or rejected by city. Smith v. King County, 80 Wash. 273, 141 Pac. 695; § 1575, post..

<sup>77</sup> Herrington v. Booth & Flime, 252 Pa. 70, 97 Atl. 178; Wm. J. Lemp Brewing Co. v. P. J. Moran, Inc. (Utah 1917), 169 Pac. 459;

dedication, acceptance is required.<sup>78</sup>

Horton v. Okanogan County, 98 Wash. 626, 168 Pac. 479.

"No formal acceptance by any public officer or agent is necessary, but there must be actual use by the public." Morris v. Blunt, 49 Utah 243, 161 Pac. 1127, 1130.

"Neither formal acceptance by the county nor the immediate opening and improvement of a street are essential to complete an irrevocable dedication." McCoy v. Thompson, 84 Or. 141, 164 Pac. 589, 591.

Proof of acceptance is not required when land is dedicated for streets by plat, and deeds of adjoining lots refer thereto. Kaufman v. French (Tex. Civ. App. 1914), 171 S. W. 831.

City is not bound to accept land dedicated for a street. Partridge v. Richmond (Cal. App. 1918), 172 Pac. 166; Sugg v. Greenville, 169 N. C. 616, 86 S. E. 695; De Castello v. Cedar Rapids, 171 Ia. 18, 153 N. W. 353; Mulligan v. McGregor, 165 Ky. 222, 179 S. W. 1129.

Optional with city to accept or reject land for streets. Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co., 240 Pa. 519, 87 Atl. 968; Smith v. King County, 80 Wash. 273, 141 Pac. 695.

City cannot be compelled to accept street shown on map. Stillman v. Olean, 161 N. Y. S. 591.

Formal acceptance by municipality of a street dedicated is not required. Daly City v. Holbrook (Cal. App. 1918), 178 Pac. 725.

<sup>78</sup> Alabama. Ivey v. Birmingham, 190 Ala. 196, 67 So. 506;

Trammell v. Bradford (Ala. 1917), 73 So. 894.

Arkansas. Mebane v. Wynne, 127 Ark. 364; 192 S. W. 221.

Colorado. Center v. Collier, 26 Colo. App. 354, 144 Pac. 1123.

Florida. Kirkland v. Tamps (Fla. 1918), 78 So. 17.

Georgia. Brown v. East Point, 148 Ga. 85, 95 S. E. 962; Atlanta v. Georgia R. & Banking Co. (Ga. 1919), 98 S. E. 83.

Iowa. Wensel v. Chicago, M. & St. P. Ry. Co. (Iowa 1919), 170 N. W. 409, 414; Christopherson v. Forest City, 178 Ia. 893, 160 N. W. 691, 693; Kenwood Park v. Leonard, 177 Ia. 337, 158 N. W. 655.

Illinois. Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14, 18; Moore v. Chicago, 261 Ill. 56, 103 N. E. 583; Doss v. Bunyan, 262 Ill. 101, 104 N. E. 153; H. A. Hillmer Co. v. Behr, 264 Ill. 568, 106 N. E. 481; Chicago & M. & St. P. Ry. Co. v. Chicago, 264 Ill. 24, 105 N. E. 702.

Kentucky. Home Laundry Co. v. Louisville, 168 Ky. 499, 182 S. W. 645; Harmon v. Lay, 169 Ky. 132, 183 S. W. 459.

Maryland. Baltimore v. Canton Co., 124 Md. 620, 93 Atl. 144.

Massachusetts. Mighill v. Rowley, 224 Mass. 586, 113 N. E. 569.

Maryland. Pope v. Clark, 122 Md. 1, 89 Atl. 387; Whittington v. Crisfield Commissioners, 121 Md. 387, 88 Atl. 232.

New York. Re Roosevelt Ave., New York City, 174 N. Y. S. 600; Re 16th Street, New York City, 142 N. Y. S. 376; Re Olinger, 145



**§ 1576. Same—statutory dedication.<sup>79</sup>**

To render the municipality liable for the maintenance of the public ways and for defects therein ordinarily acceptance should be required.<sup>80</sup>

**§ 1577. Same—necessity for acceptance where sale of lots with reference to plat.<sup>81</sup>**

Although doubted in some cases,<sup>82</sup> the rule frequently enforced is that selling lots with reference to a plat filed dedicating land for streets and alleys constitutes full

N. Y. S. 173, 160 App. Div. 96; *Stillman v. Olean*, 161 N. Y. S. 591.

New Jersey. *United New Jersey R. & Canal Co. v. Crucible Steel Co.* (N. J. Eq.), 98 Atl. 1087, affirming 85 N. J. Eq. 7, 95 Atl. 243; *United New Jersey R. & Canal Co. v. Crucible Steel Co.*, 87 N. J. Eq. 7, 95 Atl. 243.

<sup>79</sup> *Brookfield v. Block*, 123 Ark. 153, 184 S. W. 449; *Matney v. Chesapeake & O. Ry. Co.*, 170 Ky. 112, 185 S. W. 519; *Home Laundry Co. v. Louisville*, 168 Ky. 499, 182 S. W. 645; *Kennard v. Eyermann*, 167 Mo. 1, 182 S. W. 737; *Hatton v. St. Louis*, 264 Mo. 634, 175 S. W. 888.

Proof of acceptance is not required. *Keyes v. Excelsior*, 126 Minn. 456, 148 N. W. 501.

Acceptance is not essential although statute so provides, unless the statutory form precludes all other methods. *White v. Moore*, 146 N. Y. S. 593, 161 App. Div. 400, affirming 132 N. Y. S. 441, 73 Misc. Rep. 96.

<sup>80</sup> *Ramstad v. Carr*, 31 N. D. 504, 528, 54 N. W. 195, quoting with approval last paragraph of § 1576, pp. 3268 and 3269, vol. 4, ante.

<sup>81</sup> *Ramstad v. Carr*, 31 N. D. 504,

521, 54 N. W. 195, quoting with approval first paragraph of § 1577, p. 3269, vol. 4, ante.

<sup>82</sup> See § 1577, vol. 4, ante.

“While in some jurisdictions it is held that the mere sale of lots with reference to a plat made by the owner of the land, which plat shows on its face certain spaces marked as streets, constitutes a complete dedication of such spaces for streets so that there need be no acceptance of it by the public that rule has not been adopted in this state. We think it is more consistent with reason and more in harmony with the weight of authority in this country to hold that the platting of land and the sale of lots pursuant thereto creates between the grantor and the purchaser a private right to have the spaces marked upon the plat as streets, alleys, parks, etc., remain open for ingress and egress and the uses indicated by the designation, but that so far as the public is concerned, such acts amount to a mere offer of dedication which must be accepted before there is a revocation to complete the dedication.” *Kirkland v. Tampa* (Fla. 1918), 78 So. 17, 20,

dedication;<sup>83</sup> however, the judicial rulings and utterances are not entirely consistent on the various phases of this question.<sup>84</sup>

**§ 1578. Same—when acceptance will be presumed.<sup>85</sup>**

**§ 1579. Mode and sufficiency of acceptance in general.**

Acceptance may be express or implied.<sup>86</sup>

21, per Ellis, J., citing § 1575, vol. 4, ante.

<sup>83</sup> *Matthews v. Bloodworth*, 111 Ark. 545, 165 S. W. 263; *Mebane v. Wynne*, 127 Ark. 364, 192 S. W. 221; *Davidson v. Griswold*, 23 Cal. App. 188, 137 Pac. 619; *Beale v. Tacoma Park*, 130 Md. 297, 100 Atl. 379.

“Ordinarily the sale of a single lot completes the dedication, and more especially does the sale of a single lot effect the dedication of a street upon which the lot abuts.” *McCoy v. Thompson*, 84 Or. 141, 164 Pac. 589, 592.

“When the owner of land plats it and sells lots with reference to the plat he thereby dedicates the streets marked on the plat. *Nichols v. Title & Trust Co.*, 79 Or. 226, 240, 154 Pac. 391, Ann. Cas. 1917 A, 1149. In such case the purchaser of lots with reference to the plat constitutes an acceptance of the grant made by the owner to the public.” *Johnson v. Crawford*, 88 Or. 125, 171 Pac. 568; *Christian v. Eugene*, 49 Or. 170, 173, 89 Pac. 419.

“If anything is to be regarded as settled, it is that when one who is the owner of a tract of land in a municipality cuts it up into lots and sells them as laid out on a plan which he has adopted showing streets and alleys thereon, there is not only an implied covenant by him to the owner of each lot that

the streets and alleys, as they appear upon his plat, shall be forever open to the use of the public, but a dedication by him of the same as highways to the use of the public forever, and the municipality itself cannot extinguish the easement which each lot owner has thus acquired by private contract with the owner of the plot ground.” *Henderson v. Young*, 260 Pa. 334, 103 Atl. 719, 720, quoted with approval from *Tesson v. Parter Co.*, 238 Pa. 504, 509, 510, 86 Atl. 278, 279, which was followed in *Bel v. Pittsburgh Steel Co.*, 243 Pa. 83, 89 Atl. 813.

<sup>84</sup> *Ramstad v. Carr*, 31 N. D. 504, 529, 54 N. W. 195, quoting with approval all beginning with third paragraph, § 1577, pp. 3271 to 3276, vol. 4, ante.

<sup>85</sup> *Ramstad v. Carr*, 31 N. D. 305, 529, 54 N. W. 195, quoting with approval first paragraph of § 1578, p. 3276, vol. 4 ante; *Kenwood Park v. Leonard*, 177 Ia. 337, 158 N. W. 655; *State v. Brown*, 6 Boyce 179 (Del.), 97 Atl. 590; *Chicago, M. & St. P. Ry. Co. v. Chicago*, 264 Ill. 24, 105 N. E. 702; *Newell v. W. R. Chase & Sons Cutlery Co.*, 60 Pa. Super. Ct. 166; *Eddy v. Clarke*, 38 R. I. 371, 95 Atl. 851.

Presumption as to acceptance of full width of street. *Kuehl v. Bettendorf*, 179 Ia. 1, 161 N. W. 28.

<sup>86</sup> *Harris v. St. Helens*, 72 Or.

It need not be by formal act.<sup>87</sup>

It may be shown in many ways<sup>88</sup> by any act with respect to the property claimed to be dedicated that clearly indicates an intent on the part of the public to treat the dedication as acceptable by it,<sup>89</sup> as for example, assumption of jurisdiction and dominion over it by the public authorities.<sup>90</sup>

### § 1580. Same—by acts of municipal officers.<sup>91</sup>

The acceptance of a dedication by a city or town may

377, 143 Pac. 941; *Brown v. East Point*, 148 Ga. 85, 95 S. E. 962.

Express or implied acceptance stated. *Chicago, M. & St. P. Ry. Co. v. Chicago*, 264 Ill. 24, 105 N. E. 702; *H. A. Hillmer Co. v. Behr*, 284 Ill. 568, 106 N. E. 481, citing § 1579, vol. 4, ante.

Implied from acts of officers and user by public. *Baltimore v. Canton Co.*, 124 Md. 620, 93 Atl. 144.

<sup>87</sup> *Felt v. West Homestead Borough*, 260 Pa. 11, 103 Atl. 508; *Nicholas v. Title & Trust Co.*, 79 Or. 226, 154 Pac. 391.

"The grant may be accepted without action by the public authorities." *Hatch Bros. Co. v. Black*, 25 Wyo. 416, 165 Pac. 518.

<sup>88</sup> *Birmingham v. Graham* (Ala.), 79 So. 574, 576; *Ramstad v. Carr*, 31 N. D. 504, 530, 54 N. W. 195, quoting with approval third paragraph of § 1579, p. 3278, vol. 4, ante.

The acceptance or adoption or recognition by the city of the street as a city street does not have to be shown in a particular way but may be evidenced in many ways. *Drimmell v. Kansas City*, 180 Mo. App. 339, 346, 347, 168 S. W. 280; *Schmidt v. Spathe*, 86 N. J. L. 179, 90 Atl. 1002.

<sup>89</sup> Some unequivocal act showing unmistakable purpose to accept. *Moore v. Chicago*, 261 Ill. 56, 103 N. E. 583.

"May be by ordinance or by any act or conduct indicating an implied acceptance." "Something must be done indicating an intent on the part of the public to treat the dedication as acceptable to it." *Christopherson v. Forest City*, 178 Ia. 893, 160 N. W. 691, 693.

Acceptance must be predicated upon something done or expressed by the proper public authorities. *Magnolia v. Kays*, 205 Ill. App. 152.

<sup>90</sup> *Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481, 484, citing § 1579, vol. 4, ante.

<sup>91</sup> May be inferred from acts. *Hillside Cotton Mills v. Ellis* (Ga. App.), 97 S. E. 459.

The filing and recording of a plat designating the streets, alleys, and subdivisions of the town, embracing but not subdividing the particular land involved in the action, the incorporation of the town as a village precisely as laid off on the plat immediately thereafter, and using the land in question by the town by the erection of a jail and public hitch-racks and by the

be shown by various acts of its officers and agents.<sup>92</sup>

It may be by formal ordinance or resolution,<sup>93</sup> or the assumption of jurisdiction and control of the property involved,<sup>94</sup> as by opening and improving streets and public ways designated.<sup>95</sup>

planting of streets thereon, and by its continued use for those and other public purposes, all show an acceptance by the town of the trust on behalf of the public, consequently constitute a competent dedication of the land to public use. *Hardin v. Ferguson*, 271 Mo. 410, 415, 196 S. W. 746.

Omitting from assessment for taxation streets and alleys designated on the unacknowledged but recorded plat; taking charge of one of the streets, changing its name, improving it under ordinance enacted for that purpose, and causing it to be widened by condemnation proceedings; and including the streets and alleys designated in the plat in all the official maps of the city highways, constitutes an acceptance by the city of a non-statutory or common law dedication of such streets and alleys. *Hatton v. St. Louis*, 264 Mo. 634, 644, 175 S. W. 888.

Approval of plat as prescribed by statute, held not acceptance. *People v. Massieon*, 200 Ill. App. 86.

<sup>92</sup> *Ramstad v. Carr*, 31 N. D. 504, 530, 531, 54 N. W. 195, quoting with approval greater part of § 1580, vol. 4, ante; *Mableton v. Lowe*, 142 Ga. 723, 83 S. E. 665; *Huber v. Gorg*, 168 N. Y. S. 834, 181 App. Div. 369; *Newton v. Dallas* (Tex. Civ. App.), 201 S. W. 703.

<sup>93</sup> Ordinance or resolution. *Peo-*

*ple v. Massieon*, 279 Ill. 312, 116 N. E. 639; *Valley Junction v. McCurrin* (Ia.), 163 N. W. 345.

Formal resolution. *Kirkland v. Tampa* (Fla. 1918), 78 So. 17.

<sup>94</sup> Taking control. *Bowersox v. Johnson County*, 183 Ia. 645, 167 N. W. 582.

Assumption of control by act or conduct by officers, is sufficient. *Ramstad v. Carr*, 31 N. D. 504, 154 N. W. 195.

Constructing water mains or sewers in street. *Consumer's Co. v. Chicago*, 268 Ill. 113, 108 N. E. 1017.

Gravel removed from land under claim of right by municipal authorities. *La Grange v. Brown* (Tex. Civ. App.), 161 S. W. 8.

Taking control of, and expending money therein. *Harrington v. Booth & Flinn*, 252 Pa. 70, 97 Atl. 178.

Exercising control over street by city, or constructing a sewer along the strip, held sufficient. *Koop v. Henry Bickel Co.*, 168 Ky. 496, 182 S. W. 617.

Passing an ordinance directing the construction of a sewer, held sufficient. *Mulligan v. McGregor*, 165 Ky. 222, 176 S. W. 1129.

<sup>95</sup> Opening a street as laid out on plat. *Caruthersville v. Huffman*, 262 Mo. 367, 171 S. W. 323.

By improvement. *Wensel v. Chicago, M. & St. P. Ry. Co.* (Iowa 1919), 170 N. W. 409, 414; *Valley Junction v. McCurnin*, 180 Ia. 510,

§ 1582. Same—user by public.<sup>96</sup>

Formal acts of acceptance are not necessary, "and acceptance may be effectively shown by a general user

163 N. W. 345; *Beale v. Tacoma Park*, 130 Md. 297, 100 Atl. 379; *Hillside Cotton Mills v. Ellis* (Ga. App.), 97 S. E. 459.

Improving street. *Atlanta v. Williams*, 15 Ga. App. 654, 84 S. E. 139; *Newton v. Dallas* (Tex. Civ. App.), 201 S. W. 703.

Repairing and paying therefor. *Baltimore v. Canton Co.*, 124 Md. 620, 93 Atl. 144.

Improving and using street. *Crosby v. Greenville*, 183 Mich. 452, 150 N. W. 246.

Recognizing or doing work on strips of street may be an acceptance. *Drimmell v. Kansas City*, 180 Mo. App. 339, 168 S. W. 280.

Repairs on strip, held acceptance. *Lehigh & Hudson River R. R. Co. v. Warwick*, 149 N. Y. S. 378.

Acceptance by implication by improving land as street, adjusting assessment of owner and indicating street on map. *Bronxville v. Lawrence Park R. Co.*, 143 N. Y. S. 785.

The city by opening and improving streets indicated on a plat, although the dedication was defective because the plat was not submitted to the city council, accepts the dedication in full. *Caruthersville v. Huffman*, 262 Mo. 367, 376, 377, 171 S. W. 323.

<sup>96</sup> *Alabama. Ivey v. Birmingham*, 190 Ala. 196, 67 So. 506.

*California. Eltinge v. Santos*, 171 Cal. 278, 152 Pac. 915; *Sherwood v. Ahart* (Cal. App. 1918), 169 Pac. 240.

*Colorado. Sprague v. Stead*, 56

*Colo.* 538, 139 Pac. 544; *Greiner v. Park County Com'rs* (Colo.), 173 Pac. 719.

*Florida. Kirkland v. Tampa* (Fla. 1918), 78 So. 17.

*Kansas. Kansas City v. Burke*, 92 Kan. 531, 141 Pac. 562.

*Illinois. H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481; *Consumer's Co. v. Chicago*, 268 Ill. 113, 108 N. E. 1017.

*Iowa. Kuehl v. Bettendorf*, 179 Ia. 1, 161 N. W. 28, 31; *Louden v. Starr*, 171 Ia. 528, 154 N. W. 331.

*Missouri. O'Brien v. Heman*, 191 Mo. App. 477, 177 S. W. 805; *Triplett Township v. McPhearson*, 172 Mo. App. 369, 157 S. W. 857; *St. Louis v. Barthel*, 256 Mo. 255, 166 S. W. 267; *School Dist. v. Toooloose* (Mo., June, 1917), 195 S. W. 1023.

*Massachusetts. Attorney General v. Onset Bay Grove Ass'n*, 221 Mass. 243, 109 N. E. 165.

*Maryland. Baltimore v. Canton Co.*, 124 Md. 620, 93 Atl. 144.

*New York. Bronxville v. Lawrence Park R. Co.*, 143 N. Y. S. 785; *Port Dickinson v. Fish*, 154 N. Y. S. 698, 168 App. Div. 715.

*New Jersey. Dickinson v. Delaware L. & W. R. Co.*, 87 N. J. L. 264, 93 Atl. 703.

*Oregon. Bitney v. Grim*, 73 Or. 257, 144 Pac. 490.

*Pennsylvania. Kniss v. Duquesne Borough*, 255 Pa. 417, 100 Atl. 132; *Philadelphia v. Hinkle*, 64 Pa. Super. Ct. 495.

*South Carolina. Caston v. Rock Hill*, 107 S. C. 124, 92 S. E. 191.

by the public. This user need not be for any particular length of time, but only long enough to show that the public are acting on the theory of a public right resulting from the dedication act or acts of the owner.”<sup>97</sup>

As user by the public of the property in question rests upon acceptance by implication, the precise character of such user is the controlling element in reaching the conclusion of sufficient or insufficient acceptance on the part of the public. Clearly such user must be general,<sup>98</sup> for the benefit of the public,<sup>99</sup> with the knowledge of the owner,<sup>1</sup> and adverse, as a matter of right, and not merely permissive.<sup>2</sup>

Tennessee. *Doyle v. Chattanooga*, 128 Tenn. 433, 161 S. W. 997.

Texas. *La Grange v. Brown* (Tex. Civ. App.), 161 S. W. 8; *Krueger v. Gulf Co. & S. F. Ry. Co.* (Tex. Civ. App.), 191 S. W. 151.

Utah. *Morris v. Blunt*, 49 Utah 243, 161 Pac. 1127, 1130.

Wyoming. *Hatch Bros. Co. v. Black*, 25 Wyo. 109, 165 Pac. 518.

<sup>97</sup> *Trammell v. Bradford* (Ala. 1917), 73 So. 894, 895, 896; *Hillside Cotton Mills v. Ellis* (Ga. App.), 97 S. E. 459.

<sup>98</sup> Use must be general as to highway. *State v. Allen*, 107 S. C. 132, 92 S. E. 193.

Public use must be of a general character—use of way to a summer resort, held insufficient. *Bradford v. Fultz*, 167 Ia. 686, 149 N. W. 925.

<sup>99</sup> *Buchanan v. Houston & T. C. R. Co.* (Tex. Civ. App.), 180 S. W. 625.

Public user, held insufficient. *Weiss v. Mt. Vernon*, 142 N. Y. S. 250, 257 App. Div. 383.

User by line of telephone poles

is sufficient. *State v. Suffart* (Mo. App.), 180 S. W. 572.

Land dedicated to the city by the owner, although the city had never improved its surface, nor did the strip of land open at either end upon a street or alley, but it had been used by the public for travel for twenty years, was held an actual public way and not a mere “paper alley.” *O’Brien v. Heman*, 191 Mo. App. 477, 496, 177 S. W. 805, distinguishing *Hunter v. Weston*, 111 Mo. 176, 19 S. W. 1098, where the strip of land claimed to be an alley was merely designated on paper, and had never been opened for public use. The ruling of this case is set out in a note, p. 1983, vol. 3, ante.

<sup>1</sup> It must appear that the owner knew of the use by the public and intended to grant the right of way to the public. *Morris v. Blunt*, 49 Utah 243, 161 Pac. 1127, 1130.

<sup>2</sup> Mere travel is not sufficient to show acceptance by the public. Travel, to have any weight on the question of acceptance, “must have been adverse, as a matter of right, and not merely permissive.” *Rose*

The period of time of user is not so important as the character of the use.<sup>3</sup>

v. Elizabethtown, 275 Ill. 167, 279, 114 N. E. 14, 18, citing § 1582, vol. 4, ante; Palmer v. Chicago, 248 Ill. 201.

<sup>3</sup> Duration of user is not important unless user alone is relied on to create a presumption of dedication. Kansas City v. Burke, 92 Kan. 531, 141 Pac. 562.

Continued public use of street or alley. Minium v. Solel (Mo. 1916), 183 S. W. 1037.

Use by public of land as a park without interruption by permission of owner for forty years, held dedication. Wessinger v. Mische, 71 Or. 239, 142 Pac. 612.

User by public for 20 years. Muligan v. McGregor, 165 Ky. 222, 176 S. W. 1129.

User by public for ten years. Robinson v. Gebauer, 98 Neb. 196, 152 N. W. 329.

Continuous user by public, in absence of express dedication, for a period of 20 years "and as against the municipality a much shorter period is sufficient to impose upon the public the duty of keeping the road in repair." Felt v. West Homestead Borough, 260 Pa. 11, 103 Atl. 508; Kniss v. Duquesne Borough, 255 Pa. 417, 100 Atl. 132; Ackerman v. Williamsport, 227 Pa. 591, 76 Atl. 421.

"The continued use of the road by the public for such a length of time and under such circumstances as to indicate clearly an intention on the part of the public to accept the grant has generally been held sufficient. More especially so if it is made to appear that to interrupt the use would inconvenience

the public." It does not depend so much on the length of time of use as it does on the character of the use. Hatch Bros. Co. v. Black, 25 Wyo. 109, 117, 165 Pac. 518.

"The decisions are not harmonious as to the time the public use must continue an acceptance of the grant by the public; some courts holding that it must be for the same length of time as would be necessary to acquire a right of way by prescription over privately owned land, while others hold that the length of time of the user is not controlling and may be for a shorter period. The latter holding, we think, is supported by the better reasoning." Hatch Bros. Co. v. Black, 25 Wyo. 109, 119, 165 Pac. 518, 520, per Beard, J.

Use for period barring action. Sherwood v. Ahart (Cal. App.), 169 Pac. 244.

The land dedicated as a street must be recognized by the city as a street, for example by invitation of the public to use it as such. Where there is evidence from which a valid common law dedication may be inferred, and there is also evidence from which the city's recognition of the land as a street, by invitation to the public to use it as such can be implied, the mere fact that such dedication has not existed for ten years will not prevent the conclusion that the strip in question is a street. In the absence of intent to dedicate there must be user by the public for ten years with the owner's knowledge. However, when the intent to dedicate clearly appears ac-

**§ 1584. Statutory or charter provisions as to mode of acceptance.<sup>4</sup>****§ 1585. Acts showing intention not to accept.<sup>5</sup>****§ 1586. Sufficiency of evidence to show acceptance.<sup>6</sup>**

The general rule is that proof of acceptance by the

ceptance may be established by user for a period less than ten years, depending upon the purpose and extent for which used. *Drimmell v. Kansas City*, 180 Mo. App. 339, 345, 346, 168 S. W. 280.

<sup>4</sup>By ordinance or resolution. *Kenwood Park v. Leonard*, 177 Ia. 337, 158 N. W. 655; *Stockwell v. Dunchel*, 159 N. Y. S. 32.

<sup>5</sup>*Whittington v. Crisfield Commissioners*, 121 Md. 387, 88 Atl. 232; *Re Wallace, etc., Avenues, New York City*, 222 N. Y. 139, 118 N. E. 506, reversing 166 N. Y. 429, 179 App. Div. 172; *Harding v. North Poudre Irrigation Co.*, 63 Colo. 86, 164 Pac. 1156; *Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481, 485 (citing § 1585, vol. 3, ante); *Re Olinger*, 145 N. Y. S. 173, 160 App. Div. 96; *United New Jersey R. and Canal Co. v. Crucible Steel Co.*, 85 N. J. Eq. 7, 95 Atl. 243.

May be rejected by implication. *Ramstad v. Carr*, 31 N. D. 504, 154 N. W. 195.

Levy and collection of general and special taxes, in the absence of acts of acceptance indicates intention not to accept. *Hanford v. Seattle*, 92 Wash. 257, 158 Pac. 987.

<sup>6</sup>*Alabama. Mobile v. Chapman* (Ala.), 79 So. 566.

*California. Wheeler v. Oakland* (Cal. App. 1917), 170 Pac. 864, 866; *Knight v. All Persons*, 32 Cal. App. 381, 162 Pac. 1051.

*Iowa. Zollinger v. Newton*, 172 Ia. 352, 154 N. W. 611; *Kenwood Park v. Leonard*, 177 Ia. 337, 158 N. W. 655; *Valley Junction v. McCurin*, 180 Iowa 510, 163 S. W. 345.

*Illinois. H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481; *Dewey v. Chicago*, 274 Ill. 268, 113 N. E. 599; *Rollo v. Pool*, 280 Ill. 607, 117 N. E. 756; *Wiehe v. Pein*, 281 Ill. 130, 117 N. E. 849; *Magnolia v. Kays*, 205 Ill. App. 152.

*Kentucky. Harmon v. Lay*, 169 Ky. 132, 183 S. W. 459; *Louisville v. Monroe*, 163 Ky. 412, 173 S. W. 1107.

*Maryland. Baltimore v. Gordon*, 133 Md. 150, 104 Atl. 536; *Beale v. Tacoma Park*, 130 Md. 297, 100 Atl. 379; *Baltimore v. Canton Co.*, 124 Md. 620, 93 Atl. 144.

*Massachusetts. Ralph v. Clifford*, 224 Mass. 58, 112 N. E. 482.

*Missouri. Carpenter v. St. Joseph*, 263 Mo. 705, 174 S. W. 53; *Albers v. Acme Paving & Crusher Co.*, 196 Mo. App. 265, 194 S. W. 61.

*New Jersey. United New Jersey R. & Canal Co. v. Crucible Steel Co.*, 85 N. J. Eq. 7, 95 Atl. 243, affirmed in 98 Atl. 1087.

*New York. Stillman v. Olean*, 161 N. Y. S. 591; *Hall v. Olean*, 143 N. Y. S. 664, 82 Misc. Rep. 300.



public must be unequivocal, clear and satisfactory.<sup>7</sup>

Acts of acceptance of course may be shown either by direct or circumstantial evidence.<sup>8</sup>

If all the facts and circumstances taken and considered together clearly, certainly and satisfactorily show that the public, or the authorities acting in behalf of the public, intended to accept the offer of dedication, obviously an acceptance is proven. Stronger evidence of acceptance is required where it appears that the streets would not be beneficial than if it appeared that they would be beneficial.<sup>9</sup>

Otherwise stated, should the dedication appear beneficial and convenient to the public acceptance will be implied from slight circumstances.<sup>10</sup>

### § 1587. Time for acceptance.<sup>11</sup>

The acceptance need not follow immediately the offer

North Dakota. *Ramstad v. Carr*, 31 N. D. 504, 154 N. W. 195.

Oregon. *Portland Ry. Light & Power Co. v. Oregon City*, 85 Or. 574, 166 Pac. 932.

Pennsylvania. *Bell v. Pittsburgh Steel Co.*, 243 Pa. 83, 89 Atl. 813; *Sorrino v. Pittsburgh Steel Co.*, 243 Pa. 91, 89 Atl. 816; *McKee v. Pennsylvania R. Co.*, 255 Pa. 560, 100 Atl. 454.

<sup>7</sup> *Rose v. Elizabethtown*, 275 Ill. 267, 114 N. E. 14, 19.

<sup>8</sup> *Curran v. St. Joseph*, 264 Mo. 656, 659, 175 S. W. 584.

<sup>9</sup> *Dewey v. Chicago*, 274 Ill. 268, 113 N. E. 599, 601.

Laying gas pipes and sewer by public service company with consent of city in land offered for street, held not acceptance. *Re Wallace, Barnes and Matthews Ave.*, New York City, 222 N. Y. 139, 118 N. E. 506, reversing 166 N. Y. S. 429, 179 App. Div. 172.

Burden of proving is on munici-

pality. *Kirkland v. Tampa (Fla.)*, 78 So. 17, 21, approving *Darling v. Jersey City*, 73 N. J. Eq. 318, 67 Atl. 709.

<sup>10</sup> "The acceptance may be an express one, evidenced by some formal act by the public authorities, or it may be implied by their acts, such as repairing, lighting, or assuming control of the land dedicated, or may be implied by user by the public for the purposes for which it was dedicated. When the dedication is very beneficial or greatly convenient or necessary to the public, acceptance will be implied from slight circumstances." *Rose v. Elizabethtown*, 275 Ill. 167, 114 N. E. 14.

<sup>11</sup> *Ramstad v. Carr*, 31 N. D. 504, 533, 54 N. W. 195, quoting with approval greater part of § 1587, vol. 4; *Christopherson v. Forest City*, 178 Iowa 893, 160 N. W. 691; *Center v. Collier*, 26 Colo. App. 354, 144 Pac. 1123.

to dedicate,<sup>12</sup> but, it is usually asserted that it must be within a reasonable time,<sup>13</sup> to be determined by the particular circumstances,<sup>14</sup> as the convenience of the public or those who reside on adjacent property may seem to require,<sup>15</sup> and anterior to the withdrawal of the offer.<sup>16</sup> However, it has been declared that a common law dedication of land for streets may be accepted at any time before its revocation.<sup>17</sup>

### § 1588. Estoppel to accept or enforce dedication.

Where the dedication is complete by affirmative acts of the grantor constituting an unequivocal intention to dedicate and perfect by acceptance by the public, the municipality does not loose its title to the land dedicated because a portion of such land was included in an addition subsequently laid out by one of the signers of the original dedication.<sup>18</sup>

Land for street not opened within five years, held lost to public under statute applicable. *Tamblin v. Crowley*, 99 Wash. 133, 168 Pac. 982.

<sup>12</sup> May be in future, etc. *De Castello v. Cedar Rapids*, 171 Iowa 18, 153 N. W. 353.

Not required to accept forthwith, nor usually within a specified period. *Beale v. Tacoma Park*, 130 Md. 297, 100 Atl. 379.

<sup>13</sup> *Kaufman v. Butte*, 48 Mont. 400, 138 Pac. 770; *Wm. J. Lemp Brewing Co. v. P. J. Moran, Inc.* (Utah 1917), 169 Pac. 459.

<sup>14</sup> *Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481; *Kenwood Park v. Leonard*, 177 Iowa 337, 158 N. W. 655.

<sup>15</sup> "As to the time when the public must accept a tender of dedication, the authorities seem to be in harmony, holding that acceptance must be made within a reason-

able time, but before withdrawal of the offer, as the convenience of the public or those who live upon adjacent lots may require." *Kirkland v. Tampa* (Fla. 1918), 78 So. 17, 21.

<sup>16</sup> "The acceptance need not immediately follow the offer to dedicate, but must be within a reasonable time and before withdrawal by the offerer." *Rose v. Elizabethtown*, 275 Ill. 167, 114 N. E. 14, 19.

<sup>17</sup> *Dewey v. Chicago*, 274 Ill. 268, 113 N. E. 599, 602, following *Lee v. Harris*, 206 Ill. 428, 69 N. E. 230, 99 Am. St. Rep. 176.

<sup>18</sup> Relating to the contention that the city was estopped to enforce its rights in the property in question because a portion of it was described in a subsequent plat of an addition to the town filed by the ancestor of the grantor, who quit-claimed to him, the court said:

§ 1589. Acceptance of part as acceptance of all.<sup>19</sup>

§ 1590. Acceptance as subject to conditions.<sup>20</sup>

§ 1591. Acceptance as question of fact.<sup>21</sup>

"That view is untenable for the reason that since the first plat was a valid dedication, the city could not lose its title because a portion of the dedicated strip was included in an addition subsequently laid out by one of the signatories of the original dedication. Nor is there any evidence the city induced the defendants to take any steps to their prejudice by allowing the plat of the subsequent addition to be filed. Under the circumstances shown in the record no estoppel arose against the respondent city."

*Hardin v. Ferguson*, 271 Mo. 410, 416, 196 S. W. 746; *Laclede-Christy Clay Products Co. v. St. Louis*, 246 Mo. 446, 461, 151 S. W. 460; *Wright v. Doniphan*, 169 Mo. 601, 614, 70 S. W. 146; *St. Louis v. Missouri Pacific Railway Co.*, 114 Mo. 13, 24, 21 S. W. 202.

<sup>19</sup> *Mebane v. Wynne*, 127 Ark. 364, 192 S. W. 221; *Thiessen v. Lewiston*, 26 Idaho 505, 144 Pac. 548; *Bronxville v. Lawrence Park R. Co.*, 143 N. Y. S. 785; *Ramstad v. Carr*, 31 N. D. 504, 530, 54 N. W. 195, citing with approval § 1589, vol. 4, ante.

Acceptance of part of land dedicated may be acceptance of whole. *Doyle v. Chattanooga*, 128 Tenn. 433, 161 S. W. 997.

Acceptance of part of land for street is not always an acceptance of all. *Moore v. Chicago*, 261 Ill. 56, 103 N. E. 583.

Only part of property used, no acceptance of part not used. *Phil-*

*adelphia Museum Trustees v. Pennsylvania University Trustees*, 251 Pa. 125, 96 Atl. 126.

"An acceptance of a part of a street on a plat does not necessarily constitute an acceptance of other streets on the same plat." *Rose v. Elizabethtown*, 275 Ill. 167, 114 N. E. 14, 19.

Improving portion of land dedicated for street, may be kept as acceptance of all lands dedicated at the time for the purpose. *Lastinger v. Adel*, 142 Ga. 321, 82 S. E. 884.

Acceptance by city of substantially all public ways of a subdivision creates a presumption that balances were accepted. *Consumer's Co. v. Chicago*, 268 Ill. 113, 108 N. E. 1017.

"Where the city accepts the most important street of an addition and the major portion of them, and has evinced no intention to refuse to accept any of them, it will be deemed to have accepted all of the streets and alleys of that addition." *Dewey v. Chicago*, 274 Ill. 268, 113 N. E. 599, 601.

<sup>20</sup> Land dedicated as a street with condition that it be improved as such acceptance thereof will not be presumed by formal conveyance thereof. *H. A. Hillmer Co. v. Behr*, 264 Ill. 568, 106 N. E. 481.

<sup>21</sup> *Minium v. Solel* (Mo. 1916), 183 S. W. 1037; *Flynn v. Beaverhead County*, 54 Mont. 309, 170 Pac. 13; *Leach v. Philadelphia H. & P. R. R. Co.*, 258 Pa. 518, 102

## VI. REVOCATION.

§ 1592. Right to revoke.<sup>22</sup>

All dedications when complete are irrevocable.<sup>23</sup>

If the dedication is not complete without acceptance on the part of the public, revocation may take place by withdrawing the offer prior to acceptance<sup>24</sup> where the

Atl. 174; Hatch Bros. Co. v. Black, 25 Wyo. 109, 165 Pac. 518.

<sup>22</sup> Florida. Kirkland v. Tampa (Fla. 1918), 78 So. 17, 21; Smith v. Horn, 70 Fla. 484, 70 So. 435.

Illinois. Loomis v. Collins, 272 Ill. 221, 111 N. E. 999.

Iowa. Kenwood Park v. Leonard, 177 Iowa 337, 158 N. W. 655.

New York. White v. Moore, 146 N. Y. S. 593, 161 App. Div. 400, affirming 132 N. Y. S. 441, 73 Misc. Rep. 96.

N. Dakota. Ramstad v. Carr, 31 N. D. 504, 531, 54 N. W. 195, citing section 1592, vol. 4, ante.

Washington. Hanford v. Seattle, 92 Wash. 257, 158 Pac. 987.

Intention to revoke. People v. Laugenour, 25 Cal. App. 44, 142 Pac. 888.

<sup>23</sup> Porter v. Stuttgart, 135 Ark. 48, 204 S. W. 607; Burk v. Diers, 102 Neb. 721, 169 N. W. 263; Hardin v. Ferguson, 271 Mo. 410, 415, 196 S. W. 746; Southand N. & R. Co. v. Davis, 185 Ala. 193, 64 So. 606; Wiehe v. Pein, 281 Ill. 130, 117 N. E. 849; Sexton v. Elizabeth City, 169 N. C. 385, 86 S. E. 344; Hatton v. St. Louis, 264 Mo. 634, 175 S. W. 888; Francioni v. Soledad Land & Water Co., 170 Cal. 221, 149 Pac. 161; Miller & Lux v. Enterprise Canal & Land Co., 169 Cal. 415, 147 Pac. 567.

Public use may render dedication irrevocable. Doyle v. Chattanooga, 128 Tenn. 433, 161 S. W. 997.

Dedication irrevocable when accepted. Bennington County v. Manchester, 87 Vt. 555, 90 Atl. 502.

Easement in lands dedicated for street is irrevocable. Gibson v. Carroll (Tex. Civ. App. 1915), 180 S. W. 630.

Dedication in accordance with the statute is thereafter irrevocable by the owner and his heirs. Hatton v. St. Louis, 264 Mo. 634, 643, 175 S. W. 888.

Common law dedication is irrevocable. Drimmell v. Kansas City, 180 Mo. App. 339, 344, 345, 168 S. W. 280. But it is said owner may revoke common law prior to acceptance. Schick v. West Davenport Imp. Co., 167 Iowa 294, 145 N. W. 689.

When complete, only legislature or municipality may release. United New Jersey R. & Canal Co. v. Crucible Steel Co., 85 N. J. Eq. 7, 95 Atl. 243.

<sup>24</sup> Any time prior to acceptance. Wm. J. Lemp Brewing Co. v. P. J. Moran, Inc. (Utah 1917), 169 Pac. 459.

Offer may be withdrawn prior to acceptance. Mebane v. Wynne, 127 Ark. 364, 192 S. W. 221; Gathright

rights of third persons do not intervene.<sup>25</sup>

What constitutes a revocation of an offer to dedicate depends very largely upon the circumstances of the particular case, and is usually a question of fact. It may be shown before acceptance by acts inconsistent with the public use to which the land was offered to be dedicated, as by conveyance of the property offered to be dedicated, or by enclosing the land so as to exclude the public use or by erecting buildings on land offered to be dedicated as a street.<sup>26</sup>

v. State, 129 Ark. 339, 195 S. W. 1069.

Map filed may be withdrawn prior to acceptance and a new map filed showing streets differing from those indicated on first map. Stillman v. Olean, 161 N. Y. S. 591.

Dedication on conditions, not complied with, although accepted, may be withdrawn. Jacobs Pharmacy Co. v. Luckie, 143 Ga. 457, 85 S. E. 332.

Offer to dedicate held revoked by owner's death. Chicago, M. & St. P. Ry. Co. v. Chicago, 264 Ill. 24, 105 N. E. 702.

Offer may be revoked prior to acceptance with due regard to private rights which may have become vested by reason thereof. H. A. Hillmer v. Behr, 264 Ill. 568, 106 N. E. 481.

Dedication may be revoked before acceptance. Smith v. King County, 80 Wash. 273, 141 Pac. 695; Spokane v. Security Savings Society, 82 Wash. 91, 143 Pac. 435.

<sup>25</sup> Beale v. Tacoma Park, 130 Md. 297, 100 Atl. 379.

Before acceptance on mere declaration of owner, but where interests of third person have intervened the rule may be different.

Shearer v. Reno, 36 Neb. 443, 136 Pac. 705.

<sup>26</sup> Rose v. Elizabethtown, 275 Ill. 167, 114 N. E. 14, 19, citing sec. 1592, vol 4, ante.

Land offered for dedication subsequently sold amounts to a revocation of the dedication. Doss v. Bunyan, 262 Ill. 101, 104 N. E. 153; Casey v. Chicago, 263 Ill. 147, 104 N. E. 1025.

Conveyances after dedication may show an intention of revocation, but recitals in deeds to have this effect must be clear and unequivocal. Thus a recital in a deed conveying a lot on an alley dedicated on a plat "together with his (grantor's) reversionary interest in the alley in said block," was held insufficient to revoke the dedication. Zollinger v. Newton, 172 Iowa 352, 154 N. W. 611.

Statutory by filing plat, can be revoked only by vacation of plat as statute provides. Ramstad v. Carr, 31 N. D. 504, 154 N. W. 195.

After filing a map showing an intention to dedicate the successor of the title may file another map prior to acceptance by the public of the first and thereby revoke the

## VII. ESTOPPEL TO ASSERT OR DENY DEDICATION.

§ 1594. Estoppel to assert dedication.<sup>27</sup>

In order that an estoppel in pais may arise there must be (1) inequitable conduct on the part of the municipal corporation, and (2) irreparable injury to parties honestly and in good faith acting in reliance thereon.<sup>28</sup>

first offer. *Eltinge v. Santos*, 171 Cal. 278, 152 Pac. 915.

Revocation may be shown, before acceptance, by acts inconsistent with the public use to which the land was offered to be dedicated, as by erecting a pavilion or summer house on the land. *Rose v. Elizabethtown*, 275 Ill. 167, 179, 114 N. E. 14, quoting from sec. 1592, vol. 4, ante.

Facts showing no revocation. *Elizabeth City v. Commander* (N. C. 1918), 96 S. E. 736.

Held, revoked under particular facts. *Bowie v. Western Maryland R. Terminal Co.* (Md. 1918), 104 Atl. 461, 464, 465.

<sup>27</sup> *Colorado. Center v. Collier*, 26 271 Ill. 270, 111 N. E. 131.

*Illinois. McCracken v. Joliet*, 271 Ill. 270, 111 N. E. 131.

*Iowa. Christopherson v. Forest City*, 178 Iowa 893, 160 N. W. 691, 694; *Kuehl v. Bettendorf*, 179 Iowa 1, 161 N. W. 28, 31.

*Missouri. Kennard v. Eyermann*, 167 Mo. 1, 182 S. W. 737.

*Wisconsin. Rau v. Freund*, 165 Wis. 27, 160 N. W. 1063.

Assessment and collection of taxes. *Baltimore v. Canton Co.*, 124 Md. 620, 93 Atl. 144.

Payment of taxes by owner, held not to estop either municipality or abutting owners from claiming dedication. *Humphreys v. Krutz*, 77 Wash. 152, 137 Pac. 806.

Collection of taxes on land by state, county and township officers, held not to bind municipal corporation. *Wiehe v. Pein*, 281 Ill. 130, 117 N. E. 849.

Payment of taxes and erection of improvements by one claiming title, held not to estop the public from asserting dedication. *Wheeler v. Oakland* (Cal. App. 1917), 170 Pac. 864, 866.

Property owners encroaching on street with improvements, does not preclude city from asserting full width of street. *Eugene v. Garrett*, 87 Ore. 435, 169 Pac. 649.

Erection of buildings on land offered with knowledge and acquiescence of city under claim of title, held to estop city from acceptance. *Whittington v. Crisfield Commissioners*, 121 Md. 387, 88 Atl. 232.

Fencing part of a street that had been used by the public as necessary and a convenience for about 27 years, which fact was known to trespasser, held city not estopped to assert street a public way. *Newton v. Dallas* (Tex. Civ. App.), 201 S. W. 703.

Trees planted in public way, will not give title to way by adverse possession nor preclude public from asserting rights therein. *Bidwell v. McCuep*, 183 Iowa 633, 166 N. W. 369, 372.

<sup>28</sup> *Superior v. Northwestern Fuel Co.*, 164 Wis. 631, 161 N. W. 9, 13, 14.

**§ 1595. Estoppel to deny dedication.<sup>29</sup>**

What acts will constitute an estoppel precluding the dedicator and those claiming under him from denying dedication, of course, must depend upon the facts.<sup>30</sup>

"It is urged, however, that the respondent municipality is estopped to enforce its rights as to the lot claimed by appellant Ferguson for that a portion of it was described in a subsequent plat of an addition to the town filed by the ancestor of the grantors, who quit-claimed to him. That view is untenable for the reason that since the first plat was a valid dedication, the city could not lose its title because a portion of the dedicated strip was included in an addition subsequently laid out by one of the signatories of the original dedication. Nor is there any evidence the city induced the defendants to take any steps to their prejudice by allowing the plat of the subsequent addition to be filed. Under the circumstances shown in the record no estoppel arose against the respondent city." *Hardin v. Ferguson*, 271 Mo. 410, 415, 416, 196 S. W. 746.

<sup>29</sup> Alabama. *Birmingham v. Graham* (Ala.), 79 So. 574.

Arkansas. *Gathright v. State*, 129 Ark. 339, 195 S. W. 1069; *Porter v. Stuttgart* (Ark.), 204 S. W. 607.

California. *Davidow v. Griswold*, 23 Cal. App. 188, 137 Pac. 619.

Georgia. *Savannah v. Barnes* (Ga.), 96 S. E. 625.

Iowa. *Schultz v. Stringer*, 168 Iowa 668, 150 N. W. 1063; *Schick v. West Davenport Imp. Co.*, 167 Iowa 294, 145 N. W. 689.

Kansas. *Kansas City v. Burke*, 92 Kans. 531, 141 Pac. 562.

Missouri. *Bobb v. St. Louis*, 276 Mo. 59, 205 S. W. 713.

New Jersey. *United New Jersey R. & Canal Co. v. Crucible Steel Co.*, 85 N. J. Eq. 7, 95 Atl. 243.

Oregon. *Portland Ry., Light and Power Co. v. Oregon City*, 85 Ore. 574, 166 Pac. 932; *Clatskanie v. McDonald*, 85 Or. 670, 167 Pac. 560; *Lang v. Portland*, 75 Or. 385, 147 Pac. 378.

Pennsylvania. *Shetter v. Welzel*, 242 Pa. 355, 89 Atl. 455.

West Virginia. *Elkins v. Donohoe*, 74 W. Va. 335, 81 S. E. 1130.

United States. *H. A. & L. D. Holland Co. v. Northern Pacific Ry. Co.*, 208 Fed. 598, affirmed (C. C. A.), 214 Fed. 920.

Dedication binds dedicator and his successors in interest. *McCoy v. Thompson*, 84 Or. 141, 164 Pac. 589, 592.

<sup>30</sup> Selling property on public way on strength of recorded map. *Eltinge v. Santos*, 171 Cal. 278, 152 Pac. 915; *Shedd v. Alexander*, 270 Ill. 117, 110 N. E. 327.

Seller exhibiting to purchaser map showing streets, etc. *Nicholas v. Title & Trust Co.*, 79 Or. 226, 154 Pac. 391.

Grantee of lots to city addition sold by reference to plat dedicating land for street, held estopped. *Laddonia v. Day*, 265 Mo. 383, 391, 178 S. W. 741.

Laches, held not bar to right to

## VIII. RIGHTS AND TITLE ACQUIRED OR AFFECTED.

§ 1596. Persons to whose benefit dedication inures.<sup>31</sup>

§ 1597. Effect of dedication in general.<sup>32</sup>

§ 1598. Effect of dedication on rights of dedicator.<sup>33</sup>

assert title. *Hodges v. West Bloomfield Tp.*, 186 Mich. 259, 152 N. W. 1056.

The execution and exchange of deeds among the coparceners conveying the allotments to them in severalty, in accordance with the plat of the commissioners in partition, designating certain streets and alleys and reserving them to public use, immediately upon the filing of such unacknowledged plat, vest the easement in the streets and alleys in the city, and estops the coparceners from questioning the efficacy of the dedication. *Matton v. St. Louis*, 264 Mo. 634, 644, 175 S. W. 888.

Acceptance of ordinance providing for track elevation, held not binding on railroad as an admission of the existence of a street over a part of its right of way. *Heater v. Chicago and Alton R. Co.*, 200 Ill. App. 331.

Ordinance setting apart lands, providing for its use for public purposes, and appropriating money for its care and the care of buildings thereon, and acceptance and use by the public for the purposes designated, estops the city from attempting to revoke the dedication. *Philadelphia Museum Trustees v. Pennsylvania University Trustees*, 251 Pa. 115, 96 Atl. 123.

<sup>31</sup> *Loomis v. Collins*, 272 Ill. 221, 111 N. E. 999; *Indianapolis v. In-*

*dianapolis Water Co. (Ind.)*, 113 N. E. 369; *Calkins v. Westerwelt*, 214 Fed. 415; *Smith v. King County*, 80 Wash. 273, 141 Pac. 695; *Maysville v. Methodist Episcopal Church*, 156 Wis. 219, 145 N. W. 668.

<sup>32</sup> Offer and acceptance of a public way gives municipality control thereover. *Farnsworth v. Macreadie*, 115 Me. 507, 99 Atl. 455.

Street dedicated, stand as others acquired by condemnation or purchase. *Roaring Springs Townsite Co. v. Paducah Telephone Co. (Tex. Civ. App.)*, 164 S. W. 50.

After acceptance and use by public, lands cannot be used by dedicator for private purposes. *Gartrell v. McCravey*, 144 Ga. 688, 87 S. E. 917.

<sup>33</sup> *Horton v. Okanogan County*, 98 Wash. 626, 168 Pac. 479; *Hickman v. Clarksburg (W. Va.)*, 94 S. E. 501; *Cronin v. Janesville Traction Co.*, 163 Wis. 436, 158 N. W. 254.

Dedication passes right in property dedicated from the dedication. *Husband v. Catton*, 171 Ky. 177, 188 S. W. 380, L. R. A., 1917 A, 1150.

Town as dedicator of land for a courthouse has no greater control over as such than others. *Bennington County v. Manchester*, 87 Vt. 555, 90 Atl. 502.



**§ 1600. Title acquired by dedication.<sup>34</sup>**

At common law the fee of land dedicated for a street remains in the owner,<sup>35</sup> subject to the public easement therein vested in the municipality.<sup>36</sup>

**§ 1601. Same—title acquired by statutory dedication.<sup>37</sup>****§ 1602. Right and extent of title acquired by municipality.<sup>38</sup>**

<sup>34</sup> *Kenwood Park v. Leonard*, 177 Iowa 337, 158 N. W. 655; *De Castello v. Cedar Rapids, Iowa*, 153 N. W. 353; *Hobart v. Towle*, 220 Mass. 293, 107 N. E. 954.

Dedicating land in which dedicatory had only riparian right. *Gibson v. Carroll* (Tex. Civ. App.), 180 S. W. 630.

Fee of land dedicated by town for a courthouse remains in town. *Bennington County v. Manchester*, 87 Vt. 555, 90 Atl. 502.

City as trustee of property dedicated for a cemetery. *Hoboken Cemetery v. Hoboken*, 89 N. J. L. 362, 99 Atl. 1070, affirming 95 Atl. 758.

<sup>35</sup> *Appleton v. New York*, 219 N. Y. 150, 114 N. E. 73, 77, affirming 148 N. Y. S. 870, 163 App. Div. 680; *Attorney General v. Onset Grove Assn.*, 221 Mass. 342, 109 N. E. 165.

Ultimate fee of sidewalk remains unaffected by the dedication, *Brown v. East Port*, 148 Ga. 85, 95 S. E. 962.

<sup>36</sup> *Cloverdale Homes v. Cloverdale*, 182 Ala. 419, 62 So. 712; *Appleton v. New York*, 144 N. Y. S. 138, 82 Misc. Rep. 258; *Lembeck & Betz Eagle Brewing Co. v. Rosenstein*, 153 N. Y. S. 999, 168 App. Div. 563; *Hill v. Kimball*,

269 Ill. 398, 110 N. E. 18; *Bradley v. Spokane & I. E. R. Co.*, 79 Wash. 455, 140 Pac. 688.

<sup>37</sup> *Albers v. Acme Paving & Crusher Co.*, 196 Mo. App. 265, 194 S. W. 61; *McCoy v. Thompson*, 84 Or. 141, 164 Pac. 589.

Fee reserved to platter. *Drake v. Chicago, R. I. & P. Ry. Co.*, 136 Minn. 366, 162 N. W. 453.

Fee of streets vested in city. *Laddonia v. Day*, 265 Mo. 383, 178 S. W. 741.

Street, title to, vested in city. *Hill v. Kimball*, 269 Ill. 398, 110 N. E. 18.

Acceptance vests fee of streets in municipality. *Heppes Co. v. Chicago*, 260 Ill. 506, 103 N. E. 455.

The estate conveyed is a public easement, the beneficial ownership to the center of the streets remaining in the abutting owner. *Hatton v. St. Louis*, 264 Mo. 634, 643, 175 S. W. 888.

<sup>38</sup> *Deffenbaugh v. Washington Water Power Co.*, 24 Idaho 514, 135 Pac. 247; *Wolpert v. Chicago*, 280 Ill. 187, 117 N. E. 447; *Schmitt v. Carbondale*, 257 Pa. 451, 101 Atl. 755; *Schuss v. Chehalis*, 82 Wash. 595, 144 Pac. 916; *Olson Land Co. v. Seattle*, 76 Wash. 142, 136 Pac. 118.

**§ 1605. Rights of purchasers and abutters in general.<sup>39</sup>****IX. MISUSER AND ABANDONMENT.****§ 1606. Misuser or diversion of property dedicated.<sup>40</sup>**

All customary uses may be made of dedicated property,<sup>41</sup> e. g., an alley may be used not only for travel, but it may be put to customary alley uses.<sup>42</sup>

So parts of a park may be used for tennis and croquet grounds and play grounds for children.<sup>43</sup>

Property dedicated to the public must be used for the purpose named.<sup>44</sup>

Easement only, fee remaining in dedicator. *Kitzman v. Greenhalgh*, 164 Iowa 166, 145 N. W. 505.

Extent. *Ralph v. Clifford*, 224 Mass. 58, 112 N. E. 482; *Lambert v. Atlantic City*, 88 N. J. L. 521, 97 Atl. 29; *Cronin v. Janesville Traction Co.*, 162 Wis. 436, 158 N. W. 254.

Land dedicated for street; width. *Middletown v. Glenn*, 278 Ill. 149, 115 N. E. 847; *McCoy v. Thompson*, 84 Or. 141, 164 Pac. 589.

<sup>39</sup> Purchaser of lot contained in plat dedicating streets, etc., acquires right to use street so platted. *Bowers v. Machir* (Tex. Civ. App.), 191 S. W. 758.

Purchaser of property abutting on alley dedicated to public has right to use the alley which must be kept open as such. *Barclay v. Dismuke* (Tex. Civ. App.), 202 S. W. 364.

Land dedicated for public square, held purchaser of land thereon could sue to prevent change of use. *Clement v. Paris*, 107 Tex. 200, 175 S. W. 672.

Abutter may enjoin diversion of use, as streets into cemetery. *Troy v. Watkins* (Ala.), 78 So. 50.

<sup>40</sup> *Dunne v. Rock Island County*, 273 Ill. 53, 112 N. E. 342; *Montevallo v. Montevallo School Dist.*, 268 Mo. 217, 186 S. W. 1078; *McBride v. Rockwall County* (Tex. Civ. App.), 195 S. W. 926.

<sup>41</sup> *Brown v. East Point*, 148 Ga. 151, 95 S. E. 962.

<sup>42</sup> *Edison Illuminating Co. v. Misch*, 200 Mich. 114, 166 N. W. 944.

<sup>43</sup> *Caulfield v. Berwick*, 27 Cal. App. 493, 150 Pac. 646.

Courthouse; public comfort station denied. *Clement v. Paris*, 107 Tex. 200, 175 S. W. 672.

<sup>44</sup> *Home Laundry Co. v. Louisville*, 169 Ky. 499, 182 S. W. 645.

For street, can not be used for park. *Kennard v. Eyermann*, 267 Mo. 1, 182 S. W. 737.

Municipality can not divert street to other purpose. *People v. Marshall Field & Co.*, 266 Ill. 609, 107 N. E. 864.

Dedicated for sidewalk, widening street to take in sidewalk as street for vehicular traffic is diversion. *Brown v. East Point*, 148 Ga. 151, 95 S. E. 962.

Dedication of land for street required the maintenance of a side-

Diverting the property to another and inconsistent use is a misuser,<sup>46</sup> and may be enjoined.<sup>46</sup>

**§ 1608. Same—power of legislature to authorize diversion or sale.<sup>47</sup>**

**§ 1610. What constitutes abandonment.<sup>48</sup>**

The right of the public to a dedicated street is not lost by mere non user,<sup>49</sup> or delay in its improvement and use,<sup>50</sup> or by a mere temporary abandonment of such use.<sup>51</sup>

walk appurtenant to specified property, held city not bound to maintain sidewalk. *Jones v. Houston* (Tex. Civ. App.), 188 S. W. 688.

Property dedicated for one use can not be put to inconsistent uses. *Troy v. Watkins* (Ala.), 78 So. 50.

<sup>45</sup> *Brown v. East Point*, 148 Ga. 151, 95 S. E. 962.

<sup>46</sup> *Brown v. East Point*, 148 Ga. 151, 95 S. E. 962.

Equity will enjoin use for other purpose of property dedicated for park purposes. *Dodge v. North End Imp. Assn.*, 189 Mich. 16, 155 N. W. 438.

Action by taxpayer sustained to set aside unlawful conveyance of property dedicated by city for public purposes. *Philadelphia Museum Trustees v. Pennsylvania University Trustees*, 251 Pa. 115, 96 Atl. 123.

<sup>47</sup> *Cleveland & P. Ry. Co. v. Cleveland*, 35 Ohio Cir. Ct. R. 482.

<sup>48</sup> *United States v. Rindge*, 208 Fed. 611; *Hopkinsville v. Jarrett*, 156 Ky. 777, 162 S. W. 85; *Shearer v. Reno*, 36 Nev. 443, 136 Pac. 705; *Port Dickinson v. Fish*, 154 N. Y. S. 698, 168 App. Div. 715; *Nicholas v. Title & Trust Co.*, 79 Or. 226, 154 Pac. 391; *Sipe v. Alley*, 117 Va. 819, 86 S. E. 122; *Horton*

*v. Okanogan County*, 98 Wash. 626, 168 Pac. 479.

Contract between the municipality and a railroad recognizing the latter's right on which its depot was maintained to land dedicated as a street as an admission of abandonment. *Newark v. Pennsylvania R. Co.*, 86 N. J. L. 575, 92 Atl. 382.

Statute authorizing abandonment by municipalities. *Savannah v. Barnes*, 148 Ga. 822, 96 S. E. 625.

<sup>49</sup> *Barton v. Portland*, 74 Or. 75, 144 Pac. 1146; *Olson Land Co. v. Seattle*, 76 Wash. 142, 136 Pac. 118.

Nonuser or laches. *Douglas County v. Lawrence*, 102 Kan. 656, 171 Pac. 610.

<sup>50</sup> *La Grange v. Brown* (Tex. Civ. App.), 161 S. W. 8.

<sup>51</sup> *Wheeler v. Oakland* (Cal. App.), 170 Pac. 864, 866.

Where there is a statutory dedication the public can not be deprived of its rights in a street by nonuser by the public, failure of the city to exercise authority over the street or payment of taxes on the land involved by claimant. *Interstate Iron & Steel Co. v. East Chicago* (Ind.), 118 N. E. 958.

“The public can not be deprived

To constitute abandonment some affirmative act is essential.<sup>52</sup>

Lands once completely dedicated for streets in due form continue for that use until the title is divested as provided by statute or until the execution of the use becomes impossible. No mere lapse of time or adverse possession will destroy it.<sup>53</sup>

### § 1612. Effect of abandonment or misuser.<sup>54</sup>

of its rights by prescription, nor by the carelessness of its officers.” *Murray v. Huntingburg* (Ind.), 119 N. E. 209.

<sup>52</sup> Failure to take possession and improve land dedicated for a street, or failure of public to use it as a street does not constitute abandonment. *Henderson v. Yeaman*, 169 Ky. 503, 184 S. W. 878.

Planting trees in public way by abutter does not show abandonment. *Bridell v. McCuen*, 183 Ia. 633, 166 N. W. 369, 372.

Vacation ordinance. *Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co.*, 240 Pa. 519, 87 Atl. 968.

Cemetery. *Bitney v. Grim*, 73 Or. 257, 144 Pac. 490.

<sup>53</sup> *Robinson v. Korns*, 250 Mo. 663, 672, 673, 157 S. W. 790; *Gaskins v. Williams*, 235 Mo. 563, 572, 139 S. W. 117.

<sup>54</sup> *Matthews v. Bloodworth*, 111

Ark. 545, 165 S. W. 263; *Brookfield v. Block*, 123 Ark. 153, 184 S. W. 449; *Kenwood Park v. Leonard*, 177 Iowa 337, 158 N. W. 655; *Amerman v. Missouri, K. & T. Ry. Co.* (Tex. Civ. App.), 182 S. W. 54.

Misuser will not result in reversion. *Brown v. East Port*, 148 Ga. 85, 95 S. E. 962.

Reverts to abutting owners, on vacation. *Jose v. Hunter* (Ind. App.), 103 N. E. 392, 852, reversing 101 N. E. 665.

Reverts to estate of dedicator. *Shearer v. Reno*, 36 Nev. 443, 136 Pac. 705.

Vacation of street, statutory dedication, title reverts to dedicator, his heirs or assigns. At common law municipality has only easement and title remains in dedicator; on vacation it passes to abutting lot owner. *Hill v. Himball*, 269 Ill. 398, 110 N. E. 18.



















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